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ALL INDIA REPORTER

[Registrar of Newspapers for India—R. N. 1753/57]

Editor: S. APPU RAO, B.A., B.L., ADVOCATE (Madras).

56]

1969 MAY

[Part 665

IMPORTANT ANNOUNCEMENT

We are introducing a new section "Notes on recent Supreme Court judgments" in A. I. R. from June 1969. We hope our patrons will find this section quite helpful.

Every effort will be made to cover the latest decisions of the Supreme Court in this section.

We also draw your attention to another new section introduced from this month covering decisions of the United States Supreme Court.

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Published by The All India Reporter Ltd., Regd. Office—Meadows House,
Nagindas Master Road, Fort-BOMBAY.

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—Ss. 164 165 — Orders confirming pro-
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ASSAM PANCHAYAT ACT (24 of 1959)

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**ASSAM PANCHAYAT (CONSTITUTION)
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**BIHAR AND ORISSA CO-OPERATIVE
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**BIHAR AND WEST BENGAL (TRANSFER
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—S 17 — Acquired lands transferred
 from Bihar State to W B State — Appeal
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 ed date — Refusal to execute the decree by
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 —Ss 47 and 17 — Applicability of S 47
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**BOMBAY PUBLIC TRUSTS ACT (29 of
1950)**

—Ss 37 (1) (c) 67 (as applied to the
 State of Gujarat) — Words 'report' and
 'statement' — Do not include information
 directed to be supplied in respect of certain
 specified items — Failure to supply is not
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SC 373 (C N 73)
 —S 67 (as applied to the State of Guja-
 rat) — Words 'report' and 'statement' —
 Do not include information directed to be
 supplied in respect of certain specified items
 — Failure to supply it not punishable under
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**CENTRAL CIVIL SERVICES (CLASSIFI-
CATION CONTROL AND APPEAL)
RULES 1957**

See under Civil Services

**CENTRAL CIVIL SERVICES (CLASSIFI-
CATION, CONTROL AND APPEAL)
RULES 1965**

See under Civil Services

CENTRAL SALES TAX ACT (74 of 1956)

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CITIZENSHIP ACT (57 of 1955)

—S 9 (2) — Citizenship Rules (1956)
 R 30 — Scope of — Suit for injunction
 restraining Government from deporting
 plaintiff alleging himself to be citizen of
 India is not barred — What is barred is
 decision by Court of question whether plain-
 tiff has acquired foreign citizenship — Pro-
 cedure when such question arises in suit, to
 be followed indicated

All 223 A (C N 47)
 —S 9 (2) — Citizenship Rules (1956) R
 30 — Decision of question whether person
 has acquired foreign citizenship is judicial

CITIZENSHIP ACT (contd.)

— Presumption arising out of voluntarily obtaining foreign passport — Person affected must be given reasonable opportunity to rebut presumption — Ordinarily person must be given personal hearing — Official deciding case must not act upon notes prepared by other officials of the department — Constitution of India, Art. 226 — Natural justice All 223 C (C N 47)

CITIZENSHIP RULES (1956)

—R. 30 — Scope of — See Citizenship Act (1955), S. 9 (2) All 223 A (C N 47)

—R. 30, Sch. III, Cl (3) — Person leaving India and staying in Pakistan for five years and coming to India on Pakistani passport — Allegation by him that he had gone to Pakistan temporarily and that he was compelled to obtain Pakistani passport in order to be by the side of his father in India who was very seriously ill and practically on death-bed — Held, that acquisition of passport was voluntary — An act to be involuntary must be the result of legal obligation — Desire to be present at a particular place does not create legal obligation — Word "voluntarily" means that the person obtaining the passport acted of his own volition and knew the nature of his act, and did not act in performance of a legal duty, nor due to coercion, or fraud, or misrepresentation, or mistake — (Words and Phrases — "Voluntary") All 223 B (C N 47)

—R. 30 — Decision of question whether person has acquired citizenship is judicial — See Citizenship Act (1955), S. 9 (2) All 223 C (C N 47)

—Sch. III, Cl. (3) — Acquisition of citizenship of foreign country — Presumption under — See Citizenship Rules (1956), R 30 All 223 B (C N 47)

CIVIL PROCEDURE CODE (5 of 1908)

—Pre. — Interpretation of Statutes — Requirements of valid nomination paper — Non-compliance — Effect — See Representation of the People Act (1951), S 33 (5) SC 395 A (C N 78)

—Pre. — Interpretation of Statutes — One provision in statute to be so interpreted as not to nullify effect of another provision — See Income Tax Act (1961), S. 156 SC 408 A (C N 81)

—Pre. — Scope — Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction — Power of stay when to be exercised — See Income Tax Act (1961), S. 254 SC 430 (C N 84)

—Preamble — Interpretation of Statutes — Constitutionality of statute — Illicit motive of legislature, inquiry into — Intention of legislature — Speeches in Congress — Relevancy — Bill of attainder — Legislative purpose may be enquired into — Motive of legislature — See Constitution of India, Preamble USSC 7 E (C N 2)

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—Preamble — Interpretation of Statutes — Construction rendering part redundant should be avoided — See Defence of India Act (1939), S. 19 (1) (g) and (e) Bom 151 (C N 27)

—Preamble — Interpretation of Statutes — Principles Bom 163 D (C N 28)

—Preamble — Judicial precedents — Even obiter of Supreme Court is binding on High Courts — See Constitution of India, Art. 141 Cal 249 B (C N 45)

—Pre. — Interpretation of Statutes — Fiscal Statutes — Liberal interpretations — See Court Fees and Suits Valuations — Court Fees Act (1870), Pre Delhi 130 B (C N 20)

—Pre — Interpretation of Statutes — Rules of — Use of legislative history — (Interpretation of Statutes) Delhi 154 A (C N 27) (FB)

—Preamble — Interpretation of Statutes — Retrospective effect — (Interpretation of Statutes) J & K 62 E (C N 15) (FB)

—Pre — Interpretation of Statutes — Principle of ejusdem generis — When applies — See Companies Act (1956), S. 439 Madh Pra 74 B (C N 25)

—Pre — Interpretation of Statutes — Statutes creating new jurisdiction and providing for a new procedure — Rule of Construction — See Motor Vehicles Act (4 of 1939), S. 96 (2) (6) Madh Pra 89 A (C N 28)

—Pre — Interpretation of Statutes — Repealing statute — Construction — Duty of Court Mad 145 E (C N 35)

—Pre. — Interpretation of Statutes — Meaning of words — Land Acquisition Act (1894), Ss 4 (1), 40 (1)(b) — Words "public purpose" in S. 4 (1) — Words to be interpreted from a larger and more comprehensive angle without being narrowed down to restricted words used in S. 40 (1) (b) — (Words and Phrases — "Public purpose") Mad 183 B (C N 41)

—Preamble — Interpretation of Statutes — Codifying and amending statute — Regard should be had only to the clear language in the Act — See Hindu Succession Act (1956), Preamble Mad 187 B (C N 42)

—Pre. — Interpretation of Statutes — Administrative instructions — Instructions not in nature of statutory rules — See Constitution of India, Art. 226 Manipur 47 (C N 16)

—Pre. — Interpretation of Statutes — Taxing provision — Construction which would greatly diminish the efficacy of the provision should not be accepted unless its language is clear and compels such construction Mys 167 B (C N 32)

—Preamble — Interpretation of Statutes — See Bihar and West Bengal (Transfer of Territories) Act (40 of 1956), S. 47 Pat 165 (C N 44)

—Pre — Interpretation of Statutes — Word not defined in Statute — Use of Dic-

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tionary on ascertaining the meaning permissible — Regard must however always be had to context — See *Advocates Act (1961)* S 24 (1) (c) (iii) Raj 136 (C N 30)

—S 2 (2) (9)—Compromise purshis filed on 20 3 58 — Court ordering decree to be drawn up on 28 3 1958 — Decree actually drawn on Court fee being paid on 26 4 61 bearing date 28 3 58 — Execution application filed on 28-9 61 held time barred — See *Limitation Act (1908)* Art. 182 (1) and (7) Guj 152 (C N 29)

—S 9 — Exclusion of Civil Court's jurisdiction — See *Defence of India Act (1939)* S 19 (1) (g) and (e) Bom 151 (C N 27)

—S 9 — Domestic Tribunal — Jurisdiction of Civil Court to interfere with decisions of domestic tribunal — Conditions necessary — Domestic Tribunal not bound by rules of evidence Cal 224 B (C N 39)

—Ss 9 and 11 — Bar of jurisdiction of Civil Court — Tenancy Laws — Madras Estates Land (Reduction of Rent) Act (30 of 1947) S 3A (4)(b) — Question whether particular land is private land or ryoti land — Decision of Tribunal on appeal is final and Civil Court's jurisdiction is expressly barred — Writ petition challenging order of Tribunal — Dismissal on ground that proper remedy is by suit — Order cannot confer jurisdiction on Civil Court by invoking principle of *res judicata* Mad 172 C (C N 38)

—S 9—Exclusion of jurisdiction of Civil Court — When can be inferred Mad 191 D (C N 43)

—S 9 — Foot ball matches — Decisions of referee are final — Not justiciable in Courts Manipur 41 D (C N 15)

—S 11 — Writ petition — Constructive *res judicata* — Earlier writ petition considered on merits — Subsequent writ petition on grounds different from those put forward in earlier petition — Subject matter in two petitions same — Held subsequent writ petition by same person is hit by doctrine of constructive *res judicata* Andh Pra 158 B (C N 51)

—S 11 — Bar of jurisdiction of Civil Court — See *Civil P C (1908)* S 9 Mad 172 C (C N 38)

—S 20 — Cause of action — Every fact necessary to be proved is cause of action Cal 224 A (C N 39)

—S 33 — Compromise purshis filed on 20 3 1958 — Court ordering on 28 3 58 to draw up a decree in terms of compromise — Decree came into existence immediately when judgment was pronounced — See *Limitation Act (1908)* Art 182 (1) and (7) Guj 152 (C N 29)

—Ss 38 and 39 and 47 — Decree passed by Court A — Territorial jurisdiction transferred from Court A to Court B — Execution application in Court B is maintainable Guj 141 (C N 24)

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—S 38 — Execution of decree — Territorial jurisdiction — See *Civil P C (1908)* S 37 Guj 141 (C N 24)

—S 39 — Execution of decree — Jurisdiction — See *Civil P C (1908)* S 37 Guj 141 (C N 24)

—S 47 — Execution of decree — Jurisdiction — See *Civil P C. (1908)* S 37 Guj 141 (C N 24)

—S 47 — Maintenance decree creating charge on property — Auction purchaser purchasing such property for consideration and without notice of charge — Decree not satisfied — Property put to sale — Auction purchaser objecting under S 47 C P C. — Objection cannot be upheld — See *Transfer of Property Act (1882)* S 100 Orissa 114 B (C N 41)

—S 47 — Applicability to land acquisition case — See *Bihar and West Bengal (Transfer of Territories) Act (40 of 1956)* S 47 Pat 165 (C N 44)

—S 52 — Principle of substantial representation — Requisite for application of Ker 149 (C N 34)

—S 100 — Erroneous finding as to sufficiency of cause for delay in filing appeal after accepting facts alleged — Error of law — See *Limitation Act (1963)* S 5 All 210 (C N 43)

—S 100 — Finding of fact — Amount awarded as damages for use and occupation is a finding of fact — Its correctness cannot be canvassed in second appeal Mad 172 B (C N 38)

—S 107 — Appeal to Supreme Court — Finding of fact and appreciation of evidence — Practice — See *Representation of the People Act (1951)* S 116A SC 395 B (C N 78)

—S 112 — Appeal to Supreme Court — Finding of fact and appreciation of evidence — Practice — See *Representation of the People Act (1951)* S 116A SC 395 B (C N 78)

—S 115 — Sufficient cause — Erroneous finding as to sufficiency of cause after accepting facts alleged — Error of law — Interference in second appeal or revision with discretion of lower Court — See *Limitation Act (1963)* S 5 All 210 (C N 43)

—S 115 and O 8 Rr 10 9 1 — Material irregularity in S 115 — It relates to material defect of — Powers of Revision Court Goa 53 (C N 15)

—S 115 and O 13 R. 9 — Material irregularity in exercise of jurisdiction — Return of document by Court without following procedure under O 13 R 9 and without allowing it to be proved — There is material irregularity in exercise of jurisdiction Guj 149 (C N 27)

—S 115 and O 14 R 5 — Expression Case decided — Meaning — Expression does not mean conclusion of entire proceeding — It covers part of the proceedings in which some claim or right is decided —

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—S. 115 — Lower Court deciding a question within its jurisdiction — It is binding on High Court in revision

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—S. 115 — Rent suit — Third party claiming to be owner of property in question — Party claiming to be impleaded — Addition of such party wrong and material irregularity — See Civil P. C. (1908), O. 1, R. 10 (2) Orissa 116 (C N 42)

—S. 115 (c) and O. 6, R. 17 — Application for amendment of written statement — Rejection of application for delay in filing — Court acts illegally and with material irregularity — Case comes within S. 115 (c) Guj 159 (C N 30)

—Ss. 121, 122, 127 and O. 37, R. 1 (d) (Punjab) — O. 37, R. 1 (d) validly amended by Punjab High Court continues to apply to Courts of District Judges and Subordinate Judges in Union Territory of Delhi even after appointed day i.e. 30-10-1966 — Ss. 121 and 127 do not alter this position so long as power to amend under S. 122 is not exercised by Delhi High Court — Constitution of India, Art. 245) Delhi 142 A (C N 24)

—S. 122 — Rule-making powers — Exercise of — See Civil P. C. (1908), S. 121 Delhi 142 A (C N 24)

—S. 127 — See Civil P. C. (1908), S. 121 Delhi 142 A (C N 24)

—O. 1, R. 1 — Impleading as party — Question generally of judicial discretion — See Civil P. C. (1908), O. 1, R. 10 (2) Raj 131 A (C N 29)

—O. 1, R. 9 — Suit for compensation for negligence of driver — Not invalid for non-joinder of authority selecting him for appointment — See Tort — Negligence Mys 158 (C N 29)

—O. 1, R. 10 — Party — Suit brought in the name of society through its secretary who was named — Suit as laid is valid — See Societies Registration Act (1860), S. 6 All 248 G (C N 52)

—O. 1, R. 10 — See Societies Registration Act (1860), S. 20

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—O. 1, R. 10 — Applicability — Non-impleading of necessary party to election petition — Effect — Delay — Condonation of — See Representation of the People Act (1951), S. 86 Andh Pra 151 C (C N 49)

—O. 1, R. 10 (2) — Addition of parties — Principles of — Suit for recovery of money between two subsidiary companies — Holding company cannot intervene or choose to join either of subsidiaries Cal 238 A (C N 43)

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—O. 1, R. 10 (2) and S. 115 — Rent suit — Third party claiming to be owner of property in question — Such party seeking to be impleaded — Title suit of such party in respect of same property pending — Addition of such party wrong and material irregularity Orissa 116 (C N 42)

—O. 1, R. 10 (2), 1 and O. 2, R. 3 — Suit for ejectment — Application, at very late stage, by third party claiming title, to be impleaded as party — Question generally of judicial discretion — Categories of cases explained Raj 131 A (C N 29)

—O. 1, R. 10 (2) — Landlord and tenant — Defendant inducted into possession of suit property by plaintiff — No question of third party setting up title to suit property can arise — See Evidence Act (1872), S. 116 Raj 131 B (C N 29)

—O. 1, R. 10 (2) — Suit for ejectment — Application by third party to be impleaded, made at very late stage causing doubts about his bona fides — Multiplicity of enquiries can be avoided by a separate suit — High Court will not interfere in rejection of his application by lower Court Raj 131 C (C N 29)

—O. 2, R. 3 — Impleading third party — Question generally of judicial discretion — See Civil P. C. (1908), O. 1, R. 10 (2) Raj 131 A (C N 29)

—O. 6, R. 17 — Application for amendment of written statement rejected for delay in filing — Court acts illegally and with material irregularity — Case comes within S. 115 (c) — See Civil P. C. (1908), S. 115 (c) Guj 159 (C N 30)

—O. 6, R. 17 — Scope — Amendment introducing new case altogether to the prejudice of other side — Amendment cannot be allowed Manipur 33 A (C N 13)

—O. 7, R. 10 — Return of plaint for presentation to competent Court of another State — Court-fee purchased in first State can lawfully be received by Court in another State — See Court-fees and Suits Valuations — Court-fees Act (1870), S. 13 Delhi 130 C (C N 20)

—O. 8, R. 1 — Defect of procedure — See Civil P. C. (1908), S. 115 Goa 53 (C N 15)

—O. 8, R. 9 — Defect of procedure — See Civil P. C. (1908), S. 115 Goa 53 (C N 15)

—O. 8, R. 10 — "Material irregularity" in S. 115 — Relates to material defect of procedure — See Civil P. C. (1908), S. 115 Goa 53 (C N 15)

—O. 13, R. 9 — Return of document by Court without following procedure under R. 9 and without allowing it to be proved — There is material irregularity in exercise of jurisdiction — See Civil P. C. (1908), S. 115 Guj 149 (C N 27)

—O. 14, R. 5 — Expression 'case decided' — Does not mean conclusion of whole

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 —O 15 Rr 1 4 — No evidence need be led by any party on a point which is not in issue — All 248 B (C N 52)
 —O 15 R. 4 — No evidence need be led by any party on point not in issue — See Civil P C. (1908) O 15 R 1
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 —O 20 Rr 6 7 — Decree — Passing of decree follows as a matter of course as soon as a judgment is pronounced — See Limitation Act (1908) Art 182 (1) and (7) Guj 152 (C N 29)
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 —O 21 R 52 — Suit for setting aside attachment and sale in execution under R 63 — Attachment not resulting in any injury to plaintiff — Sale being voidable attachment not set aside — Held on facts there was no breach of injunction order so as to vitiate attachment — See Civil P C (1908) O 21 R 63
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 —O 21 R 98 — Dismissal of claim under — Unsuccessful party should file a suit within one year to establish his right claimed — See Civil P C (1908) O 21 R 103 Mad 166 (C N 37)
 —O 21 Rr 103 and 98 — Scope — Order of dismissal of claim under O 21 R 98 — Unsuccessful party should file a suit within one year to establish his right claimed —

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O 21 R 103 does not require him to establish his right within one year — Only suit is required to be filed within one year AIR 1937 Mad 582 & (1949) 1 Mad LJ 286 held overruled by AIR 1949 Mad 586 (FB) AIR 1960 Cal 580 Dissented from Mad 166 (C N 37)
 —O 23 R. 3 — Compromise purshus filed on 20 3 58 — On 28 3-58 Court ordering drawing up of decree in terms of compromise — Decree came into existence on 28-3-58 as it was the date on which the judgment was pronounced — See Limitation Act (1908) Art 182 (1) and (7) Guj 152 (C N 29)
 —O 29 R 1 — Suit in the name of society through secretary who was named — Suit as laid is valid — See Societies Registration Act (1860) S 6 All 248 G (C N 52)
 —O 30 R 1 — Suit by partnership firm for libel or defamation of firm not maintainable — Such suit can however be brought by a partner — Form of suit indicated — See Tort — Libel or Slander Punj 150 A (C N 26)
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 —O 37 R 4 — Maintainability of application under — Nature of jurisdiction under O 37 indicated — See Civil P C (1908) O 37 R 2 Cal 218 A (C N 37)
 —O 37 R 4 — Negotiable instruments — Summary procedure — Application to set aside decree passed under R 2 of O 37 — Held on facts that there were no special circumstances for the Court to use its judicial discretion for setting aside the decree — Cal 218 B (C N 37)
 —O 39 R 1 — Held on facts that there was no breach of injunction order so as to vitiate attachment — See Civil P C (1908) O 21 R 63 Andh Pra 167 C (C N 52)
 —O 39 R 2 — Grant of stay of contempt proceedings by High Courts — Certificate of advocate intimating stay should ordinarily be accepted — See Contempt of Courts Act (1926) S 1 Pat 151 (C N 39)
 —O 40 R 1 — Receiver of rents and profits appointed by Court — O 21 R 52 does not apply — See Civil P C (1908) O 21 R 52 Andh Pra 167 B (C N 52)
 —O 40 R 1 — Plaintiff returned for want of jurisdiction — Court appointing receiver

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during pendency of suit — Term of receiver not expressly fixed — Court can issue direction to receiver even after refileing of suit in a proper Court — Probability of anomalous situations — Remedy open to parties Mys 173 (C N 34)

—O. 41, R. 5 — Stay of proceedings — Certificate by advocate intimating it should ordinarily be accepted — See Contempt of Courts Act (1926), S. 1

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—R. 13 (vi) — Applicability — See Civil Services — Central Civil Services (Classification, Control and Appeal) Rules (1957), R. 20 (2) (ii) Manipur 36 E (C N 14)

—Rr. 20 (2) (ii), 13 (vi) — Applicability — Transfer of servant from one department to another — Lien kept in parent department — Transferee department not competent to dismiss him — Procedure indicated Manipur 36 E (C N 14)

—CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1965)

—R. 20 — Applicability — See Civil Services — Central Civil Services (Classification Control and Appeal) Rules (1957), R. 20 (2) (ii) Manipur 36 E (C N 14)

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—R. 55 — Domestic enquiry not made in compliance with prescribed Regulations — Enquiry into charges can be made by Labour Court itself — See M. P. Industrial Relations Act (27 of 1960), S. 31 (3) Madh Pra 65 A (C N 22)

—CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1930

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—R. 1 — Petitioner, a teacher of private institution, managed by a Managing Committee — Dismissal of in violation of instructions in the Rules — Domestic Tribunal governed by its own rules is not amenable to writ jurisdiction of High Court — See Constitution of India, Art. 226 Manipur 47 (C N 16)

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—INDIAN ADMINISTRATIVE SERVICE (APPOINTMENT BY PROMOTION) REGULATIONS (1955)

—Reg. 5 — Determination of seniority of officer — At this stage Reg. 5 (5) has no application and it is only when that provision comes into play that recording of reasons is envisaged Punj 161 A (C N 28)

—Reg. 5 (3) — Determination of seniority of officer — At this stage Reg. 5 (3) has no application — See Constitution of India, Art. 226 Punj 161 C (C N 28)

—Reg. 5 (5) — Supersession in process of selection — Officer junior to member of State Civil Service brought on select list whilst his name after due consideration not considered to be fit to be so brought — Held, that was what Reg. 5 (5) meant by supersession. 15 Southern Reporter 2nd Series P. 1, Ref. — No State Civil Service Officer has any vested legal right to claim to be brought on select list (Point conceded) Punj 161 B (C N 28)

—U. P. HIGHER JUDICIAL SERVICE RULES, 1953

—R. 5 — See Constitution of India, Art. 309, Proviso All 230 C (C N 48)

—R. 7 — Rules are severable — Only rules relating to appointment are invalid due to non-compliance with Art. 233 (1) — Rest of the Rules are valid — See Constitution of India, Art. 309 Proviso All 230 C (C N 48)

—R. 8 — Rules are severable — Only rules relating to appointment alone are invalid due to non-compliance with Art. 233 (1) — Rest of the rules are valid — See Constitution of India, Art. 309 Proviso All 230 C (C N 48)

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—S. 243 — Expression 'other persons' in Form No. 48 — Cannot be limited to Company, Registrar, or other person authorised by Central Govt. in a case falling under the section — See Companies Act (1956), S. 439 Madh Pra 74 A (C N 25)

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—Ss 439 and 243 — Companies (Court) Rules (1959) R 99 and Form No 48 — Expression Other persons in Form 48 — Whether restricted to those enumerated in S 439 Madh Pra 74 A (C N 25)

—S 439 — Companies (Court) Rules (1959) R 99 Form No 48 — Words other persons in Form 48 — Construction — Rule of ejusdem generis — When applies Madh Pra 74 B (C N 25)

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—R 99 — Expression other persons in Form No 48 — Connotation of — See Companies Act (1956) S 439

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—R 99 — Words other persons in Form No 48 — Construction of — See Companies Act (1956) S 439 Madh Pra 74 B (C N 25)

—Form No 48 — Expression other persons — Meaning of — See Companies Act (1956) S 439 Madh Pra 74 A (C N 25)

—Form No 48 — Other persons — Construction of — See Companies Act (1956) S 439 Madh Pra 74 B (C N 25)

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—S 23 — Transfer of motor vehicle permit without permission of Transport Authority—Transfer being forbidden by law is unlawful under the section — See Motor Vehicles Act (1939) S 59 (1) Raj 155 (C N 33)

—S 5a — Lease of land — Stipulations as to time giving an option for renewal are essence of the contract — Delay on part of lessee to apply for renewal due to oversight — Lessee not entitled to renewal SC 405 (C N 80)

—S 62 — Party to contract transferring its liability to third person — Consent of other party to contract is essential Cal 238 (C N 43)

—S 65 — Restitution — Benefit of Section not available where transfer is illegal to the knowledge of parties — See Motor Vehicles Act (1939) S 59 (1) Raj 155 (C N 33)

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—BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT (6 of 1935)

—S 40 — Prosecution of secretary of Co-operative society for offence under Section 409 Penal Code — Prosecution initiated by Assistant Registrar of Co-operative Societies—Prosecution legal—(Penal Code (1860) S 409) Pat 173 B (C N 46)

—S 40 — Whether office bearer of co-operative society discharging duty as such, is a public servant (Quaere) — See Penal Code (1860) S 21(10) Pat 173 C (C N 46)

COURT FEES ACT (7 of 1870)

See under Court fees and Suits Valuations

COURT FEES AND SUITS VALUATIONS
—COURT FEES ACT (7 of 1870)

—Pre — Interpretation of the Act should be liberal Delhi 130 B (C N 20)

—S 11 — Scope — Arbitration Act (1940) S 17 — Section 17 does not override provisions of S 11 of Court-fees Act — Suit for dissolution of partnership and rendition of accounts — Dispute by agreement of parties

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referred to arbitration — Award made rule of Court by decree under S. 17 — Held decree that followed was a decree in a suit, that put an end to suit and, therefore, provisions of S. 11 of Court-fees Act, applied
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—S. 13 — Return of plaint for proper presentation to competent Court of another State — Court-fee purchased in former State can lawfully be received in Court in latter State
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—Ss. 26, 27 (b) — Rules under, framed by Delhi Government and notified on 29-3-1954 are ultra vires its rule-making power — Insistence on exclusive use of stamp with name of Delhi State printed over it is illegal
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—S. 27 (b) — Rules under framed by Delhi Govt. and notified on 29-3-1954 are ultra vires its rule-making power — See Court-fees and Suits Valuations — Court Fees Act (1870), S. 26
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—Ss. 5 (1) and (2) and 523 — Expression "otherwise dealt with" in S. 5 — Includes provisions for disposal of property under Chapter 43 of the Code — Seizure of goods by Police for contravention of Kerala Rice (Regulation of Movement) Order (1966) — Offender produced before Magistrate and goods retained for production before Collector — Magistrate cannot direct production of goods before him under S. 523 in view of Clause 6 of Order (as amended on 22-2-1968)
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—S. 145 — Possession of part of joint family property by one member — Not proper ground to initiate proceedings under S. 145 — (Hindu law — Joint family property)
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—S. 145 — Magistrate's jurisdiction — Foundation of — Nature of enquiry is quasi civil — Right of parties
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—S. 173 — Letter to Police alleging certain cognizable offences — F. I. R. registered on the basis of the letter and investigation started — Informant filing complaint before Magistrate against the same persons making the same allegations — Police Report filed under S. 173 stating that the allegations were false — Charge-sheet submitted by police against Informant under Ss. 408, 467, 474, 193, 385, 109, 211 and 182 Penal Code — Prosecution for offences under Ss. 182, 211 and 193 could not continue for non-compliance of S. 195(1)(b) Cri. P. C. — Quashing of entire prosecution case held illegal — There could be no objection to the continuance of proceedings relating to the non-cognizable offences under the other sections — See Criminal P. C. (1898), S. 207A
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—S. 173 — Magistrate not agreeing with final report — Ordering fresh charge-sheet after re-investigation by the Magistrate — Prosecution on fresh charge-sheet is illegal — See Criminal P. C. (1898), S. 190(1)(c)
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—Ss. 190(1)(a), 173 — Order of Commissioner of Police, in Madras under S. 173 referring complaint as mistake of fact — Subsequent entertainment of same complaint by Magistrate under S. 190(1)(a), not barred, nor abuse of process — Madras City Police Act (3 of 1888), S. 7
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—Ss. 190(1)(c), 192 — Transfer of case from one Magistrate to another — Previous Magistrate found to have committed illegality in prosecuting case — Dismissal of case on that ground by second Magistrate is valid
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—S. 192 — Previous Magistrate found to have committed illegality in prosecuting case — Transfer to another Magistrate — Dismissal of case on the same ground by second Magistrate is valid — See Criminal P. C. (1898), S. 190(1)(c)
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—S. 195 — See Criminal P. C. (1898) S. 207A
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—S. 195 (1)(b) and (1)(a) — F. I. R. alleging certain cognizable offences — Informant filing complaint before Magistrate making same allegations — Allegations found to be false by Police — Magistrate cannot take cognizance of offences under Ss. 182, 211 and 193 Penal Code — Penal Code (1860), Ss. 182, 211, 193. AIR 1928 All 765, Overruled
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—S. 205 — Personal appearance of the accused dispensed with — Examination of pleader in place of accused is not a sufficient compliance — Except where the accused is a company or the juridical person accused alone has got to be examined — See Criminal P. C. (1898), S. 342
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—Ss. 207-A, 173 and 195 — Penal Code (1860), Ss. 211, 182 — Letter to Police alleging certain cognizable offences — F. I. R. registered on the basis of the letter and investigation started — Informant filing complaint before Magistrate against the same persons making the same allegations — Police Report filed under S. 173 stating that the allegations were false — Charge-sheet sub-

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 isting husband to stay with her in her
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—S 528 (8) — On first intimation that ac-
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—Ss 537 and 342 — Mere non-examination or defective examination of accused is not a ground for interference unless prejudice is established. — (Examination of pleader) SC 381 B (C N 75)

—S. 537 — Absence of mention of S. 34 I. P. C. in charge — Effect — See Penal Code (1860), S. 34 Orissa 105 D (C N 38)

—S. 540A — Personal appearance of the accused dispensed with — Examination of pleader in place of accused is not a sufficient compliance — Except where the accused is a company or the juridical person accused alone has got to be examined — See Criminal P. C. (1898), S. 342 SC 381 A (C N 75)

—S. 549 — Rules under (S. R. O. 709 dated 17-4-1952), Rules 3, 5 — Applicability — Rules not attracted merely because police had started investigation in an offence under Army Act—(Army Act (1950) Section 125) SC 414 B (C N 82)

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—S. 19(2) — Sale of property fraudulently shown as belonging to one person — Creditor of true owner can claim it as his own in collateral proceedings — See Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 47 All 220 (C N 46) (FB)

—Ss. 47, 19 (2) — Property fraudulently shown as property of one person, and sold in auction — Creditor of true owner, who is not party to sale proceedings can claim it as his own in collateral proceedings — AIR 1947 All 188, Overruled All 220 (C N 46) (FB)

DEFENCE OF INDIA ACT (35 OF 1939)

—S. 19 (1) (g) and (e) and Rules under Section — Interpretation of — Operative portion of Cl. (1) (e) of the section excludes application of other laws to "arbitrations" under the section — Exclusion is not confined to only provisions relating to actual assessment of amount of compensation — "Law for the time being in force", indicate indefinite future and not only law in force at time of passing of the Act — Section 19 and rules thereunder form a complete code for determining compensation by arbitration under S. 19, and no other law was to affect these provisions — Arbitration Act (1940) falls within the expression and does not apply to award made under S. 19 — Section 14 of Arbitration Act being inconsistent with provisions of S. 19, does not apply to award under S. 19, by reason of exception in S. 46, Arbitration Act — Award under S. 19 cannot be set aside under Arbitration Act — Court has no jurisdiction to entertain application under S. 14 (2), Arbitration Act in respect of an award under

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DELHI HIGH COURT ACT (26 OF 1966)

—S. 7 — Scope and object — Section does not exclude applicability of law in force with respect to practice and procedure in Courts subordinate to Delhi High Court — Delhi 142 B (C N 24)

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—Ss. 12 and 13 — Provisions of S. 12 are not dependent on provisions of S. 13

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—S. 12 — Acquisition of evacuee property without compensation — Section not hit by Article 19(1)(f) of Constitution

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—S. 13 — Provisions of S. 12 are not dependent on provisions of S. 13 — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 12

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—S. 52 — No interest in property passed to occupier — Occupier is licensee and not lessee — See T. P. Act (1882), S. 105

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—S. 4 — Revocation or amendment of license — Left to subjective satisfaction of State Government — Action is administrative and not judicial or quasi-judicial — Grounds of revocation of license under S. 4 (1)(a) cannot be reviewed by Court — (Constitution of India, Art. 226)

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—S. 4(1) and (3) — Notice to show cause why petitioner's license should not be revoked — Cause shown by petitioner containing sufficient material on which Gov-

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ernment could form its opinion to revoke license — Order of cancellation of license under S 4(1) passed without giving personal hearing or time to produce documents in support of objections — There is sufficient compliance with S 4(3) — No violation of principles of natural justice — (Constitution of India, Art 226) Assam 53 B (C N 13)

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—S 2 (12) — Factory — In case of a tannery mere use of power for pumping water cannot be described as use of power in manufacturing process so as to attract definition of factory — AIR 1961 Mad 7 Overruled — Question whether manufacturing process is carried on with aid of power is one of inference from facts — Heli tanneries in question did not come within definition of factory

—S 2 (12) — Word Premises — Meaning of — Includes precincts — Separation of place where 20 persons are employed from location of power plant by boundary walls — Establishment is nevertheless factory

ESSENTIAL COMMODITIES ACT (10 of 1955)

—S 3 (2) (a) and (d) — Kerala Paddy (Restriction on Milling) Order (1967) Pre — Object — Order falling only under S 3 (2)(a) and not S 3(2)(d) of the Act — No prior concurrence of Central Government — Order held invalid

—S 3(2)(c) — Scrap hoops held by Regional Director Ministry of Food — Fixation of its selling price by Iron & Steel Controller at much higher rate than controlled price is valid and does not violate the provisions of the Essential Commodities Act 1955 — See Iron and Steel Control Order (1956) CI 27(2) proviso

—S 3(6) and (5)(b) — Kerala Paddy (Restriction on Milling) Order 1967 — Order passed by State Government under delegated powers — Orders not laid before both Houses of Parliament, at any time after it was made — Effect — Violation of S 3 (b) does not render the order invalid — But it cannot be said that S 3 (6) is not applicable to an order passed by any authority in exercise of power under S 5(b) of the Act

—S 5 — Kerala Paddy (Restriction on Milling) Order 1967 issued by the State Govt as a delegate of the Central Govt empowered by S 5 of the Act is an act of the Central Govt — No question of conflict between Parliament and State Legislature can arise in the circumstances — See Constitution of India Art 245

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ESSENTIAL COMMODITIES ACT (Contd) not laid before both Houses of Parliament, at any time after it was made — Effect — See Essential Commodities Act (1955) S 3 (6) Ker 154 B (C N 36) (FB)

—Ss 6A to 6D (as amended by Act 25 of 1966) — Kerala Rice (Regulation of Movement) Order (1966) (after its amendment on 22 2 1968) Clause 6 — Interpretation of Clause 6 of Order read with S 6 of Act

—S 6C (2) (as amended by Act 25 of 1966) — Magistrate has power to pass an order of forfeiture of seized commodity even when he acquits the accused person — See Essential Commodities Act (1955) (as amended by Act 25 of 1966) S 7, Ker 151 C (C N 35) —Ss 7 and 6C (2) (as amended by Act 25 of 1966) — Magistrate has the power to pass an order of forfeiture even in a case where he acquits the accused person — The seized commodity is to be returned or its price paid by collector only if no order of forfeiture is passed by Magistrate

—Ss 7 and 8 — Inter Zonal Wheat and Wheat Products (Movement Control) Order 1964 Ss 6 3 and 4 — Offence under — Attempt to commit is equally an offence — Preparation and attempt — Distinguished 1962(1) Cri LJ 830 Diss — Penal Code (1860) S 511 Madh Pra 96 (C N 30)

—S 8 — Offence under — Attempt to commit is equally an offence — See Essential Commodities Act (1955) S 7 Madh Pra 96 (C N 30)

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—S 17 — Applicability of Madh Pra 82 B (C N 27) —S 17 — Estate Duty (Controlled Companies) Rules (1953) R 11 — Purpose of the rule is to give relief from double charge of estate duty

—Ss 17(1)(2) 20 (1) — Estate Duty (Controlled Companies) Rules (1953) R 11 (3) (b) and (9) (b) — Deceased Managing Director getting remuneration but no dividend — Remuneration received by him in excess has to be treated as share benefit under R 11 (9) (b) for purposes of R 11 (3) — Value of shares has to be deducted in determining slice under S 17 (2)

—S 20(1) — Deceased a Managing Director of Company holding shares in it — Determination of slice of the Company's assets passing on death under S 17(2) — Value of shares has to be deducted — See Estate Duty Act (1953) S 17 (1)(2) Madh Pra 82 A (C N 27)

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—R 11(3) (b) — Deceased Managing Director getting remuneration but no dividend on shares — Remuneration received by him in excess has to be treated as share benefit under R 11(9) (a) for purposes of

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R. 11(3) — See Estate Duty Act (1953), S. 17 (1) (2) Madh Pra 82 A (C N 27)

—R. 11(9) (b) — Share benefit under — Determination — See Estate Duty Act (1953), S. 17 (1) (2) Madh Pra 82 A (C N 27)

EVIDENCE ACT (1 of 1872)

—Ss. 3 and 24 — Confessional statement — Acceptance of inculpatory portion alone — Permissibility — Inculpatory portion can be accepted if the exculpatory portion is found to be inherently improbable — Charge for murder — Confessional statement to Mukhiya of village — Exculpatory portion found to be not only inherently improbable but contradicted by the statement of accused under S. 342, Criminal P. C. — Acceptance of inculpatory portion and conviction based thereon, held, was valid

SC 422 (C N 83)

—S. 3 — Discrepancies and contradictions — One witness stating that motor cycle which knocked the deceased was black in colour — Another witness stating that it was of chocolate colour — Similarly, one stating that there was heavy traffic on road — Another stating that there was no heavy traffic — Contradiction because one spoke relating to time of accident while the other spoke of time immediately after accident when there is naturally crowd gathered — Evidence held could not be ignored as contradictory Mad 180 B (C N 40)

—S. 5 — Appeal to Supreme Court — Finding of fact and appreciation of evidence — Practice — See Representation of the People Act (1951), S. 116A

SC 395 B (C N 78)

—Ss. 21, 31 and 115 — In income-tax assessment proceedings against predecessor of defendant in present suit, the predecessor and the defendant alleging that properties belonged to society registered under Societies Registration Act — This admission is binding on defendant in present suit against him and can be taken as evidence of fact that the society was duly registered under Societies Registration Act, which fact is denied by defendant in the present suit

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—S. 24 — Confessional statement — Acceptance of inculpatory portion alone — Permissibility — Inculpatory portion can be accepted if the exculpatory portion is found to be inherently improbable — Charge for murder — Confessional statement to Mukhiya of village — Exculpatory portion found to be not only inherently improbable but contradicted by the statement of accused under S. 342 Criminal P. C. — Acceptance of inculpatory portion and conviction based thereon, held, was valid — See Evidence Act (1872), S. 3

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—S. 31 — Admission by predecessor of defendant — Admissibility — See Evidence Act (1872), S. 21

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—Ss. 34, 114, Illus. (f) — Entries in property register of society showing properties gifted to the society — That the entries were made not immediately but after some time will not by itself make the document inadmissible in evidence to show what properties were gifted

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—S. 45 — Adulterated tea — Report of Public Analyst and certificate of Director — Value of and binding nature on Courts — See Prevention of Food Adulteration Act (1954), S. 13

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—Ss. 101-104 — Petition for restitution of conjugal rights — Burden of proving the conditions in S. 9(1) of the Hindu Marriage Act is on the petitioner — See Hindu Marriage Act (1955), S. 9

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—Ss. 101 to 104 — Insanity plea by accused — Onus to prove insanity is on accused — Any insanity recognised by medical science is not legal insanity — Penal Code (1860), S. 84

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—S. 114 — Consignment of mangoes reaching destination 2 days late than reasonable time — Delay of 2 days not being unreasonable, no presumption that damage was due to delay of 2 days can be drawn — See Railways Act (1890), S. 74C (3)

Orissa 100 A (C N 36)

—S. 114 Illus. (e) — Registration of society under Societies Registration Act — Presumption — See Societies Registration Act (1860), S. 1

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—S. 114, illus. (f) — Entries in property register of society, not made immediately — Admissibility of entries — See Evidence Act (1872), S. 34

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—S. 115 — Admission by predecessor of defendant in a previous suit — Is binding on defendant in present suit — See Evidence Act (1872), S. 21

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—S. 115 — Estoppel — Assam Panchayat Act (24 of 1959), Section 3(1) and (2), Provisos — Gaon Sabha created by State Government recommending creation of another Gaon Sabha out of its area — Is estopped from challenging creation thereof by State Government

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—S. 116 — Contractual relation of landlord and tenant — Defendant inducted into possession of suit property by plaintiff — No question of impleading third party setting up title to suit property can arise — Civil P. C. (1908), O. 1, R. 10(2)

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—S. 118 — Competency of witness to give evidence — Child witness — Evidence of — Court should accept it with caution and should require substantial corroboration before acting upon it

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EVIDENCE ACT (Contd)

—S 118 — Child witness — Duty of Court — Omission to administer oath or to attach certificate as required by S 5 of Oaths Act does not affect admissibility of his evidence by virtue of S 13 of Oaths Act — See Oaths Act (1873) S 5

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—S 145 — Recall of witness for cross examination — Statement — Meaning of — Statement not fully recorded or recorded in form of memorandum falls within ambit of section

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FACTORIES ACT (63 of 1948)

—S 2 (k) (ii) — Tannery merely using power for pumping water — Cannot be described as using power for manufacturing process so as to attract definition of factory — See Employees State Insurance Act (1948) S 2(12)

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FOREST ACT (16 of 1927)

—S 2(b) — Forest produce — Money claimed by Government from forest contractor is price of forest produce — See Forest Act (1927) S 5^o

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—Ss 52 and 2 (b) — Forest produce — Removal and conversion of timber from trees marked for felling — Right given to contractor — Money claimed by Government from the contractor is the price of forest produce

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—S 52 — Validity — Provisions of Sec 52 and Sections 90 and 91 of J and K Land Revenue Act do not violate Article 14 of the Constitution and are valid

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—R 57 — Granting leave is purely in the discretion of the granting authority — No Government servant is entitled to claim it as a matter of right

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—S 4(2) (d) — Scope — Clause applies only to such investigations that were pending when the Regulation came into force — Investigations commencing after Regulation came into force have to be under Criminal P C (1898) even if offence has been committed prior to the coming into force of Regulation — Lt Governor's order D 6-11-63 directing investigations in relation to offences committed prior to Criminal P C being made applicable according to law in force in the territory held was ultra vires

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—Maintenance — Neglect or refusal — Husband always ready to maintain wife and son if they resided with him — Wife however insisting husband to stay with her in her father's house — No other allegations such as cruelty ill treatment made — Maintenance for wife and son awarded — Alternatively husband directed to stay with wife in her parents house and to maintain them according to the desire of wife — Award of maintenance to wife and alternative direction illegal — Son however entitled

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— Ss. 6 and 8 — Maintenance deed creating life interest in favour of widowed daughter-in-law — Death of father-in-law — Suit by daughter-in-law for partition and

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— S. 7(2) — Applicability — Hindu family, governed by Aliyasanthana law — Suit for partition — See Madras Aliyasanthana Act (9 of 1949), S. 36 (5)

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Mad 187 A (C N 42)

HINDU WOMEN'S RIGHTS TO PROPERTY ACT (18 of 1937)

— S. 3 — Widowed daughter-in-law — Maintenance deed creating life interest in

HINDU WOMEN'S RIGHTS TO PROPERTY ACT (Contd.)

certain properties passed by father-in-law — Death of father-in-law — Succession — See Hindu Succession Act (1956), S. 6

Mad 187 A (C N 42)

HOUSES AND RENTS**—MYSORE RENT CONTROL ACT (22 of 1961)**

— Pre — Scheme and object of the Act — See Houses and Rents — Mysore Rent Control Act (1961), S. 4(2)(1)

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— Ss. 4(2) and (1), 6, 8 and Pre. — Mysore Rent Control Rules (1961), R. 3(ii) — Scheme and object of the Act — Restriction imposed under S. 4 (2) whether absolute — Stage at which Controller can consider the cause shown by landlord regarding requirement of accommodation for self occupation — R. 3(ii) held not repugnant to S. 4(2)

Mys 162 (C N 31) (FB)

— S. 6 — Restriction imposed under S. 4(2), whether absolute — See Houses and Rents — Mysore Rent Control Act (1961), S. 4(2)

Mys 162 (C N 31) (FB)

— S. 8 — Restriction imposed under S. 4(2) whether absolute — See Houses and Rents — Mysore Rent Control Act (1961), S. 4(2) & (1)

Mys 162 (C N 31) (FB)

—MYSORE RENT CONTROL RULES (1961)

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— S. 2 (11) (i) (a) — Account in respect of income from undisclosed source — No accounts maintained — No option under S. 2 (11) (i) (a) exercised — Such income to be assessed on basis of financial year being previous year — Position under new Act is the same — Income-tax Act (1961), S. 68

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— S. 2(6A) — Dividend paid in form of shares of a limited company — Valuation of shares cannot be made by adopting market rate, and the quantum of dividend cannot be determined at a rate higher than rate at which dividend was declared, especially when there is no attempt to defraud revenue

Cal 236 (C N 42)

— Ss. 2(6C) and 4 — 'Client's money' with solicitor not income — Solicitors hold money as trustee — English Common Law principles to govern their relationship — (Trusts Act (1882), S. 88 — Money left with solicitor for some work to be done by him — Solicitor holds the money as trustee) — (Contract Act (1872), S. 171 — Money of client with solicitor — Solicitor has lien over it for his costs) — (Words and Phrases

INCOME TAX ACT (1922) (Contd.)

— Client's money — Expression means the same thing as in England)

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—S 4 — Client's money with solicitors not income — Solicitors hold money as trustee See Income-tax Act (1922) S 2 (6C)

Cal 211 (C N 36)

—S 10(2) (xv) — Lump sum paid voluntarily to managing agents who were entitled to commission on profits in recognition of their past services and sacrifices — Not allowable deduction under Section 10(2) (xv)

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—S 23 (1) — Income tax Act (1961) S 271 (1) (c) — Penalty proceedings under S 271 (1) (c) Income tax Act 1961 for defaults referred to in S 23 (1) of Income tax Act 1922 in respect of assessment year ending 31 3 1962 — Proceedings could be validly initiated under S 271 of 1961 Act

Madh Pra 2 A (C N 24)

—S 23 (1) — Income-tax Act (1961) S 271 (1) — Penalty proceedings for concealment of income — Question of fact — To be determined on circumstances of case — Nature of such proceedings

Madh Pra 72 B (C N 24)

—S 34(1)(a)—Whether omission or failure to disclose fully and truly all material facts must be found to be wilful and deliberate?

SC 351 B (C N 69)

—S 34 (1) Second Proviso — Expression's finding "direction and "any person" in proviso meaning of — Once a finding necessary for disposal of appeal is given second proviso to Section 34(3) would be attracted and bar of limitation would be attracted — (Words and Phrases — Finding Direction and any person meaning of)

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—S 52 — Section does not repeal S 177 of Penal Code — Penal Code (1860) S 177

Mad 145 A (C N 55)

—S 52 — Prosecution instituted under the Section — Included in proceedings for assessment of that person for that year within S 297(2)(a) of Income tax Act 1961 — See Income Tax Act (1961) S 297 (2) (a)

Mad 145 B (C N 35)

—S 52 — Prosecution under S 52 after valid sanction by Inspecting Assistant Commissioner — Commencement of Act of 1961 during pendency of prosecution — No objection on ground that under S 279 of new Act the Commissioner alone can institute prosecution can be raised — See Income Tax Act (1961) S 277

Mad 145 C (C N 35)

—S 53 — Prosecution under S 52 after valid sanction by Inspecting Assistant Commissioner — Commencement of Act of 1961 during pendency of prosecution — No objection on ground that under S 279 of new Act the Commissioner alone can institute prosecution can be raised — See Income Tax Act (1961) S 277

Mad 145 C (C N 35)

INCOME TAX ACT (1922) (contd.)

—Sec 66 (1) — Advisory jurisdiction — New case — In the exercise of its advisory jurisdiction High Court will not allow development of a case on altogether new lines

Raj 142 B (C N 31)

INCOME TAX ACT (43 of 1961)

—S 37 — Assessee Company engaged in manufacture of crating and parts of diesel engines — Company agreeing to pay certain sum to engineer of certain concern in consideration of his leaving service and joining assessee as director — Amount so paid is capital expenditure — Claim for deduction under S 37 not maintainable

Madh Pra 68 (C N 20)

—S 68 — Account in respect of undisclosed income — No accounts maintained — No option under S 2 (11) (i) (a) exercised — Income to be assessed on basis of financial year being previous year — Position under new Act is the same — See Income Tax Act (1922) S 2 (11) (i) (a)

SC 351 A (C N 69)

—Ss 156 220 221 222 226 (3) and 297 (2) (i) — Tax liability for assessment year 1961 62 determined under Income tax Act 1922 — Notice of demand under S 156 of 1961 Act — Subsequent notice under S 221 (3) including this tax liability is valid — For issue of notice under S 226 (3) assessee need not be in default — Interpretation of S 226 (3) leading to absurd result of nullifying S 297 (2) (i) should be avoided — Procedure of new Act applicable mutatis mutandis to all cases contemplated by S 297 (2) (i) — AIR 1968 Mys 258 Reverse

SC 408 A (C N 81)

—S 156 — Notice under S 226 (3) issued after service of notice of demand under S 156 — Fact that time fixed for payment in notice of demand had not expired cannot invalidate notice under S 226 (3) — See Income Tax Act (1961) S 226 (3)

SC 408 B (C N 81)

—S 220 — Tax Liability for assessment year 1961 62 determined under Income Tax Act 1922 — Notice of demand under S 156 of 1961 — Subsequent notice under S 226 (3) including this tax liability is valid — For issue of notice under S 226 (3) assessee need not be in default — Interpretation of S 226 (3) leading to absurd result of nullifying S 297 (2) (i) should be avoided — Procedure of new Act applicable mutatis mutandis to all cases contemplated by S 297 (2) (i) — See Income Tax Act (1961) S 156

SC 408 A (C N 81)

—S 220 (6) — Interference in discretionary matter — Absence of pleading — Writ petition challenging that notice under S 226 (3) 1 T Act was issued not in proper exercise of discretion — Writ petition merely stating that order under S 220 (6) in treating the assessee in default was passed in exercise of discretion in arbitrary manner — In absence of specific particulars

INCOME-TAX ACT (1961) (contd.)
 in writ petition to support allegation: it is not open to High Court to go into that question — See Constitution of India, Art. 226 SC 408 C (C N 81)

—S. 220 (6) — Scope — Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction — Power of stay when to be exercised — See Income Tax Act (1961) S. 254

SC 430 (C N 84)

—S. 221 — Tax liability for assessment year 1961-62 determined under Income Tax Act, 1922 — Notice of demand under S. 156 of 1961 Act — Subsequent notice under S. 226 (3) including this tax liability is valid — For issue of notice under S. 226 (3), assessee need not be in default — Interpretation of S. 226 (3) leading to absurd result of nullifying S. 297 (2) (i) should be avoided — Procedure of new Act applicable mutatis mutandis to all cases contemplated by S. 297 (2) (i) — See Income Tax (1961), S. 156

SC 408 A (C N 81)

—S. 222 — Tax liability for assessment year 1961-62 determined under Income Tax Act 1922 — Notice of demand under S. 156 of 1961 Act — Subsequent notice under S. 226 (3) including this liability is valid — For issue of notice under S. 226 (3), assessee need not be in default — Interpretation of S. 226 (3) leading to absurd result of nullifying S. 297 (2) (i) should be avoided — Procedure of new Act applicable mutatis mutandis to all cases contemplated by S. 297 (2) (i) — See Income Tax Act (1961), S. 156

SC 408 A (C N 81)

—S. 226 (3) — Tax liability for assessment year 1961-62 determined under Income Tax Act 1922 — Notice of demand under S. 156 of 1961 Act — Subsequent notice under S. 226 (3) including this tax liability is valid — For issue of notice under S. 226 (3), assessee need not be in default — Interpretation of S. 226 (3) leading to absurd result of nullifying S. 297 (2) (i) should be avoided — Procedure of new Act applicable mutatis mutandis to all cases contemplated by S. 297 (2) (i) — See Income Tax Act (1961), S. 156

SC 408 A (C N 81)

—Ss. 226 (3) and 156 — Notice under S. 226 (3) issued after service of notice of demand under S. 156 — Fact that time fixed for payment in notice of demand, had not expired cannot invalidate notice under S. 226 (3) — AIR 1968 Mys 258, Reversed

SC 408 B (C N 81)

—S. 226 (3) — Interference in discretionary matter — Absence of pleading — Writ petition challenging that notice under S. 226 (3) I. T. Act was issued not in proper exercise of discretion — Writ petition merely stating that order under S. 220 (6) in treating the assessee in default was passed in exercise of discretion in arbitrary manner — In absence of specific particulars

INCOME TAX ACT (1961) (Contd.)
 in writ petition to support allegation: it is not open to High Court to go into that question — See Constitution of India, Art. 226 SC 408 C (C N 81)

—S. 246 — Scope — Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction — Power of stay when to be exercised — See Income Tax Act (1961), S. 254

SC 430 (C N 84)

—Sections 254, 255, 220 (6), 246 — Scope — Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction — Power of stay when to be exercised — (Civil P. C. (1908), Pre-Interpretation of Statutes — Statute conferring power) SC 430 (C N 84)

—S. 255 — Scope — Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction — Power of stay when to be exercised — See Income Tax Act (1961), S. 245, SC 430 (C N 84)

—S. 271 (1) (c) — Penalty proceedings under S. 271 (1) (c) Income Tax Act 1961, for defaults referred to in S. 28 (1) of Income Tax Act, 1922 in respect of assessment year ending 31-3-1962 — Proceedings could be validly initiated under S. 271 of 1961 Act — See Income Tax Act (1922) S. 28 (1) Madh Pra 72 A (C N 24)

—S. 271 (1) — Penalty proceedings for concealment of income — Question of facts to be determined on circumstances of case — Nature of such proceedings — See Income Tax Act (1922) S. 28 (1)

Madh Pra 72 B (C N 24)

—Ss. 277 and 279 — Income-tax Act (1922), Ss. 52 and 53 — Prosecution under S. 52 after valid sanction by Inspecting Assistant Commissioner — Commencement of Act of 1961 during pendency of prosecution — No objection on ground that under S. 279 of new Act the Commissioner alone can institute prosecution, can be raised — If prosecution is launched under the old Act which was in force at the time of repeal, the entire procedure provided under the old Act alone should be followed

Mad 145 C (C N 35)

—S. 279 — Prosecution under S. 52 after valid sanction by Inspecting Assistant Commissioner — Commencement of Act of 1961 during pendency of prosecution — No objection on ground that under S. 279 of new Act the Commissioner alone can institute prosecution, can be raised — See Income Tax Act (1961), S. 277

Mad 145 C (C N 35)

—S. 297 (2) (a) — "Proceedings for the assessment of that person for that year" — Meaning of — Includes prosecution instituted under S. 52 of Income-tax Act (1922)

Mad 145 B (C N 35)

—S. 297 (2) (b) — Provision is not violative of Article 14 of Constitution — Classification of person who filed returns before commencement of Act as one class and

INCOME TAX ACT (1961) (Contd)

persons who filed return after commencement of Act as another, is justifiable — Constitution of India, Art. 14

Mad 145 D (C N 35)

—S 297 (2) (i) — Tax liability for assessment year 1961-62 determined under Income Tax Act 1922 — Notice of demand under S 156 of 1961 Act — Subsequent notice under S 226 (3) including this tax liability is valid — For issue of notice under S 226 (3), assessee need not be in default — Interpretation of S 226 (3) leading to absurd result of nullifying S 297 (2) (i) should be avoided — Procedure of new Act applicable mutatis mutandis to all cases contemplated by S 297 (2) (i) — See Income Tax Act (1961), S 156

SC 408 A (C N 81)

INDIAN ADMINISTRATIVE SERVICE (APPOINTMENT BY PROMOTION) REGULATIONS, 1955

See under Civil Services

INDUSTRIAL DISPUTES ACT (14 of 1917)

—S 2 (k) — Individual dispute when becomes industrial dispute — See U P Industrial Disputes Act (23 of 1947) S 6 (1) (3)

All 242 (C N 50)

—S 2 (s) — "Workman" under S 33C (2) includes ex workman — See Industrial Disputes Act (1947) S 33 C (2)

Pat 147 (C N 36)

—S 10 — When individual dispute becomes industrial dispute — See U P Industrial Disputes Act (23 of 1947) S 6 (1) (3)

All 242 (C N 50)

—S 10 — "Corresponding Court, Tribunal authority or officer", in S 93 of Punjab Reorganisation Act 1956 — Meaning — See Punjab Reorganisation Act (1956) S 93

Punj 147 B (C N 25)

—S 33B — Reference of industrial dispute to Labour Court or Industrial Tribunal is a proceeding within the meaning of S 93 (3) of Punjab Reorganisation Act 1956 — See Punjab Reorganisation Act (1956) S 93

Punj 147 A (C N 25)

—Ss 33C (2), 2 (s) — "Workman" under S 33C (2) includes ex-workman

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—Sch III Item 2 — Revision of dearness allowance claim for — Considerations

SC 360 (C N 71)

INSTITUTES OF TECHNOLOGY ACT (59 of 1961)

—S 26 — Statutes 12 and 13 framed under — Promotion — Cannot be claimed as of right — Decision not to promote does not amount to imposing penalty

All 213 A (C N 44)

—S 26 — Statute 12, Cl 3 (f) and Cl 7 — Cl 7 is intended to operate where post is filled by promotion for period not exceeding 12 months — Post of Senior Stenographer not filled for temporary period of twelve months — Held that Selection Committee which considered cases of junior stenographers for promotion was one con-

INSTITUTES OF TECHNOLOGY ACT (Contd)

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All 213 B (C N 44)

—S 30 — Dispute not arising out of contract between Institute and employee — S 30 (1) is not attracted

All 213 C (C N 44)

INTERPRETATION OF STATUTES

—Retrospective effect — See Civil P C (1908) Preamble

J & K 62 E (C N 15) (FB)

—Rules of — Use of legislative history — See Civil P C (1908) Pre

Delhi 154 A (C N 27) (FB)

—Statute conferring power — Scope — Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction — Power of stay when to be exercised — See Income Tax Act (1961) S 254

SC 430 (C N 84)

INTER ZONAL WHEAT AND WHEAT PRODUCTS (MOVEMENT CONTROL) ORDER, 1964

—S 3 — Offence under — Attempt to commit is equally an offence — See Essential Commodities Act (1955), S 7

Madh Pra 96 (C N 30)

—S 4 — Offence under — Attempt to commit is equally an offence — See Essential Commodities Act (1955), S 7

Madh Pra 96 (C N 30)

—S 6 — Offence under — Attempt to commit is equally an offence — See Essential Commodities Act (1955) S 7

Madh Pra 96 (C N 30)

IRON AND STEEL CONTROL ORDER (1956)

—Cl 27 (2) proviso — Scrap hoops held by Regional Director, Ministry of Food — Fixation of its selling price by Iron and Steel Controller at much higher rate than controlled price is valid

Bom 163 C (C N 28)

—Cl 27 (2) proviso — Fixation under of special selling price — Order not containing explicit direction that general selling price fixed under Circular No 5 of 1957 is inapplicable — Validity of order is unaffected by such omission

Bom 163 E (C N 26)

—Cl 27 and proviso to sub-clause (2) of Cl 27 — Words 'prices and maximum prices' are used synonymously under Cl 27

—Steel Controller is entitled under proviso to Cl 27 (2) to fix selling price of specified stock

Bom 163 F (C N 28)

—Cl 27 (2) proviso — Interpretation of — Fixation of special selling price — Possible only in respect of specified stock held by Government Department or Corporation and not by other person, — Price not attached to specified stock

Bom 163 G (C N 28)

—Cl 27 (2) proviso — Fixation of special selling price at much higher rate than controlled rate — Vires of proviso not challenged — Order made in pursuance of

IRON AND STEEL CONTROL ORDER (Contd.)

proviso does not violate Art. 14 of Constitution — (Constitution of India, Art. 14)

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—Cl. 27 (2), proviso — Fixation of higher selling price than controlled price of specified iron scrap — Purchase at such price at calculated risk — Failure of purchaser to get special price fixed for resell — Compulsorily selling it at loss — Order does not contravene Art. 19 (1) (g) of Constitution — (Constitution of India, Article 19 (1) (g)) Bom 163 I (C N 28)

—Cl. 27 (1) (2) proviso — Fixation of special selling price for specified stock of iron scrap under Cl. 27 (2) proviso — Does not amount to amendment, variation or rescission of general price fixed under Cl. 27 (1) by notification of Circular No. 5 of 1957 — Approval of Central Government and publication in Gazette of India is not necessary — S. 21, General Clauses Act (1897) is inapplicable Bom 163 J (C N 28)

J AND K LAWS CONSOLIDATION ACT (SMT. 1977)

—S. 4 (1) (b) — Constitution of Jammu and Kashmir (1957), S. 157 — Advice tendered by Board of Advisers — Command Order of the Ruler accepting advice — Becomes law of the State

J & K 62 B (C N 15) (FB)

J AND K LAND REVENUE ACT (12 of 1996)

—S. 90 — Validity — Not violative of Art. 14 of the Constitution — See Forest Act (1927), S. 52

J & K 52 C (C N 13)

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J & K 52 C (C N 13)

J AND K RIGHT OF PRIOR PURCHASE ACT (2 of SMT. 1993)

—S. 14 (as amended by Act 23 of 1959)—Suit for pre-emption — Amendment of the Act improving defendant-vendee's title — Amendment not retrospective — Vendee cannot take advantage — AIR 1965 J and K 62 (FB), Overruled. (Majority view) J & K 62 A (C N 15) (FB)

—S. 14 — Amendment of by J and K Act of 23 of 1959 — Amendment not retrospective — Does not affect prior rights of agnates and co-sharers. (Majority view)

J & K 62 C (C N 15) (FB)

KERALA BUILDINGS TAX ACT (19 of 1961)

—S. 4 and Sch. — Constitutional validity — Violates equality clause of the Constitution and is ultra vires — (Constitution of India, Articles 13, 14, 265 and Sch. 7, List II Entry 49 — Power to tax lands and buildings — Cannot be used arbitrarily and in a manner inconsistent with fundamental rights) SC 378 (C N 74)

KERALA BUILDINGS TAX ACT (Contd.)

—Sch. — Constitutional validity — Violates equality clause of the Constitution and is ultra vires — Power to tax lands and buildings — Cannot be used arbitrarily and in a manner inconsistent with fundamental rights — See Kerala Buildings Tax Act (19 of 1961), S. 4 SC 378 (C N 74)

KERALA MOTOR VEHICLES (TAXATION OF PASSENGERS AND GOODS) ACT (25 of 1963)

—Pre. — Act is not within the competence of State Legislature — See Constitution of India, Art. 246

Ker 130 A (C N 32)

—Pre. — Payment and collection of tax — Statute imposing the same must provide for the same from persons as are made liable for the impost — See Constitution of India Art. 19 Ker 130 C (C N 32)

—Pre. — Taxing Statute — Must provide for payment and collection of tax from such persons as are made liable by the impost — See Constitution of India, Art. 265 Ker 130 D (C N 32)

—Pre. — Burden imposed by tax held to be reasonable — See Constitution of India, Part 13 Ker 130 E (C N 32)

—S. 3 — Act imposes tax on passengers and goods and not on operators or their income — See Constitution of India Art. 246 Ker 130 A (C N 32)

—S. 3 — Constitutional validity of the Act — Who could challenge — See Constitution of India Art. 14

Ker 130 B (C N 32)

—S. 3 — Payment and collection of tax — Statute improving it must itself provide for them — See Constitution of India Art. 265 Ker 130 D (C N 32)

—S. 3 — Burden imposed by tax held to be reasonable — See Constitution of India, Part 13 Ker 130 E (C N 32)

—S. 18 — Constitutional validity of Act — Who could challenge — See Constitution of India Art. 14

Ker 130 B (C N 32)

—S. 43 — Payment and collection of tax — Statute imposing the same must itself provide for it from persons made liable for it — See Constitution of India Art. 265

Ker 130 D (C N 32)

—S. 44 — Taxing statute must itself provide for payment and collection of tax from such persons as are made liable by the impost — See Constitution of India, Art. 265

Ker 130 D (C N 32)

KERALA PADDY (RESTRICTION ON MILLING) ORDER 1967

—Person aggrieved — Meaning of — See Constitution of India, Art. 226

Ker 154 A (C N 36) (FB)

—Violation of S. 3 (6) of the Essential Commodities Act 1955 does not render the order invalid — See Essential Commodities

KERALA PADDY RESTRICTION ON MILLING ORDER (Contd)

Act (1955) S 3 (6)

—Pre — Order passed by the State Government as delegate of Central Government cannot be said to be a piece of colourable legislation — See Constitution of India Art 245

—(1) — Ker 154 B (C N 36) (FB)
—Pre — No prior concurrence of Govt obtained — Order is invalid — See Essential Commodities Act (1955) S 3 (2) (a) and (d) Ker 154 E (C N 36) (FB)

KERALA RICE (REGULATION OF MOVEMENT) ORDER (1966) (AFTER ITS AMENDMENT ON 22-2-1968)

—Clause 6 — Magistrate before whom offender is produced for contravention of the order cannot direct production of goods seized before him — See Essential Commodities Act (1955) (as amended by Act 25 of 1966) Ss 6A to 6D

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LAND ACQUISITION ACT (1 of 1894)

—S 2 (d) — Addl. Collector — Whether Collector — See Land Acquisition Act (1894) S 11 Madh Pra 78 A (C N 26)

—S 3 (b) — Person interested — Person not noticed under Ss 9 & 12 not barred from seeking reference under S 18 (3) — See Land Acquisition Act (1894) S 18 Madh Pra 78 D (C N 26)

—Ss 4 (1) 5A — Acquisition of land owned by temple for construction of staff quarters of University — Acquisition was for public purpose — Alteration of procedure for disposal of land by public auction into proceedings for acquisition of land — Religious institution held would not lose — (Mooras Hindu Religious and Charitable Endowments Act (22 of 1959) S 34)

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—S 4 (1) — Public purpose — Meaning of — See Civil Procedure Code (5 of 1908) Pie Mad 183 B (C N 41)

—S 5A (as amended by U P Act 22 of 1954) — Applicability — See Land Acquisition Act (1894) (as amended by U P Act 22 of 1954) S 17 (1) (2) (1A) and (4) All 245 (C N 51) (FB)

—S 5A — Acquisition of land owned by temple for construction of staff quarters of University — Acquisition is for a public purpose — See Land Acquisition Act (1894) S 4 (1) Mad 183 A (C N 41)

—S 6 (as amended by U P Act 22 of 1954) — Notification under the section read with S 17 (1) and (1A) — Validity — See Land Acquisition Act (1894) (as amended by U P Act 22 of 1954) S 17 (1) (2) (1A) and (4) All 245 (C N 51) (FB)

—S 9 — Person not noticed under the section — Eligibility for seeking reference under S 18 (3) not affected — See Land Acquisition Act (1894) S 18

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—S 18 — Award by Addl. Collector empowered to discharge functions of Collector — Approval by Collector — Effect — See Land Acquisition Act (1894) S 11 Madh Pra 78 A (C N 26)

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Pat 154 (C N 40)

— Art. 36 — Scope and applicability — Suit for damages for slander of goods or title — See Limitation Act (9 of 1908), Art. 22

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—S. 110A — Scope — See Motor Vehicles Act (4 of 1939), S. 110

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cused — Yet offences under Ss 420 or 379 not ruled out Cal 232 A (C N 40)

—Ss 420 and 379 — Mens rea — Accused owner of taxi — Accused also having requisite token, insurance certificate, blue book and R T A permit — Registered partnership for running taxi existing between complainant and accused — Evidence not showing criminal mind on the part of accused — Proceedings against accused under S 420 not maintainable Cal 232 B (C N 40)

—S 499 — Concurrent finding that applicant defamed the complainant — Revision petition is liable to be rejected in limine — See Criminal P C (1898), S 435

Goa 52 (C N 14)

—S 511 — Preparation and attempt — Distinguished — See Essential Commodities Act (1955), S 7

Madh Pra 96 (C N 30)

POLICE ACT (5 of 1861)

—Ss 7 and 12 — Rules under, R 163 (Punjab) — Proceedings in Criminal Court against police officer for defalcation of Government money — Magistrate while acquitting official stating that "I admit that none else would have dared to sign this entry in T A. bill but since it has not been proved" and also recording that all prosecution witnesses had resiled — Held, case was covered by clauses (a) (b) and (c) and the official could not claim protection of sub-rule (1)

Punj 131 B (C N 22)

—Ss 7 and 12 — Rules under, R 163 (1) (Punjab) — Criminal offence not connected with official relations of delinquent official with the public — Rule has no application Punj 131 C (C N 22)

—Ss 7 and 12 — Rules under, R 162 (1) Cls (u) and (w) (Punjab) — Police Official not admitting misconduct alleged against him — Cl (w) applies and not Cl (u) Punj 131 D (C N 22)

—Ss 7 and 12 — Rules under, R 162 (1) Cl (i) (Punjab) — Summary of allegations — Names of witnesses and summary of statements which those witnesses are expected to make need not be detailed in summary of allegations Punj 131 E (C N 22)

—S 7 — Supply of requisite copies of statements of witnesses to one who already has them — Not necessary — See Constitution of India, Art 311 (2)

Punj 131 F (C N 22)

—Ss 7 and 12 — Rules under, R 162 (Punjab) — Scope — It envelopes requirements of Art 311 of Constitution and Rule 7 of Punjab Civil Services (Punishment and Appeal) Rules, 1952

Punj 131 H (C N 22)

—S 12 — Proceedings in Criminal Court against police officer for defalcation of Government money — Held case was covered by Cls (a), (b) and (c) of R 163 and the

POLICE ACT (Contd.)

official could not claim protection of sub-rule (1) — See Police Act (1861), S. 7

Punj 131 B (C N 22)

—S. 12 — Applicability of R. 16.38 (1) — Not applicable where offence is not connected with official relations of delinquent official with the public — See Police Act (1861), S. 7

Punj 131 C (C N 22)

—S. 12 — Police official not admitting misconduct alleged against him — Cl. (iii) of R. 16.24 (1) applies and not Cl. (ii) of the said rule — See Police Act (1861), S. 7

Punj 131 D (C N 22)

—S. 12 — Rules under — Delinquent official already having copies of statements of witnesses to be examined in departmental inquiry and neither disputing the fact nor asking for another set — Another set need not be furnished to him — See Police Act (1861), S. 7

Punj 131 E (C N 22)

—S. 12 — Set of copies of witness — Statements, supply to one who already has them — See Constitution of India, Art. 311 (2)

Punj 131 F (C N 22)

—S. 12 — Scope — See Police Act (1861), S. 7

Punj 131 H (C N 22)

—Rules under, R. 16.3 (Punj) — Held the case was covered by Cls. (a), (b) and (c) and the official could not claim the protection of sub-rule (1) — See Police Act (1861), S. 7

Punj 131 B (C N 22)

—Rules under, Rule 16.24 (Punj) — Scope — See Police Act (1861), S. 7

Punj 131 H (C N 22)

—Rules under R. 16.24 (Punj) — Supply of fresh set of copies of statements of witnesses, to one who already has them — Not necessary — See Constitution of India, Art. 311 (2)

Punj 131 F (C N 22)

—Rules under R. 16.24 (1) Cls. (ii) and (iii) (Punj) — Police official not admitting misconduct alleged against him — Cl. (iii) applies and not Cl. (ii) — See Police Act (1861), S. 7

Punj 131 D (C N 22)

—Rules under R. 16.24 (1) & Cl. (i) (Punj) — Names of witnesses and summary of statements which those witnesses are expected to make need not be detailed in summary of allegations — See Police Act (1861), S. 7

Punj 131 E (C N 22)

—Rules under Rule 16.38 (1) (Punj) — Applicability — See Police Act (1861), S. 7

Punj 131 C (C N 22)

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

—Ss. 2 (xiii), 10, 12, 16 — 'Sale' includes sale for analysis to public or to Food Inspector — Sale to member of public can be only voluntary but sale to Food Inspector may be voluntary or non-voluntary — Tea vendor storing milk for tea — No evidence to show that it was kept for sale — Food Inspector taking sample for analysis against protest of tea vendor — Vendor accepting its price and granting receipt without any

PREVENTION OF FOOD ADULTERATION ACT (contd.)

coercion — Transaction held to be sale within S. 2 (xiii) Pat 155 A (C N 41)

—S. 7 — Sale of adulterated tea — Binding nature of report of Public Analyst and certificate of Director — See Prevention of Food Adulteration Act (1954), S. 13

Ker 146 (C N 33)

—S. 7(i) — Sample of ghee taken from tins taken out of cold storage — Sample containing more moisture and oleic acid than prescribed in Rules — Such increases within possible ranges of variation under such circumstances — Conviction for adulteration illegal — See Prevention of Food Adulteration Act (1954), S. 16 (a) (i)

Cal 247 B (C N 44)

—S. 10 — Sale includes sale for analysis to public or to Food Inspector — See Prevention of Food Adulteration Act (1954), S. 2(xiii)

Pat 155 A (C N 41)

—S. 12 — 'Sale' includes sale for analysis to public or to Food Inspector — See Prevention of Food Adulteration Act (1954), S. 2 (xiii)

Pat 155 A (C N 41)

—Ss. 13, 7, 16 — Sale of adulterated tea — Report of Public Analyst and certificate of Director — Value of — Binding nature on Courts

Ker 146 (C N 33)

—S. 13(5) — Report of public analyst — Evidentiary value — Examination of public Analyst not essential unless he is called by either party — Prevention of Food Adulteration Rules (1955), R. 20 — Addition of adequate quantity of preservative to sample of milk — Non-compliance — Delay of two months and a half in examination of sample — Report of Public Analyst can be relied upon as basis of conviction

Pat 155 B (C N 41)

—S. 16 — Sale of adulterated tea — Report of Public Analyst and certificate of Director — Value of — Binding nature on Courts — See Prevention of Food Adulteration Act (1954), S. 13

Ker 146 (C N 33)

—S. 16 — "Sale" includes sale for analysis to public or to Food Inspector — See Prevention of Food Adulteration Act (1954), S. 2 (xiii)

Orissa 155 A (C N 41)

—S. 16(1)(a)(i), Proviso — Sentence — Offence of adulteration of milk by tea vendor only of technical nature — Sentence of fine of Rs. 5/- only would meet requirements of justice as offence is covered by proviso to S. 16(1) and a sentence of imprisonment is not compulsory

Pat 155 C (C N 41)

—Ss. 16 (1) (a) (i) and 7 (i) — Sample taken from sealed tin of ghee brought out of cold storage — Sample containing more moisture and oleic acid than standard prescribed in Rules — Such increases within possible ranges of variation under such circumstances — Conviction for adulteration illegal — (Prevention of Food Adulteration Rules

PREVENTION OF FOOD ADULTERATION ACT (contd)

(1955), Appendix I, A 1114)

—S 17 (1) *Proviso* — Accused in-charge of office of company as persons in charge of and responsible to company for conduct of its business — Commodity manufactured by company at a place different from that of office — Accused not concerned with manufacture — Conviction of accused for adulteration of commodity is not justifiable
Cal 247 B (C N 44)
Cal 247 A (C N 44)

PREVENTION OF FOOD ADULTERATION RULES (1955)

—Appendix I A 1114 — Conviction for adulteration held illegal in the circumstances — See Prevention of Food Adulteration Act (1954), S 16 (1) (a) (i)
Cal 247 B (C N 44)

PREVENTIVE DETENTION ACT (4 of 1950)
See under Public Safety**PROVINCIAL SMALL CAUSE COURTS ACT (9 of 1887)**

—S 18 — S 35 is an express provision contemplated by S 16 — See Provincial Small Cause Courts Act (1887), S 35
Guj 147 B (C N 26)

—Ss 24 and 27 — Decree or order to be final and non-appealable must be made by Small Cause Court — See Provincial Small Cause Courts Act (1887), S 35
Guj 147 A (C N 26)

—S 24 — Suit first tried by Small Cause Court and subsequently by Court of ordinary civil jurisdiction — Neither S 24 nor S 27 would apply — See Provincial Small Cause Courts Act (1887), S 35
Guj 147 B (C N 26)

—S 27 — Decree or order made by a Court of Small Causes alone is final under the section — See Provincial Small Cause Courts Act (1887), S 24
Guj 147 A (C N 26)

—S 27 — Suit first tried by Court of Small Causes and subsequently by Court of ordinary original jurisdiction — Neither S 24 nor S 27 would apply — See Provincial Small Cause Courts Act (1887), S 35
Guj 147 B (C N 26)

—Ss 35, 16 24 and 27 — S 35 is an express provision contemplated by S 16 — Suit first tried by Small Cause Court and subsequently by Court of ordinary Civil jurisdiction — Order passed by latter Court — Neither S 24 nor S 27 would apply
Guj 147 B (C N 26)

PUBLIC SAFETY**—PREVENTIVE DETENTION ACT (4 of 1950)**

—Ss 11A, 13 and 14 — Detention order expires on expiry of 12 months from date of detention — Interim bail by Court or release on parole by Government cannot operate as suspension of detention order
Cal 234 (C N 41)

PUBLIC SAFETY — PREVENTIVE DETENTION ACT (contd)

—S 13 — Detention order — Expiry of — Expires on expiry of 12 months from date of detention — See Public Safety — Preventive Detention Act (1950) S 11A
Cal 234 (C N 41)

—S 14 — Detention order expires on expiry of 12 months from date of detention — Release on parole by Government cannot operate as suspension of detention order — See Public Safety — Preventive Detention Act (1950), S 11A
Cal 234 (C N 41)

PUNJAB DOCUMENT WRITERS LICENSING RULES (1961)

—Rule 3(2) — Rule is ultra vires — See Registration Act (1903), S 69 (1) (bb) (as amended by Indian Registration (Punjab Amendment) Act (1961)
Delhi 134 (C N 22)

PUNJAB PRE-EMPTION ACT (1 of 1913)

—S 15(1)(b) *thirdly* (as amended by Punjab Act 10 of 1960) — Or. meaning of — Does not mean 'and' — Father's brother has superior right over father's brother's son — (1968) 70 PLR 571, Overruled — (Words and Phrases — Or)
Delhi 154 B (C N 27) (FB)

PUNJAB REORGANISATION ACT (1966)

—S 93 — Proceeding — Reference of industrial dispute to Labour Court or Industrial Tribunal is a proceeding within meaning of section
Punj 147 A (C N 25)

—S 93 — "Corresponding Court, Tribunal, authority or officer" — Transfer of case from Labour Court, Rohtak to Labour Court, Jullundur — Labour Court, Jullundur, is corresponding Labour Court in Rohtak by virtue of S 10 of Industrial Disputes Act (1947)
Punj 147 B (C N 25)

PUNJAB SECURITY OF LAND TENURES ACT (10 of 1953)

See under Tenancy Laws

RAILWAY ESTABLISHMENT CODE

—Rr. 1702, 1703 — Special provisions applicable to ex-B N Railway Company employees — General provisions in the Code do not apply till the special provisions are repealed or abrogated — Enquiry against petitioner — Charges framed by District Mechanical Engineer and enquiry ordered by him — Held that the District Mechanical Engineer was not the Head of the Department and hence the proceedings were not valid
Andh Pra 155 A (C N 50)

—Rule 1702 — First notice mentioning proposed punishment — Prejudice
Andh Pra 155 B (C N 50)

—R 1703 — Enquiry against petitioner — Charges framed by District Mechanical

RAILWAY ESTABLISHMENT CODE (contd.)

Engineer — Validity of proceedings — See Railway Establishment Code Rules, R. 1702
Andh Pra 155 A (C N 50)

RAILWAYS ACT (9 of 1890)

—Sec. 74C (3) — Mango consignment, despatched at owner's risk, reaching destination 2 days late than reasonable time — Mangoes found unfit for human consumption — Delay of two days not being unreasonable Railway not responsible for destruction — Presumption that damage was due to delay of two days cannot be drawn — (Evidence Act (1872), Section 114)
Orissa 100 A (C N 36)

RAILWAY GENERAL RULES NO. 29 (1954)

—In terms, Rule 29 has no application to booking of perishable goods
Orissa 100 B (C N 36)

RAJASTHAN MINOR MINERAL CONCESSIONAL RULES (1959)

—R. 46 — Appeal under, heard by secretary but disposed of by Minister in-charge — Invalid — See Constitution of India, Art. 166
Raj 129 (C N 28)

RAJASTHAN MUNICIPALITIES ACT (38 of 1959)

See under Municipalities.

RAJASTHAN SALES TAX ACT (29 of 1954)

See under Sales Tax.

REGISTRATION ACT (16 of 1908)

—S. 2(6) — Gift of cash in favour of a deity — Document does not require registration — See Registration Act (1908), S. 17
All 248 I (C N 52)
—Ss. 17, 2(6) — Document making a gift of cash in favour of a deity does not require registration
All 248 I (C N 52)
—S. 69 (1)(b) (as amended by Indian Registration (Punjab Amendment) Act (1961) — Punjab Document Writers Licensing Rules (1961), R. 3(2) — Sub-rule (2) is in excess of rule-making powers conferred under S. 69 (1) (bb) and so ultra vires
Delhi 134 (C N 22)

RELIGIOUS AND CHARITABLE ENDOWMENTS

—Concept and early history of charitable and religious trusts, right from the period of Roman law, traced with special reference to property gifted to the institution and the ownership of such property—In this connection law of gifts to corporation and corporation sole under English law also discussed. Hindu juridical notions regarding gift to God and charitable institutions also discussed. Case law referred — Transfer of Property Act (1882), S. 122 — Hindu Law — Religious Endowment All 248 L (C N 52)
—Radhaswami faith and Dayalbagh — Tenets of Radhaswami faith and history of

RELIGIOUS AND CHARITABLE ENDOWMENTS (contd.)

Dayalbagh institution at Agra traced
All 248 H (C N 52)

REPRESENTATION OF THE PEOPLE ACT (43 of 1951)

—Ss. 33(5), 36(2)(b) — Requirements of valid nomination paper — Non-compliance — Effect SC 395 A (C N 78)
—S. 36(2)(b) — Requirements of valid nomination paper — Non-compliance — Effect — See Representation of the People Act (1951), S. 33 (5) SC 395 A (C N 78)
—S. 79(b) — "Candidate" — Who is — See Representation of the People Act (1951), S. 86(1) Andh Pra 151 A (C N 49)
—S. 82(b) — Election petition — Parties to — Person who has withdrawn from contest — When necessary party — See Representation of the People Act (1951), S. 86(1) Andh Pra 151 A (C N 49)
—S. 86 — Election petition — Necessary party, not impleaded — Petition liable to be dismissed — Delay cannot be condoned — (Limitation Act (1963), S. 5) — (Civil P. C. (1908), O. 1, R. 10)
Andh Pra 151 C (C N 49)
—Ss. 86(1), 79(b), 82(b), 123(1) (B) (a) — Election petition — Parties to — (Candidate withdrawing from contest — Allegations of bribery against him — He is a necessary party to election petition — Failure to implead him is fatal
Andh Pra 151 A (C N 49)
—S. 86(1) and (4) — Sub-section (4) when comes into play
Andh Pra 151 D (C N 49)
—S. 116-A — Appeal to Supreme Court — Finding of fact and appreciation of evidence — Practice SC 395 B (C N 78)
—S. 123 — Scope
Andh Pra 151 B (C N 49)
—S. 123 (1)(B) (a) — Allegation of bribery against a candidate who had withdrawn from contest — He is necessary party to election petition — Failure to implead him is fatal — See Representation of the People Act (1951), S. 86 (1)
Andh Pra 151 A (C N 49)
—S. 123(2)(ii) — Corrupt practice — Undue influence — Speech exhorting voters that if they voted for the congress or a congress candidate they would be committing the sin of go-hatya amounts to an attempt to induce voters to believe that they would become objects of divine displeasure or spiritual censure falling within the mischief of S. 123(2)(ii) SC 395 C (C N 75)
RICE MILLING INDUSTRY (REGULATION) ACT (21 of 1958)
—Kerala Paddy (Restriction of Milling) Order, 1967, passed by Kerala Govt. as a delegate of Central Govt. is not an invalid order — It cannot be said that the purpose of the order is the same as that of the Central Act — See Constitution of India, Art. 245
Ker 154 D (C N 36) (FB)

RULES OF BUSINESS (GOVERNMENT OF RAJASTHAN)

—R 5 — Appeal under R 46(2) of Raj Mineral Concession Rules 1959 heard by Secretary but disposed of by Minister-in-charge — Invalid — See Constitution of India Art 166 Raj 129 (C N 25)

—R 21 — Appeal under R 46(2) of Raj Minor Mineral Concession Rules 1959 heard by Secretary but disposed of by Minister-in-charge — Invalid — See Constitution of India Art 166

Raj 129 (C N 28)

SALES TAX

—CENTRAL SALES TAX ACT (74 of 1956)

—S 2(b) — Madras General Sales Tax Act (1 of 1959) Section 2(g) — Business of manufacture and sale of machinery and its parts — Purchase of arc furnaces for use in foundry of the assessee — On finding them unsuitable furnaces sold at profit — Proceeds of sale do not form part of business turnover SC 348 (C N 68)

—MADRAS GENERAL SALES TAX ACT (1 of 1959)

—S 2(g) — Business of manufacture and sale of machinery and its parts — Purchase of arc furnaces for use in foundry of the assessee — On finding them unsuitable, furnaces sold at profit — Proceeds of sale do not form part of business turnover — See Sales Tax — Central Sales Tax Act (1956) S 2 (b) SC 348 (C N 68)

—RAJASTHAN SALES TAX ACT (29 of 1954)

—S 2 (o) (s) and (t) — Colliery Control Order (1945) Cl 4 — Turnover from sale of goods — Liability to tax — Essential element — Agreement between State and assessee acting — See Sales Tax — Rajasthan Sales Tax Act (29 of 1954) S 3

SC 343 A (C N 67)

—Ss. 3 2(o) (s) and (t) — Colliery Control Order (1945) Clause 4 — Turnover from sale of goods — Liability to tax — Essential elements — Agreement between State and assessee acting as agent of a Coal Company to sell coal — Price fixed under Colliery Control Order — Effect of Control Order — Supply of coal by assessee — Transaction held one of sale of goods — Turnover liable to tax ILR (1965) 15 Raj 603 Reversed SC 343 A (C N 67)

—S 3 — Sales Tax — Sales Tax Laws Validation Act (1956) S 2 — Rajasthan Sales Tax Act (29 of 1954) S 3 — Inter State Sales — Order of Assessment of Sales Tax for entire assessment Year 1955-56 — S 3 of Act of 1956 validating levy of sales tax on inter-State Sales till September 6th 1955 — Writ of mandamus can be issued directing State not to realise sales tax except with regard to transactions of sale between the period April, 1955 and September 6th 1955 both days inclusive — See Sales Tax — Sales Tax Laws Validation Act (1956) S 2 SC 343 B (C N 67)

SALES TAX (contd)

—SALES TAX LAWS VALIDATION ACT (7 of 1956)

—S 2 — Rajasthan Sales Tax Act (29 of 1954) Section 3 — Inter-State sales — Order of assessment of sales tax for entire assessment year 1955-56 — Section 2 of Act of 1956 validating levy of sales tax on inter State sales till September 6 1955 — Writ of mandamus can be issued directing State not to realise sales tax except with regard to transactions of sale between the period April 1 1955 and September 6 1955 both days inclusive — Constitution of India Article 225 ILR (1965) 15 Raj 603 Reversed SC 343 B (C N 67)

SALES TAX LAWS VALIDATION ACT (7 of 1956)

See under Sales Tax.

SAURASHTRA LAND REFORMS ACT (2 of 1951)

See under Tenancy Laws

SOCIETIES REGISTRATION ACT (21 of 1860)

—Ss 1, 2 3 19 — Certified copy of registration of society under Act produced — Presumption as to signature of persons on memorandum of association — Burden to prove contrary — Evidence Act (1872) S 114, illus. (e) All 248 C (C N 52)

—S 2 — Registration of society — Duty of Registrar — See Societies Registration Act (1860) S 1 All 248 C (C N 52)

—S 3 — Registration of Society — Duty of registrar — See Societies Registration Act (1860), S 1 All 248 C (C N 52)

—S 6 — Civil P. C. (1908) O 1 R 10 O 29 R 1 — Suit brought in the name of society through its secretary who was named — Suit as laid is valid — The provision in S 6 which begins with the words 'may sue or be sued in the name of one' of its officers cannot take away the right of the Society itself to sue or be sued in its own name Sec. 6 is merely an enabling provision All 248 G (C N 52)

—S 13 — Manner of dissolution of society is indicated in S 13 — By-law of society that it shall stand dissolved in case no Sant Sad Guru reappeared within two years of the death of the last Sant Sad Guru militates against S 13 and must therefore be deemed to be invalid and inoperative All 248 F (C N 52)

—S 19 — Certified copy of registration of society produced — Presumption as to signature of persons on memorandum of association — See Societies Registration Act (1860) S 1 All 248 C (C N 52)

—S 20 — Society for charitable purposes — Some objects religious but dominant object, charitable — Society can be registered All 248 E (C N 52)

SPECIFIC RELIEF ACT (1 of 1877)

—S. 9 — Scope — Tenant holding over after expiry of lease — Has a possessory title — Mad 191 C (C N 43)

—S. 9 — Words "due process of law" — Not equivalent to word legally — Whether power can be claimed to disturb quiet possession by force relying on terms in lease deed drawn in conformity with statutory provisions — Mad 191 E (C N 43)

—S. 9 — Person inducted into possession without his transfer having right in law to do so — Such person cannot claim benefit of S. 53A of T. P. Act — Mad 191 F (C N 43)

—S. 9 — Judgment and decree under the section — Revision is maintainable — See Civil Procedure Code (5 of 1908), S. 115 — Mad 191 G (C N 43)

—S. 28 — Applicability — See Civil P. C. (1908), O. 21 R. 19

—S. 42 — Suit for mere declaration that suit property belongs to the plaintiff and that the defendants in occupation are mere licensees without a prayer for their ejectment is maintainable — All 248 O (C N 52)

SUCCESSION ACT (39 of 1925)

—S. 214 — Production of succession certificate — Trial Court specifying time limit for production of succession certificate — Section only requires production of certificate at any time before decree is passed — Trial Court's order was erroneous — Guj 158 A (C N 26)

—S. 214 — Original pro-note executed in favour of deceased husband of plaintiff — Original pro-note substituted by a new one in favour of plaintiff — Consideration of substituted pro-note was initial amount loaned by deceased husband — Succession certificate held not necessary — Fact that consideration of substituted pro-note was initial amount of the original pro-note had no relevance — Guj 150 B (C N 28)

TELEGRAPH WIRES (UNLAWFUL POSSESSION) ACT (74 of 1950)

—S. 7 — Magistrate, not agreeing with final report submitted, ordering submission of fresh chargesheet after reinvestigation — Validity — See Criminal P. C. (1898), S. 190 (1) (c) — All 241 A (C N 49)

—S. 7 — Conviction for theft and unlawful possession of telephone copper wire — Notification delegating power to file complaint as required under S. 7 (1) published in fact in Gazette of India as cited in the footnote to S. 7 in AIR Manual, Vol. 15 P. 592 but not brought on record — Complainant not stating that the complaint was made by or under authority of Central Government or that he was specially empowered to file that complaint — Held that there was no compliance with S. 7 and the Magistrate had no power to take cognizance of the offence under Telegraph Wires (Unlawful Possession) Act — Conviction and sentence for the offence of

TELEGRAPH WIRES (UNLAWFUL POSSESSION) ACT (contd.)

theft under S. 379 Penal Code was, however, proper — (Penal Code (1860), S. 379). Goa 55 (C N 16)

TENANCY LAWS**—BIHAR LAND REFORMS ACT (30 of 1950)**

—S. 4 (d) — Scope — Suit for arrears of maintenance out of income of certain property, claiming only money decree without enforcing charge on the property — Suit is not barred by S. 4 (d) — Pat 162 B (C N 43)

—S. 33 — Ad interim compensation — It is not compensation in lieu of property — It is interest on compensation — Ad interim compensation is income which is attachable — Mutawalli in charge of wakf property — Beneficiary having charge on income for maintenance — Property later vesting in Government — Ad interim compensation paid to Mutawalli is income attachable by the beneficiary — Pat 162 C (C N 43)

—MADRAS CULTIVATING TENANTS' PROTECTION ACT (25 of 1955)

—S. 2 (a) — Cultivating tenant — Private agricultural land of landlord — Agricultural lease is governed by the Act and not by Transfer of Property Act — Heirs of original lessee are cultivating tenants and not trespassers — (Transfer of Property Act (1882), S. 117) — Mad 172 A (C N 38)

—MADRAS ESTATES LAND (REDUCTION OF RENT) ACT (30 of 1947)

—S. 3A (4) (b) — Question whether particular land is private land or ryoti land — Decision of Tribunal on appeal is final and Civil Court's jurisdiction is expressly barred — See Civil P. C. (1908) S. 9 — Mad 172 C (C N 38)

—PUNJAB SECURITY OF LAND TENURES ACT (10 of 1953)

—S. 2 (1) and (6) — Application under S. 13 — Sub-tenant is not entitled to make — See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 13 — SC 392 (C N 77)

—Ss. 18 and 2 (1) and (6) — Application under Section 18 — Sub-tenant is not entitled to make — SC 392 (C N 77)

—SAURASHTRA LAND REFORMS ACT (25 of 1951)

—S. 2(15) — Expression 'grant' in S. 18, interpretation of — Grant by ruler of erstwhile State of Virpur confirmed by Government of India subject to condition that grantee would not evict cultivators from land — Grant accepted by grantee subject to conditions — By a notification under S. 2 (15) of the Act grantee declared to be a Girasdar subject to provisions of S. 18 — Application by grantee under

TENANCY LAWS — SAURASHTRA LAND REFORMS ACT (contd)

S 19 as Girasdar for order of allotment of land for personal cultivation, held incompetent — Grantee was bound by conditions annexed to grant and Mamlatdar could not pass an order enabling him to evict the tenants — See Tenancy Laws — Saurashtra Land Reforms Act (25 of 1951) S 18

SC 370 (C N 72)
—Ss 18 19 20 and 2 (15) — Expression 'grant in Section 18 interpretation of — Grant by rule of erstwhile State of Virpur confirmed by Government of India subject to condition that grantee would not evict cultivators from land — Grant accepted by grantee subject to conditions — By a notification under Section 2 (15) of the Act grantee declared to be a Girasdar subject to provisions of S 18 — Application by grantee under Sec 19 as Girasdar for order of allotment of land for personal cultivation held incompetent — Grantee was bound by conditions annexed to grant and Mamlatdar could not pass an order enabling him to evict the tenants

SC 370 (C N 72)
—S 19 — Expression grant in S 18 interpretation of — Grant by ruler of erstwhile State of Virpur confirmed by Government of India subject to condition that grantee would not evict cultivators from land — Grant accepted by grantee subject to conditions — By a notification under S 2 (15) of the Act grantee declared to be a Girasdar subject to provisions of S 18 — Application by grantee under S 19 as Girasdar for order of allotment of land for personal cultivation held incompetent — Grantee was bound by conditions annexed to grant and Mamlatdar could not pass an order enabling him to evict the tenants — See Tenancy Laws — Saurashtra Land Reforms Act (25 of 1951) S 18

SC 370 (C N 72)
—S 20 — Expression grant in S 18 interpretation of — Grant by ruler of erstwhile State of Virpur confirmed by Government of India subject to condition that grantee would not evict cultivators from land — Grant accepted by grantee subject to conditions — By a notification under S 2 (15) of the Act grantee declared to be a Girasdar subject to provisions of S 18 — Application by grantee under S 19 as Girasdar for order of allotment of land for personal cultivation held incompetent — Grantee was bound by conditions annexed to grant and Mamlatdar could not pass an order enabling him to evict the tenants — See Tenancy Laws — Saurashtra Land Reforms Act (25 of 1951) S 18

SC 370 (C N 72)

TORT

—Libel or slander — Action for — Suit by partnership firm for libel or defamation of firm not maintainable — Such suit can

TORT (contd)

however be brought by its partners — Form of suit indicated — (Civil P C (1908) O 30 R 1) — (Partnership Act (1932) S 4)

Punj 150 A (C N 26)
—Master and Servant — Rule of absolute liability — Held on facts that rule of *res ipsa loquitur* did not apply — See Motor Vehicles Act (4 of 1939) S 110

Punj 172 (C N 29)
—Negligence — Vicarious liability — Relationship of master and servant — Not dependent on instrumentality through which selection of servant is made — Suit for compensation for negligence of driver — Not invalid for non joinder of authority selecting him for appointment — Civil P C, (1908) O 1 R 9 Mys 158 (C N 29)
—Negligence — Proof — Motor accident — Claim for compensation for injuries — Negligence on part of master or servant must be proved — See Motor Vehicles Act (4 of 1939) S 110 Punj 172 (C N 29)
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—S 52 — Applicability — If it is applicable to a case it controls second part of S 100 — See Transfer of Property Act (1882) S 100 Orissa 114 B (C N 41)

—S 53A — Benefit under the section — Who can claim — See Specific Relief Act (1877) S 6 Mad 191 F (C N 43)

—S 60 — A put in possession of mortgage property by mortgagee after purported redemption of usufructuary mortgage — A claiming to be in possession not only of mortgagee's right but also adverse to mortgagee — B claiming declaration of his title to and confirmation of his possession of mortgage property but his possession of property not accepted although his title to property by virtue of auction purchase accepted — Held B being purchaser of equity of redemption of usufructuary mortgage was entitled to obtain possession of mortgage property as against A without redeeming mortgage in favour of mortgagee

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—S 73 — Decree creating charge against property — Decree-holder has same right as a simple mortgagee under the section — See T P Act (1882) S 100

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—S. 105 — No interest in property passed to occupier — Occupier is licensee and not lessee — Fact that ground rent was being charged would not make him lessee — Easements Act (1882), S. 52

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COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1969 MAY

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A. I. R. AND ORI. L. J. JOURNAL SECTIONS

Rules regarding contributions.

1. The A. I. R. and Ori. L. J. are essentially and primarily law reports and have to find space for judgments of Courts in preference to all other matters. It should also be noted that the number of judgments which the A. I. R. has to report is ever increasing and leaves very little space available for articles, etc. Contributions and articles cannot, therefore, be expected to be published as a matter of course.
2. Contributors are requested to note that the failure of the A.I.R. to publish any article sent to it for publication should not be construed as a reflection on the *merit* of the article.
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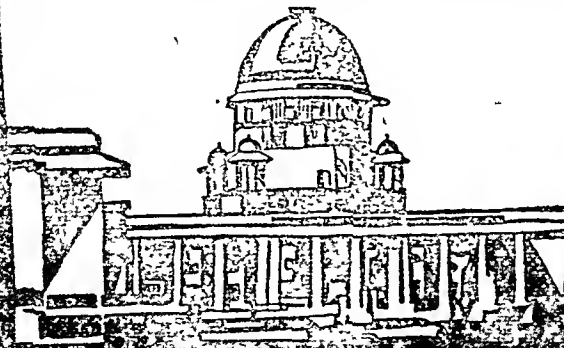
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Judge Madras High Court



The Hon'ble Mr Justice
M N SHUKLA
Judge Allahabad High Court

JOURNAL SECTION

1969 MAY

THE NEW CHIEF JUSTICE OF MADHYA PRADESH

We learn with pleasure that Shri Bishambar Dayal J., a senior Judge of the Allahabad High Court, has been appointed Chief Justice of the High Court of Madhya Pradesh, to succeed Shri P. V. Dixit who retired on 19-3-69. We welcome the appointment as such interstatal appointments to high judicial posts are very useful to promote the sense of national unity in the country. Our respectful felicitations to the new Chief Justice.

"ACT OF STATE: NEED FOR REAPPRAISAL"

(By S. B. WAD, M.A., LL.M., *Advocate, Supreme Court.*)

In *State of Gujarat v. Dr. R. B. Chandrachud*, Civil App. No. 579 of 1968, D/- 19-11-1968 (SC), the Court (Sikri, Bachawat, Hegde JJ.) was called upon to decide whether the financial assurances by way of compensation for premature termination of service and rise in salary, given by the then Ruler of Baroda State to the Respondent, were enforceable at his instance against State of Gujarat as a successor State. The Supreme Court held that the State of Gujarat was bound to respect such assurances. In this case, the Ruler of Baroda by his order dated 8th Feb. 1948 (after signing the instrument of accession but before the final merger) granted the payments, and, about Rs. 65,000 were disbursed to the Respondent. But the Executive Council constituted under the Baroda laws headed by Jivraj Mehta, cancelled the said order and through coercive means the money was recovered. The High Court confirmed the decree passed by the trial Court, with certain modifications, holding the State of Gujarat liable to refund the amount. In High Court as well as Supreme Court, Appellants urged that the Executive Council's order was legal and in the alternative was saved by Act of State.

(2) The Supreme Court held (a) that the Executive Council order of April 22, 1949 was illegal and ultra vires. (b) That Successor Governments had continued the old laws until they were repealed or altered including the laws constituting the Executive Council. (c) that Art. VIII of the merger agreement furnished strong evidence of the recognition of claim by Government of India. (d) that the invalid order of the Executive Council cannot be justified as act of State. In these circumstances the Supreme Court held that the successor governments recognized and took over the liability under the order dated February 8, 1948.

(3) The Supreme Court has referred to *Dalmia Dadri Cement Co. v. Commissioner of Income-tax*, AIR 1958 S C 816 and *State of Gujarat v. Vora Fiddali*, AIR 1964 S C 1043

as representing the view which currently prevails in Supreme Court. The said cases had laid down that on State succession only those rights bind the successor State that are recognized by him. The decision in *Chandrachud's* case, C. A. No. 579 of 1968, D/- 19.11.1968 (SC) implies that although change of sovereignty is an act of State it does not necessarily terminate private rights. It also implies that such rights are enforceable in municipal Courts. It appears from the decision that the Court was slow to extend the act of State beyond 26th January, 1950. The Court has looked into the merger agreement and the conduct of successor State (continuation of laws) to impute recognition to the successor States. The order of the Executive Council cancelling the Maharaja's order was not held to be an act of State. It is interesting to note that these implications tend to go contrary to *Dalmia Dadri* case, AIR 1958 SC 816 and *Vora Fiddali* case, AIR 1964 S C 1043 and have inflicted serious dents on the reasoning in those cases.

(4) It, therefore, appears that *Dalmia Dadri* case AIR 1958 SC 816 and *Vora Fiddali* case AIR 1964 SC 1043 have not finally concluded all the points regarding the vexed question of enforceability of pre-succession rights against the successor State by a private individual. Re-examination of these decisions especially the *Vora Fiddali* decision AIR 1964 S C 1043 may help to clarify some vague areas of act of State doctrine.

(5) In *Vora Fiddali* case AIR 1964 S C 1043 a Special Bench of seven Judges was constituted to reconsider the decision in *Virendra Singh v. State of Uttar Pradesh*, AIR 1954 S C 447. In *Virendra Singh's* case, AIR 1958 SC 447 the unanimous Court had held that the right to the villages granted to the petitioner by Rulers of Sarila and Charkr Kari State was enforceable against the U. P. State, and that the order cancelling the grant of villages could not be justified as act of State, as the same was passed after the independence

and when the petitioners had become the citizens of India

II Reliance on Act of State unnecessary

(6) The Vora Fiddalia case AIR 1964 S C 1043 involved a question of enforcing the forest rights granted by Maharaja of Sant State through Tharao dated 12th March 1948 against the State of Gujarat. Broadly speaking two main questions fell for decision in this case namely whether—

- (i) there was recognition by State of Gujarat of the rights created by the Tharao and
- (ii) the Tharao was law within the meaning of Arts 366 (10) and 372

It is clear that if Tharao was held as existing law within the meaning of Art 366 (10) it was an enforceable law even after merger/independence and Gujarat State was bound by it. Ayyangar J, Sinha J and Subba Rao J held that Tharao was law while Hidayatullah J, Bhagwati Dayal J, Shah J and Mudholkar J held that Tharao was not a law and was a mere executive grant. It is submitted that the principal question of enforceability of pre-accession right could have been concluded by the majority on this finding because on the facts of the case the State of Bombay by an executive order dated 8th July 1949 had repudiated the grant. It was therefore on either view unnecessary to go into the question of act of State in Vora Fiddalia case AIR 1964 S C 1043. The final order passed by the Court was in accordance with the opinion of the majority. Appeals are allowed with costs throughout. The final order would have been the same even if the act of State question had not been touched by the Court. At this stage these comments may sound idle since the matter was actually considered by the Court in the light of the doctrine of act of State. Ayyangar J (and Sinha C J) have held that Tharao was law within the meaning of Art 366 (10) and directed that the appeal should be dismissed. At the same time they have very elaborately analysed the reasoning in Virendra Singh's case AIR 1954 S C 447 to show how the same was wrong. In face of their final direct on all observations regarding act of State smack of obiter.

III Summary of findings in Vora Fiddalia AIR 1964 S C 1043

(7) For properly appreciating the ratio of Vora Fiddalia case AIR 1964 S C 1043 it is necessary to follow up the course of events leading to the litigation. Immediately after 15th of August 1947 the then Ruler of Sant State signed the Instrument of Accession and the State became part of the Dominion of India. On 12th March 1947 the ruler of Sant State issued the Tharao in question granting

forest rights to the [successors] in title of the respondents. The final merger was completed by June 10 1948 (the Merger Agreement signed on March 19 1948). On June 2 1948 Administration of Indian States Order was issued and was made applicable from June 10 1948. On 1st of October 1948 Shri V P Menon Secretary in the Ministry of State wrote to the Ruler of Sant a letter of guarantee guaranteeing that the orders of the Ruler passed after 1st day of April 1948 would not be called in question unless they were palpably unjust or unreasonable. On July 28 1948 Indian States (Application of Laws) Order was promulgated. On July 8 1949 the Government of Bombay cancelled the Tharao as being mala fide. Although the order was not communicated to the respondents they were in fact prohibited to fell the trees from the forest. State Merger (Governors Provinces) Order of 1949 was issued on August 1 1949. By two subsequent resolutions dated 29th June 1951 and February 6 1953 the Government of Bombay reiterated the order dated 8th July 1949. The second resolution was in fact passed after the suit was filed. It was for the first time in the written statement that the plea in the nature of act of State was taken.

(8) The judgment delivered by Ayyangar J (for himself and Sinha C J) is mainly devoted to show how the ratio of Virendra Singh's case AIR 1954 S C 447 was inconsistent with the Privy Council decisions and how it was not a correct statement of law as obtained in India. The judgment can be broadly summarised as follows:

(i) The ratio of Vaje Singhji v Secy of State for India AIR 1924 P O 216 correctly lays down the law on the issues raised in the present case. Lord Dunedin in that case said:

When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest it may be by acquisition following on treaty it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has through his officers recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more even if in a treaty of acquisition it is stipulated that certain inhabitants could enjoy certain rights that does not give a title to those inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the high contracting parties.

(ii) The law laid down by Vaje Singhji's case, AIR 1924 P C 216 and other Privy Council cases was followed by the Supreme Court of India in Dalmia, Dadri Cement Company's case, AIR 1958 S C 816 and is binding a law.

(iii) The rule of non-enforceability followed in Dalmia Dadri case, AIR 1958 S C 816 is applicable to personal rights and also to rights in immovable property. The ratio of Virendra Singh's case, AIR 1954 S C 447 that a voidable title to immovable property survives the previous ruler, (which, it was asserted to be the correct statement of law laid down by Privy Council in various decisions) was incorrect. This according to the learned Judges had led to the incorrect conclusion in Virendra Singh's case, AIR 1954 S C 447 that Articles 19 and 31 afford a protection to such rights.

(iv) That Virendra Singh's case, AIR 1954 S C 447 does not express decisive opinion in favour of accepting the observations in Perchemen's case (1831-34) 7 Peter 51, as proper law to be applied by Municipal Courts in India.

(v) That the assumption in Virendra Singh's case, AIR 1954 S C 447 that a new succession of State has taken place after 26th January, 1950, so as to terminate the act of State was incorrect.

(vi) That the Privy Council decisions, in actual practice had not led to injustice but had struck a just balance between the acquired rights of the private individuals and the economic interests of the community.

(vii) That there was nothing so out of tune with the notions of propriety or justice to call for the rejection of those decisions.

(viii) That Constitution makers intended no departure from the Privy Council decisions which have become the constitutional doctrine of India.

(9) In a separate judgment, Hidayatullah, J. (as he then was) held as follows :

(i) Letter of guarantee by V. P. Menon, Secretary, cannot be relied upon by the respondents because :

(a) they were not the parties to the transaction; and

(b) that the same was barred by Article 363. It was further held that there can be no relinquishment by a subordinate official and the waiver cannot be inferred on the facts of the case. Permission to collect the trees which were already felled was conditional.

(ii) Tharao was not a "law."

(iii) Section 299 of the Government of India Act was of no avail to the respondents as no right was in existence which could be protected.

(iv) In so far as Sant State is concerned, State succession had taken place in 1918 and

no fresh succession had taken place on 26th January, 1950.

(v) The act of State which began in 1948 continued uninterrupted even beyond 1950 and it did not lapse or get replaced by another act of State.

(vi) The highest point in favour of private individuals can be that cessation ought not to affect private rights. But Municipal Courts cannot render any help (1899.2 A C 572 and 1921.2 A C 399 relied upon).

(vii) Recognition of private rights is still only at a diplomatic level.

(viii) There was no treaty involved in the instant case and the transaction was not in the nature of concessionary contract as it lacked bona fides.

(ix) Even Vivian Bose, J. did not decide Virendra Singh's case, AIR 1954 S C 447 on the basis of international law or the opinion of the Supreme Court of the United States.

(10) Shah, J. has agreed with Hidayatullah, J.'s findings on all points, but has furnished some additional reasons as follows :—

(i) Vaje Singh's case AIR 1924 P C 216 and other Privy Council cases correctly represent the law that private rights guaranteed by ex-Rulers are brought to an end by change of sovereignty unless they are recognised by the new sovereign, the reason being that sovereign being the fountain head, all rights including property rights, flow from him.

(ii) An act of State has no point of time and continues till the right is recognized.

(iii) The fact that the act of State operated to the prejudice of persons who were at the date of refusal of the recognition citizens did not deprive of the act of State either its character or efficacy.

(iv) American cases are based on American principle of enforcement of international law and treaties by national Courts and, therefore, are not relevant for India.

(11) Mudholkar, J. has broadly agreed with the judgment of Ayyangar, J. but has given some additional grounds in justification of the law laid down by the Privy Council :—

(i) The repudiation of right by Government of Bombay on February 19, 1953, amounted to an act of State.

(ii) That the respondents had no enforceable right. The argument that there can be no act of State against its citizens is based on the assumption that the rights were enforceable.

(iii) The law laid down by Privy Council is based on international law. This law has become the part of common law of India and is saved by Art. 372 of the Constitution.

(iv) Indian Courts are not bound to enforce any other rule of international law or American decisions.

(v) It would neither be just nor reasonable to bind the new sovereign

(vi) International law does not prevent legislation by the new sovereign for the purpose of freeing itself from the duties and obligations created by ex sovereign but that would be a long and laborious process and may be rendered onerous or by reason of constitutional provisions such as those contained in Part III of the Constitution even impossible

(12) Sobha Rao J has summarised his dissenting opinion as below

(i) The doctrine of acquired rights at any rate in regard to immovable property has become crystallized in international law

(i) Change of sovereignty does not affect the title to immovable property

(iii) As the title exists it must be held that even in those countries which accepted the doctrine of act of State and the right of a sovereign to repudiate the title that title is good against all except the State

(iv) Before the Constitution came into force the State did not repudiate that title

(v) When the Constitution came into force the respondents had both the title and possession to the property

(vi) At any rate the possessory title of the respondents attracts the protection of Art 31 (1) of the Constitution

(vii) International authorities and decisions of the U S A Courts uphold the view that private rights are not extinguished by the change of sovereignty

(viii) The decisions of the Supreme Court subsequent to the Virendra Singh's case AIR 1954 SC 447 have not changed the law laid down in that case

(ix) Unanimous decision in Virendra Singh's case AIR 1954 SC 447 is a correct and binding law

(x) Tharao was a law within the meaning Art 366 (10) of the Constitution of India

IV Indian doctrine more arbitrary

(13) It may be noted at this stage that the Indian doctrine of act of State is more sweeping and arbitrary than the one applied by English Courts in England

(14) Seizure of private property illustrated by Kamacheboye's case (1859) 7 Moo Ind App 476 and Salaman's case 1906 1 KB 613* was the extension of Crown privilege of conquest and establishing colonies. It was practised in a subjugated territory and against colonial people who were ethnically politically

and culturally different from British stock. British nationals had vast mining plantation and other commercial concerns in the colonies but there is no reported case of act of State (by way of seizure of property) exercised against any Britain either in England or colonies

(15) British act of State doctrine requires that the act must be authorized or at least ratified by the Crown. In *Mungrave and Puhdo* (1879) 5 A O 102 P C it was held that a colonial Governor cannot exercise act of State. But the Privy Council extended this doctrine to justify the action of East India Company which was a distinct person in law through doctrine of agency (implied) in *Kamacheboye's case* (1859) 7 Moo Ind App 476

(16) Treaties or transactions between sovereign States are non justiciable. This principle was applied by the Privy Council in *Kamacheboye's case* (1859) 7 Moo Ind App 476 where neither *Kamacheboye* nor East India Company were sovereign States. For the purpose of act of State Privy Council treated ruler of Tanjore as a sovereign ruler. It may be noted that treaty making is an incident of external sovereignty which power the ruler had already lost

(17) There is no case similar to *Buron v Denman* (1848) 2 Ex 167 practised against Britain. The case has a peculiar colonial setting as property belonging to a Spaniard's British was destroyed by Naval Officer on African coast. In an altogether different setting the principle was invoked by the Supreme Court in *Memon Hajji's case* AIR 1959 SC 1283. In that case the Court was called upon to decide the legality of order of resumption of grants passed against the Respondent by the administrator appointed by Government of India after taking order from Junagadh State

V Different look at Privy Council cases

(18) The origin of the doctrine of total extinction of rights with a change of sovereignty as applied in colonies is traced by Harrison Moore to the 18th Century despotic power of the Crown in relation to conquered territories. Harrison Moore (Act of State in English Law p 75) has relied on a case (1722) 1 P Will 75) decided in 1772 and observed

The circumstances of such acquisition bring the case close to the matters of treaty and war. The despotic power which the Crown may exercise over a conquered colony at any rate has in fact been attributed to the position of inhabitants as public enemies whose lives and property are in the King's hands so that any severity he may exercise in regard to them is clemency for all is forfeit.*

* Action filed by Trustees in Bankruptcy for accounts — payment of pension and return of private property belonging to the grandson of Ranjit Singh turned down by Court on the ground of Act of State.

The doctrine of total extinction of the rights reiterated in Bai Rajbai's case, AIR 1915 P C 59* is criticized by O'Connell. (The Law of State Succession p. 80). He has pointed out that :

"any such interpretation would serve to be unfounded and go beyond the limits established in a long series of cases."

He has cited the following cases in this context : Secretary of State v. Kamacheeboyee, (1859) 7 Moo I A 476 (PC), Sardar Bhagwan Singh v. Secretary of State, L R (1874-75) 2 Ind App (PC) 38; Rustomji v. R., 1 G R D 487; Doss v. Secretary of State, (1875) L R 19 Eq. 509; West Rand Gold Mining Company v. King, 2 K B 57; Dattatraya v. Secretary of State, AIR 1980 P O 267.

(19) In 1906-1 K B 613, Fletcher Moulton, L. J., has vigorously pleaded for the recognition of private rights and their enforcement by municipal Courts. He says—

"..... The object and effect of an act of State are not necessarily of this kind (matters between two sovereign States). Its intention and effect may be to modify and create rights as between the Government and those who are about to become subjects of Government. In such cases, the rights accruing therefrom may have to be adjudicated upon by municipal Courts. Let me take a simple example. Let us suppose that a Government by an Act of State annexed a neighbouring country, and formally take over all the property and liabilities of the former ruler and that a part of such property consists of debts due to him. The Government is not compelled to collect such debts. Vict Armis, it may avail itself of the assistance of its Courts of law for the purpose, in the same way as though the debts had accrued due to it otherwise than by an act of State. But in deciding on such a claim, the Courts must loyally accept the act of State as effective. Evidence that the debt was due to the former ruler would thereby become evidence of its being due to the existing Government and I see no reason why in such a case a claim of a converse character might not equally be entertained by municipal Courts and a subject recover from existing Government by the process of law applicable to such a case any debts due from the former ruler." He has cited Fifth v. Rex, (1872) L R 7 E 365 for the support of the above proposition.

(20) Harrison Moore (Act of State in English Law p. 178) has made a similar plea for the

continuation of rights of State's Succession on the ground of equity and justice. He writes—

"Annexation (acquisition of territory for the first time) is no doubt an act of State, but the act is also the foundation of juristic consequences. In regard at any rate to matters which are substantially part of the same transaction or series of transactions, it is submitted that the Crown will not be allowed to appropriate, and reprobate; that it avails itself of the rights of the preceding Government, it will pay as successor and subject to any right of the other party which was legally enforceable against the old Government and is of a kind which apart from the complications arising from annexation would be enforceable against new Government."

Sterling, J., observes in (1906) 1 K B 613:

"Obligations unquestionably exist which bind the East India Company and the British Government as their successors and which ought most scrupulously to be observed."

So also Haldane L. J. in Amodu Tijani v. Secretary Southern Nigeria, (1921) 2 A C 899 has held that a mere change of sovereignty is not to be presumed to disturb rights of private owners and the general terms of cessation are prima facie to be construed accordingly. In Cook v. Sprigg, 1899 A C 572 Lord Halsbury observed :

"All that can properly be meant by such a proposition is that according to well understood rules of international law a change of sovereignty by cessation ought not to affect private property, but municipal Tribunal has no authority to enforce such an obligation."

It would thus be seen that Vivian Bose J., had good support of the authorities to the proposition that the Appellants in Virendra Singh's case, AIR 1954 S C 447 had voidable title at the commencement of the Constitution.

VI. Voidable title:

(21) But Ayyangar J. has observed that the Court in Virendra Singh's case, AIR 1954 S O 447 was wrong in holding that the inhabitants of the erstwhile States held a voidable title to the rights granted to them by the ex-rulers. He has further observed that the Privy Council decisions unequivocally held that such rights do not survive unless they are specifically recognised by the new sovereign. Now the interesting question is what is the position of such rights in between the time when State's accession takes place and the day on which such rights are recognised by the new sovereign. If the rights are totally ext-

*Extension of the application of Land Revenue Code to Respondent's Inam lands granted before territory attacking possession and enjoyment of the lands, justified as act of State.

ingnished by State's Succession recognition is not of much avail. The rights which accord ing to the Privy Council decisions are not recognised by the new sovereign and are ex tinguished. If this is so then there is no need to repudiate the rights as was done in Vora Fiddah case AIR 1964 SC 1043 and many other cases. Repudiation resorted to in several cases lends support to a view that the rights are really not extinguished by State succession but by non recognition. Thus there are two ways of looking at this old situation. One is to treat the rights as inchoate or imperfect till the time they are recognised by the new sove reign and the other is to treat that such rights create voidable title. It is submitted that from the facts of various cases decided by the Privy Council both the interpretations appear to be plausible.

VII. Mala fide grants

(22) The principal rea son for the repudia tion of the respondent's rights in Vora Fiddah case A I R 1964 S C 1043 was mala fides of grants. This was stated clearly in the order dated 8th July 1949 and the resolution passed in 1951 and 1953 by Bombay Govern ment. It appears that this factor has gone a long way in pushing the majority opinion to the extreme position. A I R 1964 S C 1043 at p 1031 Hidayatullah J has further adverted to this factor and found that forest rights in question were not in the nature of concessionary contract as the same were not granted bona fide. A I R 1964 S C 1049 at p 1091 Mudholkar J has observed that the new sovereign should examine all grants and reject only those grants which are mala fide and against the interests of State. He has further observed that it would be unreason able to presume that the new sovereign has recognised the grants until he shows that they were mala fide. If mala fides were the main consideration it is submitted that the grants could have been terminated for a very valid reason. Grants from State in their very nature are always subject to the right of re-emption by a sovereign. The grants in the instant case could have been resumed by the ruler of Sant State and the Government of India would have exercised only those powers which the ex ruler could have lawfully exercised. It is submitted that it was not necessary to find the authority for the termination of the grant in act of State doctrine. Mudholkar J has said that a new sovereign should examine all grants to find out whether they are mala fide or not. But a new sovereign may not follow this course at all unless there is a presumption against him. In any case the Privy Council rule is too wide and may adversely affect even bona fide grants. It may be pointed out that

in Virendra Singh's case A I R 1954 S C 447 Court did not hold that the grants were mala fide. It appears that this fact was not noticed or appreciated in Vora Fiddah case AIR 1964 SC 1043 while commenting on the 'mail case'.

VIII. Duration of Act of State

(23) An important question of which the doubts are not settled in Vora Fiddah case A I R 1964 SC 1043 is the duration of the act of State. Shah J has observed that act of State has no point in time and continues till it is recognised by the new sovereign. Hidayatullah J has also observed that act of State is a continuous process and may even continue after 26th January 1950. Now if recog nition is the test of the termination of act of State it may result in very harsh and inequitable results if the rights are in fact enjoyed under the new sovereign for long length of time and then suddenly brought to an end by the new sovereign. In Bai Rajabai's case A I R 1915 P O 59 the rights were enjoyed for 60 years after the change of sove reign and they were terminated thereafter. Change of sovereignty in words of Fletcher Moulton L J in Saloman's case 1906-1 K B 613 is an act of State because it is a catastrophic act. Such catastrophe in India was brought to an end by the merger integration and unionisation process completed before 26th of January 1950. But it is given further lease by the Court for the purposes of non recognition of private rights. This extension it appears is based on the observations in Kamacheeboyee's case (18 9) 7 Moo Ind App 476 that the original act with all its consequences is to be regarded as an act of State. The Supreme Court will have to clarify this point in some future case.

IX. Act of State against a citizen

(24) The natural corollary of the above observations of Hidayatullah J and Shah J is that right of recognition (Act of State) can be enforced against the citizens. Courts should be slow to accept this position. Especially, where the property has passed hands from original owners to other citizens, the court will have to be more cautious in applying the doctrine.

X. Justice and economic consequences

(25) In the course of his judgment, Ayyangar J has asserted that the Privy Council decisions have not resulted into any injustice and (are justified) because they had struck just balance between the acquired rights of the private individuals and the economic interests of the community. The assertions it is submitted are not borne out by the Privy Council cases. Both in Kamacheeboyee's case,

(1859) 7 Moo Ind App 476 at p. 538* and Salaman case (1906) 1 K B 613, Court was conscious that it was unjust to deprive the parties of their private property but pleaded that courts had no authority to go into the question. The ratio of the Privy Council cases according to the learned judge was the total extinction of the rights granted by the ex-rulers. How can it then be said that the just balance was struck between private rights and economic interests of the society? Act of State as applied in colonies and dependencies provided a legal cover for the conquests and seizure made by the colonial powers and was more consistent with the British colonial interest than the economic interests of Indian community. As for the economic interests of India after independence, the necessary balance could have been justly struck without resorting to act of State doctrine as depicted at some other place in the article. (Pl. See p. 22)

XI. Is Privy Council Law adopted by the Constitution makers ?

(26) The observation of the Court that law of act of State laid down by Privy Council is a part of the common law of (free) India (Mudholkar J.) or the finding that the Constitution makers did not intend any departure from the Privy Council decisions (Ayyangar, J.) is also not free from doubts and difficulties.

(27) If the Constitution makers intended to rely on Act of State doctrine, there was no need for Arts. 363 and 131, which render matters arising out of the covenants and merger agreements non-justiciable. Kamachee-boyee's case, (1859) 7 Moo Ind App 476 would have taken care of any such eventuality, since that case laid down that the matters or treaties between sovereign States are not enforceable in municipal courts. Supreme Court's opinion and actual interpretation of covenants and merger agreement as an act of State (Dalmia Dadri, AIR 1958 S C 816 and other cases) lends further support to the view that the Courts would not have found any serious impediments in deciding the claims based on covenants and merger agreements filed by the rulers or their subjects.

(27A) Further, if the Government of India guaranteed the continuation of rights created by the ex-rulers (illustrated by Chandrachud's

*"of the propriety or justice of that act neither the court below nor the judicial committee have the means of forming or the right of expressing, if they had formed any opinion. It may be just or unjust, politic or impolitic, beneficial or injurious, taken as a whole to those whose interests are affected, are considerations into which their hardships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy."

case, C. A. No. 579/68 D/-19-11-1968 (S C) with the full knowledge that private individuals would not be able to enforce the rights in municipal courts and that the ex-rulers had lost legal competence to enforce them diplomatically after the merger, the guarantees would amount to fraud on the power. Courts, it is submitted, should be slow to accept such an interpretation.

(27B) Take another case *Johnstone v. Pedlar*, (1921) 2 A C 262 where the English Court held that act of State cannot be pleaded against a resident alien, from whose person money was seized at the time of his arrest. Article 31 of the Constitution guarantees that no person shall be deprived of his property without payment of compensation. A resident alien can claim protection of this Article. If we impute to Constitution makers any desire to preserve the act of State of law as laid down by (1921) 2 A C 262, guarantees of Art. 31 would use the word 'citizen' instead of 'person'.

(27C) *Bai Rajbai's case*, AIR 1915 P C 59 illustrates the absurdity of permitting the executive to exercise act of State without time limit.

(27D) Can it be legitimately presumed that the Constitution makers intended to end the public act of merger by 26th January, 1950, but intend to keep the act of State of merger of reference to private individuals, alive without time limit? Can it be imputed to the Constitution makers that they permitted to plead act of State after 69 years of enjoyments of rights by private individuals as in *Bai Rajbai's case*, AIR 1915 P C 59. Difficulties created by merger of State were temporary and transitional. They could have been attended to by the executive through the President who could exercise vast powers of modification, addition or omission of the Constitution vested in him by Art. 392. The time limit for exercise of powers under Art. 392 viz. till the first Parliament met (i. e. 1952) clearly indicates the mind of the Constitution makers on this point.

XII. Alternative Solution to Act of State:

(27E) The next question is whether it was possible to achieve the same results as were brought about by decisions of Indian Courts after Independence, without resorting to Act of State doctrine. In other words, would the economic interest of free India have suffered if the Act of State plea would not have been invoked.

(28) It is submitted that by appropriate exercise of President's powers of modification, addition or omissions from the provisions of the Constitution under Art. 392, it could have been possible to protect private rights which

were consistent with the economic interests of the community by suitably amending Fundamental rights and other relevant provisions. Apart from this various legislations abolishing Jagirs and Inams passed by the State Legislatures would have undone the grants similar to those in *Memon Haji* case AIR 1959 S C 1388 and *Vora Fiddal* case AIR 1964 S C 1043. Art 31A and Art 31B with Ninth Schedule would have provided constitutional protection for any such action. So also mining contracts similar to those in *Dalmia Dadi* case AIR 1958 S C 816 could have been terminated under the powers provided by Art 31A (e). Other guarantees regarding services and pensions could have been effectively dealt with through the doctrine of service at the pleasure of the President or the Governor as the case may be.

(29) Indeed nobody would suggest that subjects of the former States should have more rights than the other citizens of India. They should be entitled to equal protection of law and equal subjection to law.

(30) The solutions suggested above would have brought about more just and humane results without jeopardising the economic interest of Society. *Mudholkar J* has explained that legislation was an onerous solution in this context. But democratic powers and legal procedures based on it are always onerous as compared to autocratic methods. Peaceful transfer of power (as against war or rebellion) from British hands to India and from ex-rulers to India was a part of constitutionalism and sanctity of means accepted by Indian society.

XIII Changing Doctrine

(31) Act of State doctrine must change according to the needs of time.

(32) English Courts have shown this capacity to echo the changes through a recent case in *Burmah Oil Co v Lord Advocate* 1965 A C 695. Extensive oil installations were destroyed in Burma during second world war not as a part of actual hostilities but in order to prevent the installations falling into enemy hands in the event which in fact happened shortly afterwards of the territory being invaded by the Japanese enemy. The destruction was ordered by the Commanding General. The House of Lords held that the subject was entitled to compensation.

(33) If *Vora Fiddal* AIR 1964 S C 1043 correctly represents the approach of Indian Courts, Courts would have on the basis of Privy Council cases, turned down such claim as arising out of act of State. They would have relied upon (1966) 1 K B 618 where claim to compensation for destruction of property by East India Co's soldiers during 1857

rebellion was negatived. *Kamacheeboyse* case (1859) 7 Moo Ind App 476 would have been pressed in service as was done in *Salamanca* case (1966) 1 K B 618.

(34) Another example of modern thinking on act of State is to be seen in the writing of British Constitutional Pandits in tackling the problem of act of State within the Commonwealth. It may be worthwhile to quote the relevant discussion from *Wade & Phillips (Constitutional Law)* VII Edn p 267.

The independent status of the several members of the commonwealth raises a doubt whether the term act of State both in wide sense of an act of policy on the part of the Executive and in the narrow sense of defence to an action in tort can nowadays be accepted by a Municipal Court if the plaintiff is a citizen of a Commonwealth State other than the United Kingdom and the injury of which he complains has been inflicted upon him outside the United Kingdom or Colonial territory. For example if under orders United Kingdom service air craft dropped bombs on a foreign oil installation or on the high seas or in foreign territorial waters thereby injuring a Citizen of India who was not taking part in the local disturbances which led to the bombing could the defence act of State be raised if the Indian sought redress for the injuries he received in an English Court? It would seem that the answer to the question is to be found in the British Nationality Act 1948 S 1 which recognizes as British subjects or commonwealth citizens the citizens of all countries to which the section applies. No one can doubt the independence of India as a State for the purpose of the conduct of its own foreign affairs but its citizens by United Kingdom legislation enjoy the advantages of local citizenship and therefore can never be deprived by an English Court of their right to redress on the plea of Act of State, i.e. the consequences of military operation against hostile elements abroad. It would follow that if the injury were incurred in similar circumstances on the territory of any member State of the commonwealth or of a colony the defence act of State would clearly not be available in an English Court to the agent of the Government of the United Kingdom.

(35) In similar circumstances Indian Courts would not show readiness to look beyond the Privy Council rulings and the claim would be rejected.

Conclusion

It is only in *Virendra Singh* case (AIR 1964 S C 447) that a bold attempt was made to adopt the doctrine of act of State to the changing needs as a Court of an independent

ation should do. Legal postulates like act of State are not autonomous and should not be indifferent to facts of life to which they owe their existence and justification. In contrast to Vora Fiddali case (AIR 1964 S C 1043), Virendra Singh's case (AIR 1954 S C 447) has really struck a "new and refreshing note." (AIR 1964 S C 1043, Subbarao J. at p. 1067).

Vora Fiddali case (AIR 1964 S C 1043) represents in the words of Bachawat J. (C. A. No. 579/65 D/- 19.11.68 (SC)) "the view which currently prevails in this (Supreme) Court." The Supreme Court may not review it in immediate future but decisions like Chandrachud case (C. A. No. 579/65 D/- 19-11-1968) may well pave the way towards its reconsideration.

CITIZENSHIP AND LAW

(By SHRI NITTANAND KANUNGO, the Governor of Bihar)*

I should confess at the start that I happened to be the only lawyer in India who was formally debarred from practising by a Full Bench of the Patna High Court in the year 1931 or 1932. Several friends including the Chief Justice Courtney-Terrell had asked me to seek for a review which I did not feel to do. When I was asked to meet you, I readily agreed because when a man is deprived of something he always likes to enjoy, the illusion of getting it is very attractive. So I have been always attracted to come into contact with judges and lawyers. For many years I lived in Delhi at a place where every morning I happened to meet some Supreme Court Judges, and I am proud to claim myself to be a friend of the retired Chief Justice of Madras, Mr. Rajamannar, whom I consider to be one of the most civilised men I have come across anywhere in the world.

2. This is a meeting of the Old Boys' Association. I do not know what is the system of teaching and what is the system of lectures in the Law Colleges here. I happen to be an old student of the Calcutta University where late Mr. Khudabux, the eminent scholar, used to take some classes which were so popular that students from other classes used to crowd in to hear his lectures. If I have any intellectual capacity, I owe it entirely to the lectures of Mr. Khudabux. One of our lecturers was Dr. Radha Binode Pal. Perhaps, many of you know that his classical judgment during the trial of war crimes in Japan was a matter of discussion all over the world. The judgment earned a great regard for India all over the world.

3. When Rajendra Babu as President of India visited Japan the Emperor of Japan, in continuous dynasty of three thousand years, who had never come out of the palace, came out to receive Rajendra Babu. The Japanese people are undemonstrative, yet the welcome which the President received from all quarters was tremendous. When Rajendra Babu enquired of the President of

the Tokyo University, who was 90 years old, he was told of three factors for the respect and regard of Japanese people for the President of India. Firstly, after the cessation of war, every belligerent nation claimed reparation from Japan, but India was the only country which waived any such claim. Secondly, India was the first country to enter into a treaty with Japan on equal terms long before any other power did so. And thirdly, Dr. Pal's judgment in the war crime trial restored the self-respect of the Japanese people during the worst period of the history. The point I am trying to make out is that during my student time there were professors in the Law College whose lectures attracted many students who listened to them with attention to their lasting profit. Therefore, being student of a law college should not be thought of as killing time. The best result depends on teachers to create interest and capacity of students.

4. The subject I propose to speak on is "Citizenship and law." I cannot explain it in academic terms, as I am not capable of it. I will give a simple story that will not take more than 5 minutes. Bihar and Orissa had been separated into two different Provinces in 1936, but the High Court continued to be common. On October 7, 1947, when I happened to be in Delhi, Sardar Patel, who was then the Home Minister, sent for me. He told "I am coming to Orissa on the 14th of December and I will start integration of independent States from Orissa. But I will not do so unless you set up a High Court before I visit Orissa." There were only 10 weeks left October, November and half of December—no building, no conception of what High Court means—Judges to be chosen, records to be separated and thousand other problems. When I pleaded for more time, he would not agree and when I asked for the reasons his answer was cryptic "मैं जनता को चोर के हाथों में छुड़ाकर डाकू के हाथों में नहीं देना चाहता हूँ" "Elaborat-

*Address delivered at the Annual General Meeting of the Patna Law College Old Boys Association on 29-8-1968

ing he said 'you politicians accuse the princes of being oppressive to their subjects but what is the guarantee that you will not be worse. There should be some institution to which a subject can look to with confidence for justice and High Court is the only institution to which people can look to'. There I learnt the remarkable lesson of the value and importance of the judicial system in Government. It has been proved and being proved every day that a citizen can be protected only by the rule of law administered by an independent judicial system. Once that faith disappears society will disintegrate. I have learnt as a common man that society can be sustained only if the people in general have full faith in the courts. Therefore a great responsibility devolves on you both Judges and lawyers. I am sorry to say that I am seeing apprehensive signs of erosion in that faith.

5 I have no direct knowledge of the working of the High Court or the judicial

system in Bihar though I have known some of the Judges and the retired Chief Justice Shri Narasimham as an old friend of mine. It is up to you members of the legal profession to keep up the trust and the faith of the citizens. How it should be done I am not competent to say. I came to know that there were more than 72 writ petitions before the High Court in matters pertaining to the Universities. I had asked Shri Narasimham as to why it was so. He gave me two or three instances in which it was clear that intervention of the High Court prevented grave injustice. When I said that it is possible that intervention of the Court could cause injustice also I was told to find out for myself if that had happened. The citizens believe and should believe that they can get justice in the Courts particularly in the High Courts.

I am grateful to have the opportunity of coming in contact with lawyers and would-be lawyers.

LEGAL EDUCATION, ITS SCOPE

(By The Hon ble Mr. Justice J M SHELAT, Judge, Supreme Court, India)*

I am profoundly grateful to Dean Hafeezul Rahman for inviting me to inaugurate the Ninth Annual All India Law Teachers Conference. I confess of having at first a feeling of hesitation in accepting the invitation, for belonging to the practising branch of lawyers I felt that I could not usefully contribute anything new to the subject of legal education, a subject upon which, all of you I venture to think must have bestowed considerable thought. But the importance of the occasion and the cordiality in the letters which Dean Hafeezul Rahman was good enough to write to me dispelled any hesitation which I had and made me bold to be with you this morning.

2 Legal education is not a question which ends with setting up Law Schools at various centres in the country. Various problems arise at once as soon as one begins to think of its role in the national scene, its scope and its obligations. Fortunately we are not beset, as in England with the conflict of vested interest between the professional and the academic bodies involved in legal education as legal education has always been entrusted in this country to the universities. Nevertheless it would be fairly safe to say that until 1947 legal education contented itself in preparing prospective practitioners and did not consider though it was one of the university faculties law as one of the sciences. The law colleges which impart-

ed legal teaching were a kind of offshoots most of which part-time institutions manned by part time teachers. Recruited mostly from the members of the bar these teachers regarded their task as more of a sideline or a hobby rather than a serious obligation.

3 It is not surprising that this was the position. For, the idea that legal education was concerned only with equipping a pupil with the techniques of the trade and the linguistic rules of law which prevailed in England then was consciously or unconsciously transported to this country. The higher judiciary was a field partly reserved for the members of the English bar and partly for the members of the Indian Civil Service. The myth which existed for a little more than a century, that executive administrators who had never studied law in any accredited law school nor practised it could still administer law and justice could only subsist in a country subordinated under a colonial system. The object of setting up law schools was, therefore to prepare students who would be able to man the network of subordinate courts established throughout this vast country. Part-time institutions with part time teachers were therefore adequate to meet the administrative need.

4 The truth that law and its administration through law courts are dependent upon legal profession from which those

*Inaugural Address delivered at the Ninth Annual Session of the All India Law Teachers Association at Aligarh Muslim University on 28th Dec 1968

who are to conduct law courts would be recruited, and consequently the law schools who prepared them have public duties and responsibilities, appears to be adequately realised for the first time after 1947. Commissions to inquire into university education as well as legal education were set up both at the State and national levels. These commissions reported the unsatisfactory standards of law teaching existing in the majority of the existing law schools. It is a matter of some interest that though the majority of the members of the Law Commission were practitioners, the Commission not only did not insist on mere professional side of legal education but emphasised the necessity of the universities treating in all earnestness law as an academic faculty. The Commission reported:

"The task of promoting research and combining it with teaching which has been advocated in the United States as being within the legitimate sphere of law schools falls in our country probably more appropriately within the scope of the activities of the universities. Our needs in this respect are greater than those of the United States or of England where research projects and programmes in law have already been carried on by a number of institutions and have resulted in valuable and learned publications on different legal subjects".

5. Likewise, the Radhakrishnan Commission had earlier deplored that while in Europe and America legal education had long occupied a high niche among the learned curricula and products of the study of law had frequently risen to positions of distinction in public service or had acquired wide reputation as scholars and legal education was on an elevated plane and teachers of law enjoyed a high respect, perhaps as high or higher than those of any other field of instruction, "we have no internationally known exponents of jurisprudence and legal studies". "Law has not become an area of profound scholarship and enlightened research". Legal education thus has not suffered, at any rate since the post-independence era, from any clash of conflicting attitudes between the professional and the academic lawyer. On the contrary, official as well as unofficial opinion has consistently regarded law as a full-fledged faculty implying thereby a judicious mixture of teaching and research as its legitimate activities. If legal education has not been lifted to an elevated plane, the responsibility for that lapse must fairly and squarely fall on the universities.

6. There is yet another fortunate circumstance which may legitimately be observed. The disparity of status between the professional and the academic lawyer of which Harold Laski complained in

his correspondence with Holmes does not luckily exist, or, if it does, it does so only with those who are blind and will never be aware of the crucial role that the academic lawyer will in course of time play, so that it can well be disdained. Two factors have principally led to the gradual but perceptible diminution of gap in status between the two branches of lawyers: (1) the widening of the field of law, and (2) the awareness and the consequent questioning of the social utility of law and legal institutions.

7. With the acceptance of the concept of a Welfare State in almost all democratic countries, the scope of State activity has expanded beyond expectations and with it the field of legislation. Not a day passes when besides the statutes passed by legislative bodies there are not issued, by way of subordinate legislation, regulations, rules, notifications and orders which leave no human activity untouched. These have the effect of regulating, restricting and in some cases even prohibiting the activities of the citizen. The field of law, therefore, is no longer a narrow one, limited only to the maintenance of order and the adjustment of rights between an individual and an individual. There is a growing readiness to accept law as an instrument of social control, concerned intimately with socio-economic dynamics and, therefore, as one which must be studied as such. Examples of the widening of the field of law are to be found in the numerous enactments touching industrial law and social reforms.

8. The traditional attitude to circumscribe legal studies to a mere understanding of the rules of law and of legal institutes can no longer hold good. Nor can the mere philosophical posture, such as that of Holmes, that the business of a law school is to teach law in the grand manner and to make great lawyers, continue to be valid in view of the social and economic events which are rapidly taking place all around us and their transforming the very structure of contemporary society. Maitland appears to have foreseen such a development and, therefore, held that legal institutions "can only be fully understood against the background of the totality of social institutions". Since his time the world events have so rapidly shifted the focus of law that Lord Sankey was constrained to observe that the mere practising lawyer was not enough and that law must join hands with all other social sciences. Recent thinking in England shows that problems of social policy became matters upon which the winning or losing the second world war depended. Their importance has not yet lessened in the post-war struggle for existence. It was, therefore, that Lord Radcliffe recently gave vent to the feeling when with his characteristic felicity of phrase he said: "you cannot learn law by learning law....

it must stand rooted in the great tradition of humana civilitas'

9 Legal philosophy thus is not primarily concerned with questions of language involved in the analysis of statutes and doctrinal issues. Books of law are not to be merely compilations of rules laid down in the precedents. The inquiry must be to discover the basis of a precedent and to formulate a new doctrine where such a basis has become obsolete by reason of the change in social conditions.

10 Yet the constitutional law is being taught divorced from political science and politics so too the law of tort and of contract remains without any substantial adaptation to the changed environment. The impact of insurance for instance on the law of tort still remains unstudied. The majority of teachers and writers on law subjects do not regard it their function to go outside the doctrinal framework or to rationalise the legal rules in the background of contemporary society. The obvious result is that law is being taught in isolation from other social sciences which have rapidly advanced and the profession tutored under such a scheme of education tends to get cut off from the current of social and economic events.

11 This narrowness both in the legal teaching and writing is having a significant impact on the whole legal system for that system in all its tires of administration remains separated from the current social strings. There is hardly any study worth the name encouraging criticism of the content and policy of a law and its effects on the individual or the society. Worse still legal scholars showed total indifference towards the numerous amendments carried out in the Constitution, their necessity and their consequences on the legislative policies both at State and Central levels. The projection of social and economic democracy in the field of law is still viewed with indifference bordering on apathy.

12 The administration of law was so far regarded as too specialised and as the unassailable field of the few to be questioned. Suddenly there has, however been a spurt of interest in examining the validity of the system in the context of the current problems both social and economic. Even within the profession itself the idea of law reform has begun to be voiced. For the first time there is felt the necessity of re-examining law and the legal institutions in the light of the social service functions performed by them. California University and the Harvard Law School recently undertook to investigate the objectives of legal education and formulated them principally under two heads, training of lawyers and improvement of law by providing centres,

which may contribute to a fuller understanding of law and government and may creatively participate in their development and improvement. To these must be added training to solve not only the problems of the individual client but of the community in which the lawyer lives and to provide leaders in policy making at all the diverse levels of authority.

13 This spirit of inquiry has been generated by the fact that as the field of legislation expands a large part of it is concerned with benefits and obligations of social services and the utilisation of the resources of the community. The question which is insistently put is—are these benefits and obligations fairly and justly distributed through the legal agencies?

14 Legal education must come to terms with this type of laws the implementation of which will be in the hands of those who never enter the profession. These must be catered for if the target of legal education to improve the law is to be fulfilled. In point of fact, the majority of law students do not pursue the profession but enter public service business and other avocations where the impact of the new legislation is the most felt. It is they who need the techniques and the skill of examining the tenability of the new legislation in the context of the varying needs and standards of current society. When laws are studied in this context and the academic lawyers evolve new principles as did the old courts of Chancery by traversing beyond the framework of the common law they will emerge more impressive and with a totally different status. They will be the experts to whom both the legal practitioners and the politicians will turn for the knowledge and for solutions of their problems.

15 Law is the most effective instrument of cohesion. It is both the embodiment of social values and the means for attaining them. Its purpose is to conserve and at the same time to further social values to preserve liberty to promote justice and to advance the common good. As has been aptly said a person having a mere technical approach to law may either turn out a reactionary obstructing progress and reform or a nihilist ignorant of the value of all that he seeks to destroy. To quote from the memorandum of the Society of Public Teachers of Law to the Robbins Committee on higher education.

'Nor can we accept the changes an entirely new world demands by a wholesale annihilation or surrender of all that has been. The duty of an educated man and woman is to explore through reason and understanding by frank discussion and open debate those inevitable changes and to strive for a process of gradualness which coalesces the values of yester-

day, today and tomorrow..... On it depends the future of our civilised world."

16. The challenge that legal education is confronted with is that besides providing effective teaching agencies it must provide through law school laboratories, as medicine and technology do, for carrying out research into law, its development and its application to the solution of current issues. That this challenge is not a mere utopia can be seen from a thesis issued by Professor McDougal and Lasswell in their *Legal Education and Public Policy* which summoned the law schools to broaden their horizons and aims at not only training law students who will practise law but those who will shape the legal and constitutional policies of the nation. "If legal education", they said, "with contemporary world is adequately to serve the needs of a free and productive commonwealth it must be conscious, effective and systematic training for policy making. The proper function of our law schools is, in short, to contribute to the training of policy makers for the ever more complete achievement of the democratic values that constitute the professed aims of American policy." There is therefore, a clear necessity of framing of curriculum on the basis of the current mores of our society joined with the knowledge of socio-economic questions but oriented toward the preservation of democratic values.

17. The obligations of Indian legal education are voluminous considering the demands made on it by the vast population. The very size of the country coupled with its committal to democratic way of life, the diversities in its population, the multiplicity of language, tradition and religion, and the deep gap between the different sections of its vast population, social and economic, all these throw out the necessity of legal education being oriented by national specifications.

18. Being a democracy unparalleled in size, committed to the guaranteed rights of its citizens and to a constitutional policy of social and economic justice, those whose burden is to operate the judicial agencies are bound to be confronted with the delicate and difficult task of reconciling and striking a balance between the demands of individuals on the one hand and of society on the other. It is this circumstance alone which has wrought during the last two decades a radical change in the nature of litigation, particularly in the superior courts. Whereas the traditional litigation has considerably diminished, there is a stupendous rise in writ litigation in which the State has emerged as the biggest litigant. The result is large arrears in almost every court to wipe out which a large number of trained persons will of necessity be required.

19. Apart from the purely judicial bodies there are also a growing number of administrative tribunals performing judicial and quasi-judicial functions. These tribunals are the necessary concomitants of a Welfare State. These also will need persons trained in law. A system of Government committed to a planned economy must result in increased legislation the implementation of which requires at diverse stages numerous policy-making decisions.

20. Legal education will, therefore, have to provide trained persons to man all these agencies endowed not only with the knowledge of the techniques of law but with an awareness of the democratic values, political, social and economic, which are the foundations of our Constitution.

21. Let me end with the hope that your deliberations will evolve ways and means to meet this challenge.

REVIEWS

B. B. MITRA'S THE INDIAN SUCCESSION ACT — 9th Edition, by Sudhindra Kumar Palit, Published by Eastern Law House, Calcutta, Price Rs. 26/-.

The present work is the ninth edition revised by Sudhindra Kumar Palit. Besides the Commentary on Indian Succession Act, a text of Hindu Succession Act, 1956 and also the model forms of Wills, Applications for letters of administration, for Probate and for Succession Certificate are appended to the book.

Case law has been brought upto-date and in the text the amendments of 1962 in the Succession Act have been incorporated.

There is a useful index, at the end.

—G.G.M.

RIGHT TO PROPERTY UNDER THE INDIAN CONSTITUTION by H. M. Jain, Published by Chaitanya Publishing House, University Road, Allahabad, Price Rs. 25/-.

Fundamental Rights in Indian Constitution have essentially a social aspect. Our Constitution is out of recognition that Society needs protection as much against the claim of the State as against itself. It has laid emphasis in the provisions of the Fundamental rights not so much upon individual rights but upon social control. The aim of the fundamental rights is to achieve social democracy.

The book under review is a study of Art 31 of the Constitution. The book purports to analyse the provisions with the above approach. The attempt is laudable.

A post-script explaining the effect of Supreme Court's decision in Golaknath's case (A I R 1967 S C 1613) has been added.

There is a bibliography and a useful Index.
—G M

BOOKS RECEIVED

THE YOUNG LAWYER — Magazine of Kishinchand Chellaram Law College, 1967 68, Printed by Shri M J Mirchandani at Jain Printing Press Arthur Road, Bombay 11 and published by him for K C Law College Dinshaw Wacha Road, Bombay 1

Published by Eastern Law House, Private Ltd, Calcutta, Price Rs 14/-

The book under review deals with notices. The book is divided in three sections. Section I deals with general principles relating to notices, their requirement, purpose, service etc. Section II deals with notices under different statutes and Section III gives some Model forms. Case law has been appropriately noticed.

LAW RELATING TO NOTICES 2ND EDITION — By Ajit B Majumdar, Pub

A GREAT LAWYER

We wish to pay in this issue our homage to the memory of a great lawyer and jurist — the late Mr J B Kanga who died recently in Bombay full of years and honours. The late Mr Kanga was one of the greatest lawyers and jurists that India has produced in recent times. He lived up to a ripe old age and was 96 years of age at the time of his death. He was a Judge of the Bombay High Court in the twenties of this century and after he retired from the Bench he accepted the Advocate Generalship of Bombay. He was the first Indian Advocate General of Bombay during the British regime — a unique distinction and honour in those days. His knowledge of law was phenomenal. He was an authority on the law of Income Tax and was a co-author, along with Mr N A Palkhivala of the leading Commentary on the Income Tax Act. He was also a great scholar and litterateur and had a marvellous command of the English language. Of the galaxy of talent and scholarship that the Indian Bar has produced the late Mr Kanga's name can justly be placed in the front rank.

siders appropriate for the hearing of the representation in the presence of any persons likely to be affected thereby.

(7) When a Regional Transport Authority refuses an application for a permit of any kind, it shall give to the applicant in writing its reasons for the refusal.

"Rule 67. Regional Transport Authorities.—(1) the Regional Transport Authority shall meet at such times and at such places as its Chairman may appoint:

Provided that it shall meet not less than once in each month unless the State Transport Authority otherwise directs.

(2) Not less than 3 days' notice shall be given to every member of any meeting of the Regional Transport Authority.

(3) A member of the Regional Transport Authority shall attend at least six meetings in each financial year. The State Government may at any time remove any such member from office on his failure to attend the minimum number of meetings fixed under this rule. The State Government may also remove from office any member for any other cause.

(5) Where a Regional Transport Authority consists of more than three members the number of members whose presence shall constitute a quorum shall be one half of its members and where it consists of three members, the quorum shall be two. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting shall be adjourned to such day and at such time and place as the Chairman or the Presiding Officer nominated under sub-rule (6) may appoint; and if at the adjourned meeting a quorum is not present, the members present shall be a quorum.

(7) The Chairman or the Presiding Officer shall have a second or casting vote."

"68. (1)

(2) Subject to the provisions of the Act and these rules and to the approval of the State Government, a State or a Regional Transport Authority shall have power to make bye-laws to regulate the conduct of its business and shall likewise have power to amend or rescind such bye-laws and the business of such Transport Authority shall be conducted according to such bye-laws under the direction of the Chairman.

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(3) Save in the case of the hearing of an objection to the grant of stage carriage permit or of a public carrier's permit and in the case of the hearing of a representation under sub-section (6) of Section 57, a State or a Regional Transport Authority, as the case may be, may decide any matter, without holding a meeting by the majority of the votes of members recorded in writing and sent to the Secretary (hereinafter referred to as procedure by circulation).

(6) The State or the Regional Transport Authority, as the case may be, may require any applicant for a permit to appear before it and may withhold the consideration of the application for the permit until the applicant has so appeared in person if so required, or by any recognised agent if so permitted, and until the applicant has furnished such information as may be required by the Transport Authority in connection with the application.

Explanation.—In this sub-rule, except in cases falling under sub-section (5) of Section 57, the expression "recognised agent" means a pleader or the father, son, brother, partner or employee of the applicant duly authorised by him in writing or any other person so authorised and recognised by the Transport Authority concerned as a fit person to be a recognised agent under its bye-laws made under sub-rule (2).

(7) Nothing contained in this rule shall prevent a State or Regional Transport Authority from deciding by following the procedure by circulation any matter which has been considered at a meeting or has been the subject of a hearing and upon which a decision has been reserved.

(8) Where a matter is decided by the votes of members present at a meeting of a State or Regional Transport Authority, no person other than a member of the Transport Authority shall be entitled to be present and no record of the voting shall be kept save of the number of votes cast on either side; provided that when any matter is decided by the exercise of the second or casting vote of the Chairman or the Presiding Officer the fact shall be recorded."

13. On behalf of respondent No. 1 Mr. Phadke conceded that the procedure adopted by the R. T. A. did not contravene any section of the Act or the Rules made thereunder. Counsel, however, put forward the argument that even in the

absence of any express provision a statutory tribunal has to give its order in writing and no oral judgment can be legally given. It was also contended on behalf of respondent No 1 that it was not sufficient that reasons for the decision were given subsequently by the R. T. A. in its letter dated July 20, 1967 but the reasons should have been given simultaneously at the time of the resolutions on June 28/29, 1967. We are unable to accept this argument as correct. As we have already stated, there is no provision either in the Act or the Rules which requires the R. T. A. to give a written decision with regard to the grant of a stage carriage permit. Nor is there anything in the Act or the Rules which by necessary implication throws a duty upon the R. T. A. to give a written judgment in each case and to give reasons thereof along with the written decision. It is true that Section 57 (7) of the Act requires the R. T. A. to give in writing the reasons if it refuses an application for a permit of any kind. But in the case of a grant of a permit the statute does not impose any such duty upon the R. T. A. Mr Phadke on behalf of respondent No 1 has been unable to point to any section of the Act or any Rule from which a necessary implication can be drawn that such a duty is thrown upon the R. T. A. Reference was, however, made by Mr Phadke to two decisions of this Court in *Bhagat Raja v The Union of India*, (1967) 3 SCR 302 = (AIR 1967 SC 1606) and in *Prag Das Umar Vaishva v The Union of India*, Civil App No 657 of 1967, D/- 17-8-1967 (SC). In the former case, the appellant was one of several applicants for a mining lease in Andhra Pradesh. The State Government however granted it to respondent No 3. The appellant then filed an application in revision under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957 read with R. 54, to the Union of India. Respondent No 3 filed a counter statement and the State Government filed its comments. The appellant filed a rejoinder. The Union Government without hearing the appellant rejected his revision application. An appeal was filed before this Court. The question which fell for consideration was whether it was necessary for the Government of India to give reasons for its decision in view of the provisions of the Act and the Rules or because the decision was liable to be questioned in appeal to this Court. It was held by this

Court in these circumstances that "a speaking order is all the more necessary in the case of a decision under Rule 53 because there is provision for new material being placed before the Central Government which was not there before the State Government, and further, because the decision, affecting important rights of parties, is given in a summary manner without a hearing being allowed to the parties and that a party was entitled to know why the decision has gone against him". In the result, the appeal was allowed and the orders of the Central Government were set aside and the Central Government was directed to decide the review applications afresh in the light of the observations made. In the latter case, i.e., Civil App No 657 of 1967, D/- 17-8-1967 (SC) the same principle was reiterated. It is manifest that the material facts in the present case are different. The significant fact in the present case is that the decision of the R. T. A. on June 28/29, 1967 was given after hearing respondent No 1 and the other private operators who were present at the meeting of the R. T. A. either personally or through Counsel and reasons for the decision were also communicated to respondent No 1 and other private operators by a registered letter dated July 20, 1967. The principle of the decisions of this Court in (1967) 3 SCR 302 = (AIR 1967 SC 1606) and in Civil App No 657 of 1967, D/- 17-8-1967 (SC) has therefore no bearing upon the determination of the question involved in the present case. Apart from any requirement imposed by the statute or statutory rules either expressly or by necessary implication we are unable to accept the contention of Mr Phadke that there is any general principle that a statutory tribunal should always give its judgment in writing and should always give reasons thereof immediately with the pronouncement of the judgment.

14. In English law, an applicant for a certiorari was required to verify by his affidavit a copy of the conviction or other record of adjudication complained of, or to explain his failure to do so. The rule in question was Rule 35 of the Crown Office Rules 1886 which seems merely to have codified the common law on the subject. This rule was later replaced by Rules of Supreme Court and Order 59, Rule 8 (1) is substantially to the same effect. It is apparent that this rule, like the earlier rules, though it calls for a written record when a certiorari is moved

for, permits its absence at the outset if the applicant accounts for his failure to lodge the order to the satisfaction of the Court. At Common Law the practice was that if the conviction or order attacked had not been put in writing, the applicant for the certiorari would simply so state in his affidavit, and thus its non-production would be excused at that stage. If the court was persuaded that the conviction or order when in writing would probably be quashable, it would grant the certiorari, and order return of the record of adjudication. It is well settled by several English authorities that even though there was no such record when the inferior tribunal received the writ of certiorari it could not defeat the writ by making a return that the record was not drawn up or that it had only made an oral order. If it did so, then the return would be quashed, and the tribunal directed to enter the conviction or order and return it: *R. v. Levermore*, (1700) 1 Salk 146; *R. v. Lichfield*, (1843) 4 QB 893; *R. v. Coles*, (1845) 8 QB 75; and *R. v. Trafford*, (1855) 4 WR 55. This was the legal position even though at common law a practice had grown up of not drawing up convictions until an appeal was taken or a certiorari received, which practice was continued by the Summary Conviction Rules, 1915, R. 53 and later by the Magistrates' Courts Rules 1952, Rule 19 (1). These rules referred to convictions not being drawn up till needed for an appeal or other "legal purpose." That an oral order was a legally valid order is also indicated by the decision of the Court of Appeal in *Rex v. Newington Licensing Justices*, (1948) 1 KB 681 in which the lessee of premises in respect of which a justices off-licence was in force applied for the transfer of the licence to her from the previous lessee and licensee. At the hearing of the application it appeared that the applicant had mortgaged the premises by way of sub-demise to the lessors and the justices considering the mortgage to be 'an agreement or other assurance under which the licence was to be transferred and held' within the meaning of S. 25, sub-section (2), of the Licensing (Consolidation) Act, 1910, purported to order the applicant to produce it. It was held by the Court of Appeal that the justices had no power to order the production of any document even if it were a document which the section required to be produced and that in any view the mortgage

was not such a document, and the order of the justices was therefore made without jurisdiction. The order of the justices was, however, made orally at the hearing of the application and had not been reduced into writing at the time when the motion for an order of certiorari was made. On this point the Court of Appeal held that it had no power to deal with any order but an order in writing in proceedings for certiorari. The court, therefore, refused to give judgment until the order was reduced into writing, but consented to hear the arguments on an undertaking being given by the parties that the order would be duly reduced into writing and produced before the Court. After the Court of Appeal had heard the arguments a written order was drawn up by the justices and produced before the Court which thereafter delivered the judgment and quashed the order of the grant of a writ. Reference should in this context be made to Section 12 (8) of the Tribunals and Inquiries Act, 1958 (6 and 7 Elizabeth 2. c. 26) which contemplates that a tribunal or any Minister may furnish a statement, either written or oral, of the reasons for the decision if requested on or before the giving or notification of the decision, to state the reasons. Section 12 provides as follows:

"(1) Subject to the provisions of this section, where after the appointed day—

(a) any such tribunal as is specified in the First Schedule to this Act gives any decision, or

(b) any Minister notifies any decision taken by him after the holding by him or on his behalf of a statutory inquiry,

..... it shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons:

Provided that the statement may be refused, or the specification of the reasons restricted, on grounds of national security, and the tribunal or Minister may refuse to furnish the statement to a person not primarily concerned with the decision if of opinion that to furnish it would be contrary to the interests of any person primarily concerned.

..... (8) Any statement of the reasons for such a decision as is mentioned in paragraph (a) or (b) of sub-section (1) of this Section, whether given in pursuance of

that sub-section or of any other statutory provision shall be taken to form part of the decision and accordingly to be incorporated in the record.

It should be noticed that under this section the statement of reasons may be oral and any such statement "shall be taken to be a part of the decision and accordingly to be incorporated in the record" Further, the duty to give reasons arises only when a request to give them is made to the tribunal or to the Minister. No such duty arises under this sub-section if the request is made after the decision has been given or notified.

15 We are therefore of the opinion that in the absence of any statutory provision there is nothing wrong in principle if an administrative tribunal gives a decision orally and subsequently reduces to writing the reasons thereof and communicates it to the parties. We accordingly reject the argument of Mr Phadke on this aspect of the case.

16 For the reasons expressed we hold that the judgment of the Bombay High Court dated October 20 1967 should be set aside and Special Civil Applications Nos 540 570 to 572, 575 to 596 and 634 of 1967 filed by respondent No 1 and other private operators should be dismissed. We accordingly allow these appeals with costs—there will be one hearing fee.

RGD

Appeals allowed.

AIR 1969 SUPREME COURT 340

(V 56 C 66)

(From Punjab)*

V RAMASWAMI AND A. N.

GROVER, JJ

M/s Daffadar Bhagat Singh and Sons,
Appellant v Income-tax Officer, A Ward,
Ferozepore Respondent.

Civil Appeal No. 962 of 1966, D/-
22-8-1968

Income-tax Act (1922), Section 34 (3)
Second Proviso — Expressions "finding",
"direction" and "any person", in proviso,
meaning of — Once a finding necessary
for disposal of appeal is given, second
proviso to Section 34 (3) would be attracted
and bar of limitation would be lifted —
(Words and Phrases — "Finding",

*(L. P. A. No 169 of 1965, D/- 11-5-1965
—Punj)

BM/BM/E180/68

"direction" and "any person", meaning of)

The expressions "finding" and "direction" in the second proviso to Sec 34 (3) mean respectively a finding necessary for giving relief in respect of the assessment for the year in question and a direction which the appellate or revisional authority, as the case may be, was empowered to give under the sections mentioned in that proviso. A "finding" therefore could only be that which was necessary for the disposal of an appeal in respect of an assessment of a particular year. The word "finding" only covers material questions which arise in a particular case for the decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing. AIR 1965 SC 342 and 1967-68 ITR 586 (SC), Foll.

(Para 1)

Therefore, where the assessee filed the return claiming the status of a firm together with an application under S 26A for its registration the partners being B and his two sons, which was disallowed by the Income-tax Officer but was allowed by the Appellate Assistant Commissioner holding that the business belonged to the firm and not to the Hindu undivided family and therefore its income must be excluded from that of the family and the Income-tax Officer was directed to assess the income of the business in the hands of the firm, the finding cannot be regarded as having been made only incidentally. The substantial issue before the Appellate Assistant Commissioner was one of status of the assessee and be held that it was a partnership firm and not a Hindu undivided family. That finding was necessary for deciding the appeal. Once a finding is given which was necessary for the disposal of the appeal, the second proviso to Section 34 (3) of the Act would be attracted and the bar of limitation would be lifted. AIR 1963 SC 1356 Ref. to (Para 1)

Further the expression "any person" to the setting in which it appears in the proviso must be confined to a person intimately connected with the assessments of the year in question. The members of the assessee firm cannot be taken out of the category of person or persons intimately connected with the assessment of the year to question. As

the returns, were originally filed by the partnership firm comprising B and his two sons and the question was of the assessment of the income of the business of the firm and their contention that they formed a partnership firm was accepted by the Assistant Commissioner, it cannot be said that the assessee was a total stranger to the assessment before the Appellate Assistant Commissioner and had no intimate connection with the persons whose assessment was made by the I. T. O. and was set aside by the Appellate Assistant Commissioner: AIR 1965 SC 342, Foll.; L. P. A. No. 169 of 1965, D/- 11-5-1965 (Punji), Affirmed.

(Para 2)
Cases Referred: Chronological Paras
 (1967) Civil Appeal No. 1985 of 1966, D/- 27-3-1967 = 1967-66 ITR 586 (SC), N. K. Sivalingam Chettiar v. Commr. of Income Tax, Madras I
 (1965) AIR 1965 SC 342 (V 52) = 1964-52 ITR 335, Income Tax Officer, A Ward, Sitapur v. Murlidhar Bhagwandas 1, 2
 (1963) AIR 1963 SC 1356 (V 50) = 1963-49 ITR (SC) 1, S. C. Prashar v. Vasantsen Dwarkadas I
 (1960) AIR 1960 All 97 (V 47) = 1960-39 ITR 265, Hazari Lal v. Income Tax Officer, Kanpur I

Mr. Veda Vyasa, Senior Advocate (M/s. Bishambar Lal, H. K. Puri, M. K. Garg and K. K. Jain, Advocates, with him), for Appellant; Mr. Niren De, Solicitor-General of India (M/s. T. A. Ramachandran, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave against the judgment of the Punjab High Court dismissing the writ petition of appellants herein under Articles 226 and 227 of the Constitution by which it was prayed that a writ of prohibition directing the Income-tax authorities not to proceed with the assessment for the year 1952-53 be issued. A prayer was also made for the issue of a writ of certiorari for quashing the notices under Sections 23 (2) and 22 (4) of the Income-tax Act 1922 hereinafter called the Act, which had been issued by the Income-tax Officer in that connection. The appellant firm filed a return for the assessment year 1952-53 on March 31, 1953. It also applied that it may be registered as a firm under Section 26A of

the Act, the partners being Bhagat Singh and his two sons Kartar Singh and Dhian Singh, their shares being in the proportion of 4/16, 6/16 and 6/16 respectively. The Income-tax Officer passed an order on March 26, 1957 holding that the assessee constituted a Hindu Undivided Family and not a firm. The registration under Section 26A was also refused. The appellants approached the Appellate Assistant Commissioner in appeal who made an order on August 11, 1959 allowing registration of the partnership firm under Section 26A. He further held that the business belonged to the firm and therefore its income must be excluded from that of the family. The Income Tax Officer was directed to assess the income of the business in the hands of the firm. The Income-tax Officer issued fresh notice to the appellants under Sections 22 (4) and 23 (2) of the Act. The appellant refused to comply with these notices and moved the Inspecting Assistant Commissioner of Income-tax for giving a direction that the assessment should not be proceeded with owing to the statutory bar created by Section 34 (3) of the Act. As the Income-tax authorities did not accede to the request of the appellants a petition under Articles 226 and 227 was filed in the High Court. The High Court dismissed the petition on the ground that in view of the decision of this Court in Income tax Officer, A-Ward, Sitapur v. Murlidhar Bhagwandas 1964-52 ITR 335 = (AIR 1965 SC 342) the second proviso to S. 34(3) would be applicable because the members of the appellant firm could not be regarded as strangers to the proceedings which resulted in the assessment order made in respect of them on the basis of their constituting a Hindu Undivided Family along with others and that they were intimately connected with the "person" whose assessment was made by the Income-tax Officer and set aside by the Appellate Assistant Commissioner on whose direction fresh assessment proceedings were taken. The second proviso to S. 34 (3) of the Act reads:

"Provided further that nothing contained in this section limiting the time within which any action may be taken, or any order, assessment or reassessment may be made, shall apply to a reassessment made under S. 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 31,

Section 33 Section 33A, Section 33B, Section 66 or Section 68A"

In *S. C. Prashar v. Vasanten Dwarkadas*, 1963-49 ITR (SC) 1 = (AIR 1963 SC 1856) this court, by majority, held that the provisions of second proviso to S. 34(3) insofar as they authorised the assessment or reassessment of any person other than the assessee beyond the period of limitation specified in S. 34 in consequence of or to give effect to a finding or direction given in an appeal, revision or reference arising out of proceedings in relation to the assessee, violated the provisions of Art. 14 of the Constitution and were invalid to that extent. The scope and ambit of the second proviso came up for consideration again in 1964-52 ITR 335 = (AIR 1965 SC 342). According to the majority decision the expression "finding" and "direction" in the said proviso means respectively a finding necessary for giving relief in respect of the assessment for the year in question and a direction which the appellate or revisional authority, as the case may be, was empowered to give under the section mentioned in that proviso. A "finding" therefore could only be that which was necessary for the disposal of an appeal in respect of an assessment of a particular year. If the Appellate Assistant Commissioner found that the income shown by the assessee was not the income for the relevant year but was income which belonged to another year that was not a finding necessary for the disposal of the appeal and was only incidental to it. The meaning of the words "any person" was also considered and it was said at page 348 (of ITR) = (at p. 349 of AIR) that a combined reading of Ss. 30 (1) and 31 (3) indicated the case where persons other than the appealing assessee might be affected by the orders passed by the Appellate Commissioner. It was observed:

"Modification or setting aside of assessment made on a firm, joint Hindu Family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu Undivided Family or the individual, as the case may be. In such cases though the latter are not co-nomine parties to the appeal, their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that, the expression "any person" in the setting in which it appears

must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal." The argument of Mr. Veda Vyasa for the appellant has been two-fold. He contends firstly that the finding or direction which the Appellate Assistant Commissioner gave in the present case in his order dated August 11, 1959 that the business belonged to the partnership and not the Hindu Undivided Family and the further direction which was given by him that the Income tax Officer should assess the income in the hands of the partnership firm were not necessary for the disposal of the appeal. According to Mr. Veda Vyasa the crux of the matter was that the Appellate Assistant Commissioner gave a decision that the income was to be excluded from the assessment of the Hindu Undivided Family thereby reversing the decision of the Income tax Officer that it was assessable in the hands of the family. It is contended that, in these circumstances, the direction to the Income tax Officer that he should assess the income in the hands of the firm was neither necessary nor called for and therefore the law laid down in *Murlidhar Bhagwan Das's case*, 1964-52 ITR 335 = (AIR 1965 SC 342) was clearly applicable. In this connection it may be mentioned that according to Mr. Veda Vyasa two returns had been filed by the appellant for the assessment year 1952-53, one relating to the Hindu Undivided Family and the other, of the partnership firm. But the statements contained in the writ petition of the appellant do not support this submission. In para 3 of that petition it is stated that the firm and all the three partners filed their returns of profit and loss on March 31, 1953 with the Income tax Officer and also made an application under S. 26A of the Act for registration of the firm. It is true that in the assessment order of the Income tax Officer the status of the assessee is shown to be Hindu Undivided Family but that has been apparently shown in the order because the Income tax Officer gave an express decision about the status of the assessee and held that it constituted a Hindu Undivided Family. It, however, stands proved that the assessee filed the return claiming the status of a firm together with an application under S. 26A for its registration which was disallowed by the Income tax Officer but was allowed by the Appellate Assistant Commissioner. The substantial issue before the Appellate Assistant Commissioner was

one of status of the assessee and he held that it was a partnership firm and not a Hindu Undivided Family. This finding was necessary for deciding the appeal before the Appellate Assistant Commissioner and it is not possible to understand how it can be regarded as having been made only incidentally. Once a finding is given which was necessary for the disposal of the appeal the second proviso to S. 34(3) of the Act would be attracted and the bar of limitation would be lifted. In *N. K. Sivalingam Chettiar v. Commissioner of Income-tax, Madras*, Civil Appeal No. 1985 of 1966 D/- 27-3-1967 (SC) this Court after referring to the relevant observations in *Murlidhar Bhagwandas' case* 1964-52 ITR 335=(AIR 1965 SC 342) reiterated that a finding within the second proviso to Section 34 (3) must be necessary for giving relief in respect of the assessment of the year in question. It was further observed that this Court in an earlier case lent approval to the observations of the Allahabad High Court in *Hazari Lal v. Income tax Officer, Kanpur*, 1960-39 ITR 265 = (AIR 1960 All 97) "that the word 'finding' only covers 'material questions which arise in a particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the 'final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing.' The first submission of Mr. Veda Vyasa therefore cannot be accepted.

2. The second limb of the argument of Mr. Veda Vyasa is based on the premise that the appellant which was a partnership firm was a distinct legal entity and was thus a total stranger to the Hindu Undivided Family the assessment of which came up for consideration before the Appellate Assistant Commissioner in which the orders already referred were made by him. It is suggested that the appellant could not fall within the meaning of the expression "any person" in the second proviso to Section 34 (3) of the Act. If the observations made in *Murlidhar Bhagwan Das's case* 1964-52 ITR 335=(AIR 1965 SC 342) are borne in mind it is again not possible to understand how the appellant can be taken out of the category of person or persons intimately connected with the assessment of the year under appeal. The returns, as stated before, were originally filed by

the partnership firm comprising Bhagat Singh and his two sons. The question was of the assessment of the income of the business of the firm. The Income tax Officer treated the father and the sons as Hindu Undivided Family. On appeal, however, the Assistant Commissioner accepted their contention that they formed a partnership firm. It is difficult, in these circumstances, to agree that the appellant was a total stranger to the assessment which was under appeal before the Appellate Assistant Commissioner and had no intimate connection with the person whose assessment was made by the Income tax Officer and was set aside in appeal by the Appellate Assistant Commissioner.

3. For all these reasons, the appeal fails and is dismissed with costs.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 343 (V 56 C 67)

(From Rajasthan: ILR (1965) 15 Raj 603)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

State of Rajasthan and another, Appellants v. M/s. Karam Chand Thappar and Brothers (Coal Sales) Ltd., Jaipur, Respondents.

The Advocate-General for the State of West Bengal, Intervener.

Civil Appeal No. 1364 of 1966, D/- 27-8-1968.

(A) Sales Tax — Rajasthan Sales Tax Act (29 of 1954), Sections 3, 2 (o), (s) and (t) — Colliery Control Order, (1945), Clause 4 — Turnover from sale of goods — Liability to tax — Essential elements — Agreement between State and assessee acting as agent of a Coal Company to sell coal — Price fixed under Colliery Control Order — Effect of Control Order — Supply of coal by assessee — Transaction held one of sale of goods — Turnover liable to tax. ILR (1965) 15 Raj 603, Reversed.

To render turnover from sale of goods liable to tax under the Sales Tax Act, there must be concurrence of four elements in the sale: (1) parties competent to contract; (2) mutual assent of the parties; (3) thing absolute or general, property in which is transferred from the seller to the buyer, and (4) price in money paid or promised. AIR 1958 SC 560, Followed. (Para 8)

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Under an agreement between the State of Rajasthan and the assessee acting as an agent of a Coal Company to sell coal, the assessee supplied coal to the State Power House. The price chargeable was fixed under the Colliery Control Order, 1945.

Held that there was an agreement of sale between the parties competent to contract and in pursuance of the agreement of sale, property in the goods supplied passed to the purchaser for price agreed to be paid. The transaction, was, therefore, one of sale of goods within the meaning of the Rajasthan Sales Tax Act. AIR 1963 SC 1207, Disting AIR 1958 SC 560 and AIR 1968 SC 478 and AIR 1968 SC 599. Rel. on, ILR (1965) 15 Raj 603 Reversed. (Para 10)

The effect of the Control Order was only to superimpose upon the agreement between the parties the rate fixed under the order. But on that account it could not be said that the relation between the supplier and the person to whom the coal was supplied was not contractual. The contract between the parties was only modified by the statutory provisions.

(Para 7)

(B) Sales Tax — Sales Tax Laws Validation Act (1956), Section 2 — Rajasthan Sales Tax Act (29 of 1954), Section 3 — Inter State sales — Order of assessment of sales tax for entire assessment year 1955-56 — Section 2 of Act of 1956 validating levy of sales tax on inter State sales till September 6, 1955 — Writ of mandamus can be issued directing State not to realise sales tax except with regard to transactions of sale between the period April 1, 1955 and September 6, 1955 both days inclusive — Constitution of India, Article 226 AIR 1955 SC 765 and AIR 1964 SC 1873, Explained, AIR 1968 SC 1350, Rel. on, ILR (1965) 15 Raj 603, Reversed. (Para 14)

Cases Referred Chronological Paras

- (1968) AIR 1968 SC 478 (V 55) = 1968-21 STC 138, Indian Steel and Wire Products Ltd. v State of Madras 8
(1968) AIR 1968 SC 599 (V 55) = 1968-21 STC 212, Andhra Sugars Ltd. v State of Andhra Pradesh 9
(1966) AIR 1966 SC 1350 (V 53) = 1966-17 STC 612, State of Jammu and Kashmir v Caltex (India) Ltd. 13
(1964) AIR 1964 SC 1873 (V 51) = 1964-15 STC 144 Provincial Govt. of Madras v J S Basappa 11

- (1963) AIR 1963 SC 1207 (V 50) = 1963 Supp 2 SCR 459, New India Sugar Mills Ltd. v Commr of Sales Tax, Bihar 4, 8, 11
(1958) AIR 1958 SC 560 (V 45) = 1959 SCR 879 = 1958 Cri LJ 983, State of Madras v Gannon Dunkerley and Co (Madras) Ltd. 8

- (1955) AIR 1955 SC 765 (V 42) = 1955-6 STC 627, Ram Naram Sons Ltd. v Assistant Commr of Sales Tax 11, 13

Mr Niren De, Solicitor General of India, (Mr K. Baldev Mehta, Advocate, with him), for Appellants M/s S P Mehta, N N Bhattachariya and Miss Bhuvnesh Kumari, Advocates, and Mr J B Dadachanji, Advocate of M/s J B. Dadachanji and Co., for Respondent, Mr B Sen, Senior Advocate, (M/s G S Chatterjee and P K. Bose, Advocates, with him), for the Intervener

The following judgment of the Court was delivered by

SHAH, J The respondent—hereinafter called the assessee—has its Head Office at Calcutta and a Branch Office at Jaipur, and is registered as a "dealer" under the Rajasthan Sales Tax Act, 1954. Under a contract dated September 2, 1948, with the Equitable Coal Company the assessee acquired monopoly rights to supply on behalf of the collieries coal in certain areas including Rajasthan. Under an agreement dated April 28, 1955, with the State of Rajasthan the assessee supplied coal to the State Power Houses upto May 19, 1958. The Sales Tax Officer, City Circle A, Jaipur assessed to tax the turnover of the assessee in the year 1955-56 from the supply of coal to the State of Rajasthan.

2. The assessee then moved a petition under Article 226 of the Constitution in the High Court of Rajasthan for a writ quashing the order of assessment of the Sales Tax Officer. The High Court accepted the plea that the assessee was not a dealer within the meaning of the Act and quashed the assessment. In appeal by the State of Rajasthan against the order of the High Court, this Court held that the assessee was a dealer within the meaning of the explanation to Sec. 2 (f) of the Rajasthan Sales Tax Act, since the assessee was an agent for sale for the Equitable Coal Company which carried on the business of buying, selling or supplying goods in the State. But this Court remitted the case to the High Court for

determination of certain other questions which were not decided.

3. The High Court on remand held that there was no sale of coal by the assessee to the State of Rajasthan; that in any event the sales were inter-State sales from the collieries in other States to the State of Rajasthan and that the Sales Tax Laws Validation Act 7 of 1956 which validated the levy of sales tax on inter-State sales till September 6, 1955, did not operate to validate the order of assessment, which was a composite order for the entire assessment year 1955-56. The High Court again issued a writ quashing the assessment. The State of Rajasthan has appealed to this Court with certificate granted by the High Court under Article 133 (1) (a) of the Constitution.

4. In support of the appeal the Solicitor-General urged two contentions:—

(1) In relying upon the judgment of this Court in *New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar*, 1963 Supp 2 SCR 459 = (AIR 1963 SC 1207) in support of the conclusion that there was no sale of coal within the meaning of the Rajasthan Sales Tax Act, the High Court seriously erred; and

(2) that the order of assessment made by the Sales Tax Officer for the financial year 1955-56 is not liable to be quashed insofar as it relates to the period April 1, 1955, to September 6, 1955, in view of the provisions of the Sales Tax Laws Validation Act 7 of 1956.

5. Under the agreement dated September 2, 1948, with the Equitable Coal Company Ltd. the assessee was granted a monopoly right to supply coal in certain areas including the territory of Rajasthan. The assessee was to arrange despatches to cover the quantities of coal reserved on its account by the Equitable Coal Company. This Court in the judgment dated October 9, 1964, held that the assessee was an agent of the Equitable Coal Company and sold coal on behalf of that Company. Under the agreement dated April 28, 1955, with His Highness the Rajpramukh of the State of Rajasthan the assessee was to supply coal to the Rajasthan Government in accordance with the specifications and on the terms set out therein. The assessee undertook thereby to supply coal at controlled rates F. O. R. Colliery and to arrange all the transport and sale delivery of coal at Jaipur Power House.

6. At all times material in this appeal supply of coal was governed by the Colliery Control Order, 1945. By Cl. 4 of the Order, the Central Government was competent to fix the prices at which coal may be sold by colliery owners. By Clause 5 the colliery owners and their agents were prohibited from selling or agreeing to sell or offering to sell coal at a price different from the price fixed in that behalf under Clause 4. By Cl. 6 it was provided that where a colliery owner has signified to the Deputy Coal Controller (Distribution) in writing his willingness to sell direct to consumers and an allotment is made by the Deputy Coal Controller to a consumer with his consent for such direct sale, the coal shall be delivered to the consumer at the price fixed under Clause 4, and no commission or other charges except brokerage shall be paid in addition. By Clause 8 the Central Government was authorised to issue from time to time such directions as it thought fit to any colliery owner regulating the disposal of his stocks of coal or of the expected output of coal in the colliery during any period, including directions as to the grade, size and quantity of coal which may be disposed of and persons or class or description of persons to whom coal shall or shall not be disposed of, the order of priority to be observed in such disposal and the stocking of coal on Government account. Clause 12-E provided that no person shall acquire or purchase or agree to acquire or purchase any coal from a colliery, and no colliery owner or his agent shall despatch or agree to despatch or transport any coal from the colliery except under the authority and in accordance with the conditions contained in a general or special authority of the Central Government.

7. Under the Colliery Control Order, coal may be supplied under directions issued by the Central Government upon the colliery owner to any person without an agreement express or implied between the colliery owner and such other person: coal may also be supplied under a contract between the colliery (sic) to a purchaser at the price fixed by the Central Government. In the present case there was between the State of Rajasthan and the assessee acting as an agent of the Equitable Coal Company an agreement to sell coal. The price chargeable was fixed under the Colliery Control Order. The effect of the Control Order was only to superimpose upon the agreement between the

parties the rate fixed under the Order. But on that account it cannot be said that the relation between the supplier and the person to whom the coal was supplied was not contractual. The contract between the parties was only modified by the statutory provisions.

8. This Court in *State of Madras v. Garmon Dunkerley and Co (Madras) Ltd.*, 1959 SCR 379 = (AIR 1958 SC 560) held that to render turnover from sale of goods liable to tax under the Sales Tax Acts, there must be concurrence of four elements in the sale—(1) parties competent to contract, (2) mutual assent of the parties (3) thing absolute or general, property in which is transferred from the seller to the buyer; and (4) price in money paid or promised. In the present case all the four elements exist. The principle of the decision of this Court in *M/s New India Sugar Mills Ltd's case*, 1963 Supp 2 SCR 459 = (AIR 1963 SC 1207) which the High Court regarded as decisive has no application to this case. In that case it was found that Conditions (1) (3) and (4) were present, but not Condition (2), since there was no mutual assent between the parties. The facts found in that case were that the States in need of sugar intimated to the Sugar Controller from time to time their requirements, and similarly the factory owners sent to the Sugar Controller statements of stock of sugar held by them. The Sugar Controller then made allotments taking into consideration the supply position and the requirements of the States. The Sugar Controller then intimated the allotment order to the factory owner, directing him to supply sugar to the State Governments in accordance with the despatch instructions received from the State Government. A copy of the allotment order was also sent to the State Governments concerned, on receipt of which the competent authority of the State Government sent to the factory concerned instructions about the destination to which the sugar was to be despatched and the quantity of sugar to be despatched. On these facts it was held that there was no contractual relation between the State Government and the factory owner. The Sugar Controller directed the manufacturer of sugar to supply sugar to the State Government and the factory owner complied with the direction. This Court in two recent judgments has held that when goods supply of which is controlled by statutory orders are delivered pursuant to contract of sale, the principle

of the case in *M/s New India Sugar Mills Ltd.*, 1963 Supp 2 SCR 459 = (AIR 1963 SC 1207) has no application. In the *Indian Steel and Wire Products Ltd. v State of Madras*, 1968-21 STC 133 = (AIR 1968 SC 478), the facts were these: sale and purchase of iron and steel products was at the relevant time controlled by the Iron and Steel (Control of Production and Distribution) Order 1941. An intending purchaser of iron or steel goods placed his order for supply of materials through the Iron and Steel Controller, agreeing that the order was placed subject to the provisions of the schedule regarding prices etc. and the terms and conditions of business (including payment) of the registered producer on whom the order would be placed by the Iron and Steel Controller. The indent was forwarded to the producer for delivery of the material in accordance with any general or special directions of the Iron and Steel Controller. The works order issued by the producer provided that all orders booked were subject to his terms of business and general understanding in force at the time of booking the orders and despatch of goods. It was open to the producer to supply the goods ordered at his convenience, and to fix the time and mode of payment of the price of the goods supplied. It was held that the transactions resulting in the supply of the steel products to the purchaser amounted to sales and were liable to sales tax.

9. In *Andhra Sugars Ltd. v. State of Andhra Pradesh* 1968-21 STC 212 = (AIR 1968 SC 599) under the *Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act*, 1961, on the declaration of a factory zone for the purposes of supply of cane to a factory during a particular crushing season, the occupier of the factory was bound to purchase such quantity of cane grown in that area and offered for sale to that factory as might be determined by the Cane Commissioner. The Act prohibited the cane growers in a factory zone from supplying or selling cane to any factory or other persons otherwise than in accordance with the provisions of the Schedule to the Act. Under the Rules framed under that Act, the cane grower may within the period specified offer to supply cane grown in that area to the occupier of the factory, and the occupier of the factory was bound to enter into an agreement with the cane grower for the purchase of the cane offered. The

prescribed agreement provided that the occupier of the factory agreed to buy and the cane grower agreed to sell during the crushing season certain sugarcane crop grown in the area, and at the minimum price notified by the Government from time to time, upon the terms and conditions mentioned in the agreement. Under the Act and the Rules framed thereunder, the cane grower in the factory zone was free to make or not to make an offer of sale of cane to the occupier of the factory. But if he made an offer, the occupier of the factory was bound to accept it. The resulting agreement was recorded in writing and was signed by the parties. The consent of the occupier of the factory to the agreement, it was held, was free, and in spite of statutory compulsion, the agreement was neither void nor voidable. Purchases of sugarcane under the agreement could, it was held, be taxed by the State Legislature under the Act enacted in exercise of the power conferred under Entry 54, List II of Schedule VII to the Constitution of India.

10. There was in the present case an agreement of sale between the parties competent to contract and in pursuance of the agreement of sale, property in the goods supplied passed to the purchaser for price agreed to be paid. The transaction was, therefore, one of sale of goods within the meaning of the Rajasthan Sales Tax Act.

11. Counsel for the assessee made no serious attempt to support the judgment of the High Court which was largely influenced by the decision in *M/s. New Sugar Mills' case*, 1963 Supp 2 SCR 459 = (AIR 1963 SC 1207)—a case founded on a different principle—but he contended that since the sales tax authorities had made assessment for the entire period April 1, 1955 to March 31, 1956 even if it be held that upon enactment of the Sales Tax Laws Validation Act 7 of 1956, the assessee was liable to pay tax in respect of the transactions of sale which admittedly took place in the course of inter-State trade or commerce, during the period April 1, 1955 to September 6, 1955, the order of assessment could not be upheld in part. Counsel placed reliance upon two judgments of this Court in *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*, 1955-6 STC 627 = (AIR 1955 SC 765) and *Provincial Government of Madras v. J. S. Basappa*, 1964-15 STC 144 = (AIR 1964 SC 1873). In *Ram Narain Sons Ltd.'s case*, 1955-

6 STC 627 = (AIR 1955 SC 765) it was held by this Court that when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation render the assessment invalid in toto, and therefore a composite assessment relating to the pre-Constitution as well as the post-Constitution periods of which the part relating to the post-Constitution period was invalid in its entirety and was liable to be set aside. The principle of that case was reiterated in *J. S. Basappa's case*, 1964-15 STC 144 = (AIR 1964 SC 1873).

12. In the present case the Solicitor-General submits that on the finding recorded by this Court in the appeal filed in the earlier judgment it was held that the owner of the goods was the Equitable Coal Company and the assessee was merely the agent of that Company and coal was supplied in the course of inter-State sales. The State was entitled to levy tax for the period April 1, 1955 to September 6, 1955 both days inclusive, by virtue of the provisions of the Sales Tax Laws Validation Act 7 of 1956, and the order of assessment levying tax on the turnover for that period could be upheld.

13. Counsel relied upon the judgment of this Court in *State of Jammu and Kashmir v. Caltex (India) Ltd.*, 1966-17 STC 612 = (AIR 1966 SC 1350) in which this Court directed that the order of assessment for the period January 1, 1955 to May 1959 challenged by the tax payer could be split up and dissected so as to uphold it insofar as it related to items of sale which could be separated and taxed for different periods, and a writ of mandamus would issue directing the State not to realize sales tax only in respect of transactions of sale which were not taxable. There is no inconsistency between the principles of the cases of *Ram Narain Sons Ltd.*, 1955-6 STC 627 = (AIR 1955 SC 765) and *Caltex (India) Ltd.*, 1966-17 STC 612 = (AIR 1966 SC 1350). In *Ram Narain Sons Ltd.'s case*, 1955-6 STC 627 = (AIR 1955 SC 765) this Court, after declaring that the assessment was invalid, directed that the matter will go back to the Assessment Officer for reassessment of the appellant in accordance with law: see pp. 638 and 643 (of STC) = (at pp. 771 and 773 of AIR). In *Caltex (India) Ltd.'s case*, 1966-17 STC

612 = (AIR 1966 SC 1850) the Court issued a writ of mandamus prohibiting the State from realizing sales tax with regard to the transactions on which the sales tax was not validated by the Sales Tax Laws Validation Act, 1958. The effect of the two orders is the same.

14. A writ of mandamus will issue directing the State of Rajasthan not to realize sales tax except with regard to the transactions of sale between the period April 1, 1955 and September 6, 1955, both days inclusive. The Sales Tax Officer who is also one of the appellants in this case will make appropriate modifications in the order of assessment in the light of the judgment of this Court. In view of the divided success, there will be no order as to costs throughout.
LCC/D.V.G. Appeal allowed.

AIR 1969 SUPREME COURT 348 (V 56 C 68)

(From Madras 1965 Mad W N 50)
J C SHAH, V RAMASWAMI AND
A. N GROVER, JJ
State of Madras, Appellant v M/s K.
C P Ltd., Respondent.

Civil Appeal No 731 of 1968, D/- 20-8-1968.

Sales Tax — Central Sales Tax Act (1956), Section 2 (b) — Madras General Sales Tax Act (1 of 1959), Section 2 (g) — Business of manufacture and sale of machinery and its parts — Purchase of arc furnaces for use in foundry of the assessee — On finding them unsuitable, furnaces sold at profit — Proceeds of sale do not form part of business turnover.

The assessee Company carried on the business of manufacture and sale of machinery and parts of machinery and accessories. For manufacturing parts of the machinery, the company maintained a foundry and in 1952 it purchased two arc furnaces for a sum of Rs 2,13,512.81 for the purpose of using the same in its foundry. The furnaces were found to be unsuitable for the purpose for which they had been purchased and therefore they were disposed of in 1958 to a purchaser in Calcutta for a sum of Rs 4,20,000. The assessing authorities sought to include the amount of Rs 4,20,000 in the turnover of the company although it was maintained by the company that the sale represented an isolated sale of its fixed capital assets.

Held that where a person in the course of carrying on the business was required to dispose of what might be called his fixed assets or his discarded goods acquired in the course of business, an inference that he desired to carry on the business of selling his fixed assets or discarded goods would not ordinarily arise. AIR 1967 SC 1066 and 1964-15 STC 367 (Guj) and (1967) 19 STC 103 (SC), Rel. on. (Para 3)

(2) That although the assessee was dealing in the sale of heavy machinery and machinery parts it was nowhere proved that furnaces were ever manufactured or sold by it or were part of its business or ingraned therein. The arc furnaces were either fixed assets or discarded goods which had been found to be unserviceable or unsuitable. The assessee could therefore hardly be said to be a dealer within the definition given in Section 2 (b) of the Central Act in relation to their sale and the sale proceeds of the furnaces could not be included in the turnover of the assessee (Paras 4, 5).

Cases Referred Chronological Paras
(1967) AIR 1967 SC 1066 (V 54) =
(1967) 19 STC 1, State of Gujarat v Raipur Manufacturing Co Ltd. 5
(1967) 1967-19 STC 103 (SC), State of Gujarat v Vivekanand Mills 6
(1965) AIR 1965 SC 531 (V 52) =
1964-15 STC 644 State of Andhra Pradesh v Abdul Bakshi and Bros 2, 5
(1964) 1964-15 STC 367 = 1964-5
Guj LR 446 Ambika Mills Ltd. v State of Gujarat 2

Mr A. K. Sen, Senior Advocate (Mr A. V. Rangan, Advocate, with him) for Appellant, Mr S. T. Desai, Senior Advocate (Mr T. A. Ramachandran, Advocate with him), for Respondent.

The following judgment of the Court was delivered by

GROVER, J. This is an appeal by special leave in which the sole question for decision is whether the respondent company was liable to pay sales tax on an amount of Rs 4,20,000 being the sale-price of two arc furnaces which had been purchased in 1952 and sold in 1958.

2. The respondent company carried on business at 38, Mount Road, Madras, its main business being the manufacture and sale of machinery and parts of machinery and accessories. For manufacturing parts of the machinery, the company maintained a foundry and in 1952 it

purchased two arc furnaces for a sum of Rs. 2,13,512.81 for the purpose of using the same in its foundry. In the account books and the balance sheet of the company these furnaces were shown under the heading "workshop equipment". According to the company the furnaces were found to be unsuitable for the purpose for which they had been purchased and therefore they were disposed of in 1958 to a purchaser in Calcutta for a sum of Rs. 4,20,000. For the assessment year 1958-59 the assessing authorities sought to include the amount of Rs. 4,20,000 in the turnover of the company although it was maintained by the company that the sale represented an isolated sale of its fixed capital assets. The appeal before the Sales Tax Appellate Tribunal, Madras also failed. The view of the tribunal may be stated in its own words:—

"It is not denied that the appellant comes within the scope of the definition of "dealer". It has to be seen whether the sale of the two arc furnaces had a reasonable connection with the normal course of business of the assessee. The fact that the appellant could not use them or that they are surplus machinery cannot take it out of the ambit of the appellant's business of sales of machinery or part of machinery. The necessity to dispose of unwanted machinery is ingrained in the very nature of business of sale of machinery which the assessee was carrying on and it had to effect sales of such surplus materials." A revision petition was presented to the High Court of Madras under Section 38 of the Madras General Sales Tax Act (Act I of 1959) read with Section 9 (3) of the Central Sales Tax Act 1956 (Act LXXIV of 1956), hereinafter called the Madras Act and the Central Act respectively. Before the High Court it was argued on behalf of the assessee that the furnaces were purchased for the purpose of being installed in the factory. It was therefore to be used as capital asset and not as a part of the stock-in-trade. At the time of purchase the assessee had no idea of selling the furnaces and there was no intention of making any profit. The business which was carried on by the assessee was entirely different, namely production of machinery and parts and the sale of the furnaces, when they were found to be unserviceable, was not made in the course of the normal business activity of the assessee. The position taken up on behalf of the State was that when

the assessee carried on the business of selling machinery of various kinds the sale of arc furnaces must be regarded as sale of machinery in the normal course of its business activity. The learned Judges of the High Court referred to a large number of decided cases including the decision of this court in State of Andhra Pradesh v. Abdul Bakshi and Bros., 1964-15 STC 644 = (AIR 1965 SC 531). Reliance was finally placed on the observations in Ambica Mills Ltd. v. State of Gujarat, 1964-15 STC 367 (Guj) in which it was observed inter alia that the machinery which had been disposed of had been obviously purchased and installed for use for production of textile goods. The view taken in that decision was that a person could not be said to be carrying on business of selling assets of that business when sale of such assets had been made only because they had become useless and unserviceable by usual wear and tear or because of the necessity for substituting modern machinery. In the present case the learned Madras Judges were of the opinion that it was impossible to hold that the sale of the arc furnaces was either ingrained in the business activity of the assessee or would constitute its normal business activity. According to them the mere fact that the sale price exceeded the cost price of the arc furnaces was not sufficient to establish that their sale was a business activity or that it was actuated by the profit motive. It was consequently held that the turnover of the assessee was not liable to sales tax.

3. Mr. A. K. Sen for the appellant contends that the assessee being a dealer in heavy machinery and accessories thereof the sale of arc furnaces could not be said to be wholly different and unconnected with its usual business activity. He has emphasised the fact that the assessee had admittedly made a profit of Rs. 2,07,000 from the aforesaid transaction and in addition collected sales tax from the Calcutta dealer. He has called attention to the finding of the appellate Assistant Commissioner of Commercial Taxes that the sale in the present case was not one of used assets and that whatever the intention at the time of the purchase might be, once the machinery was found not usable, the assessee "has got necessarily to get into a business venture of selling it and in point of fact sold it at good profit". It is further urged that the arc furnaces became a

part of stock or machinery for sale because the assessee was dealing in manufacture and sale of heavy machinery and it must be deemed to have put the furnaces into its stock in due course of business activity. Mr Sen has next pointed out that the respondent fell squarely within the definition of the word "dealer" as defined by Section 2 (b) of the Central Act. In support of his submission Mr Sen sought to rely on a decision of this court in 1964-15 STC 644 = (AIR 1965 SC 531). In that case the respondents had purchased undressed hides and skins and tanning bark together with other material required in their tannery as they carried on the business of tanning hides and skins and of selling tanned skins in the town of Hyderabad. For the assessment year 1954-55 the Sales Tax Officer sought to include in the total turnover a certain amount representing the price paid for buying tanning bark required in their tannery. The respondents submitted that the tanning bark had been bought for consumption in tannery and not for sale and they were accordingly not dealers in tanning bark. Therefore the price paid for buying tanning bark was not liable to duty under the Hyderabad General Sales Tax Act. The departmental authorities as also the Sales Tax Appellate Tribunal rejected this contention but it was accepted by the High Court of Andhra Pradesh. The High Court rejected the claim of the taxing authorities to tax the tanning bark on the ground that the purchaser was liable to pay tax only when he was carrying on business of buying and selling the commodity and not when he bought it for consumption in the process for manufacturing an article to be sold by him. This view was reversed and it was observed as follows:

"A person to be a dealer must be engaged in the business of selling or buying or supplying goods. The expression 'business' though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure."

Mr Sen has laid stress on what has been said further at pages 647 and 648 (of STC) = (at p 532 of AIR)

"The Legislature has not made sale of the very article bought by a person a condition for treating him as a dealer; the definition merely requires that the buying of the commodity mentioned in Rule 5 (2) must be in the course of business, i.e., must be for sale or use with a view to make profit out of the integrated activity of buying and disposal. The commodity may itself be converted into another saleable commodity, or it may be used as an ingredient or in aid of a manufacturing process leading to the production of such saleable commodity."

The facts in the decision of this Court under discussion were different and distinguishable from the present case. The tanning bark was actually consumed in the process of manufacturing another commodity and it was either used as an ingredient or for adding the process of manufacture which cannot be said about the arc furnaces which were indisputably bought for being installed in the foundry as a part of the manufacturing plant. The words "in aid of a manufacturing process" have to be read in the context in which they appear in passage extracted above and cannot be taken to mean that even a part of manufacturing plant will become a saleable commodity if it is found to be unusable or no longer required. Such a view is untenable and cannot be regarded as sustainable in the light of the decision of this Court. In *State of Gujarat v Rasipur Manufacturing Co Ltd.*, 1967 19 STC 1 = (AIR 1967 SC 1066), the tribunal had held that where a cotton textile mill had managed to collect unserviceable articles in the course of manufacture of cloth which were sold, sales of these articles must be regarded as part of the business of the textile mill if the transactions of sale were large and frequent. After referring to the definition and the expression "dealer" in Section 2 (6) of the Bombay Sales Tax Act 1953 and the other relevant provisions of that Act as also the law laid down in 1964-15 STC 644 = (AIR 1965 SC 531) it was observed that by the use of the expression "profit motive" it was not intended that profit must, in fact, be earned nor did the expression cover a mere desire to make some monetary gain out of the transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity. Where a person came to own, in the course of his busi-

ness of manufacturing or selling a commodity, some other commodity which is not a by-product or a subsidiary product of that business and he sold that commodity, cogent evidence that he had the intention to carry on the business of selling that commodity would be required. It was further observed that where a person in the course of carrying on the business was required to dispose of what might be called his fixed assets or his discarded goods acquired in the course of business, an inference that he desired to carry on the business of selling his fixed assets or discarded goods would not ordinarily arise. In the State of Gujarat v. Vivekananda Mills, 1967-19 STC 103 (SC) the assessee was carrying on the business of manufacturing cotton fabrics. It had agreed to purchase under user's import licence 300 bales of Californian cotton in January 1953. Believing that the shipment would arrive after six months the assessee made arrangement to purchase 300 bales of similar cotton to meet its immediate requirements. The consignment of Californian cotton arrived unexpectedly in April 1953. A large sum of money belonging to the assessee was blocked up and with the sanction of the authorities the assessee sold 411 bales of this cotton to other mills. It was held that in selling the cotton with a view to avoid locking up of funds, it could not be inferred that the assessee had sold the goods with the intention to carry on the business of selling cotton and the sales were not liable to tax. It was clear from the supplemental statement of the case which had been submitted that though the assessee had been selling cotton from the year 1946 onwards except for three intervening years the sales were in respect of goods purchased for the business of manufacturing cotton cloth and the sales had been effected either because the cotton was surplus or the assessee had to accommodate its sister concern or with the view that the finances were not blocked up by detaining cotton which the assessee did not need for its business.

4. The facts and circumstances which have been established in the present case are stronger than those in the previous decisions of this Court. The furnaces were admittedly imported for the purpose of being installed as a part of the plant in the foundry of the assessee. There is no material whatsoever to show that there was any intention at the time when the furnaces were purchased of sel-

ling them at a profit. According to Mr. Sen himself the assessee decided to sell the furnaces because it was discovered that they were too big to be installed in the manufacturing plant. The case of the assessee throughout was and no evidence or material to the contrary existed that the furnaces had been shown in the books of the assessee under the classification "workshop equipment". The same entries existed in the balance sheet. Although the assessee was dealing in the sale of heavy machinery and machinery parts it was nowhere proved that furnaces were ever manufactured or sold by it or were part of its business or ingraind therein. The arc furnaces were either fixed assets or discarded goods which had been found to be unserviceable or unsuitable. The assessee could therefore hardly be said to be a dealer within the definition given in S. 2 (b) of the Central Act which is:

"dealer" means any person who carries on the business of selling goods, and includes a Government which carries on such business".

This definition has to be read in the light of the principles which have been laid down by this court in the cases referred to above.

5. It must therefore be held that the High Court rightly came to the conclusion that the sale proceeds of the furnaces could not be included in the turnover of the assessee for the purpose of determining the liability of the assessee to sales tax. The appeal fails and is dismissed with costs.

D.R.R.

Appeal dismissed.

AIR 1969 SUPREME COURT 351
(V 56 C 69)

(From: Allahabad)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Baladin Ram (In both the Appeals),
Appellant v. Commissioner of Income-tax,
U. P. (In both the Appeals), Respondent.

Civil Appeals Nos. 663 and 664 of 1966,
D/- 21-8-1968.

(A) Income-tax Act (1922), S. 2 (11) (i)
(a) — Account in respect of income from
undisclosed source — No accounts main-
tained — No option under S. 2 (11) (i) (a)
exercised — Such income to be assessed
on basis of financial year being previous

* (I. T. Ref. No. 244 of 1959, D/- 2-1-1964
— All.).

BM/CM/E173/68

year — Position under new Act is the same — Income-tax Act (1961), S 68

Where there was nothing to show that any accounts in respect of the income from undisclosed source existed or were maintained or that the assessee exercised any option under S 2 (11) (i) (a) in respect of such accounts, the only course open to the department was to tax his income from undisclosed source on the basis of the financial year being the previous year AIR 1955 Pat 478 and AIR 1960 All 722 and (1963) 49 ITR 633 (Cal), Relied on. (Para 2)

Even under the provisions embodied under the new Act of 1961 it is only when any amount is found credited in the books of an assessee that Section 68 of the new Act will apply. On the other hand if the undisclosed income was found to be from some unknown source or the amount represents some concealed income which is not credited in his books the position would probably not be different from what it was when the old Act was in force. (Para 3)

(B) Income-tax Act (1922), S 34 (1) (a) — Whether omission or failure to disclose fully and truly all material facts must be found to be wilful and deliberate? AIR 1956 Cal 197, Ref (Quaere) (Para 4)

Cases Referred: Chronological Paras
(1963) 1963-49 ITR 633, Jethmal v Commr of Income-tax 2

(1960) AIR 1960 All 722 (V 47) = 1960-39 ITR 534 Bisban Dutt v Commr of Income-tax, U P and V P 2

(1956) AIR 1956 Cal 197 (V 43) = 1956-38 ITR 535, P R. Mukherjee v Commr of Income-tax, West Bengal 4

(1955) AIR 1955 Pat 478 (V 42) = 1955-27 ITR 515, Commr of Income-tax, Bihar and Orissa v P Darolia and Sons 2

Mr S C Manchanda, Senior Advocate (Mr J P Goyal, Advocate with him) for Appellant (In both the Appeals) Mr D Narsaraju, Senior Advocate (M/s T A. Ramchandran and S P Nayar Advocates with him) for Respondent (In both the Appeals)

The following Judgment of the Court was delivered by

GROVER, J In these appeals by special leave the facts may be stated. The assessee at the material time was a Hindu Undivided Family. The relevant assessment year is 1944-45 corresponding to the

accounting year ending on Diwala Samvat 2000 (October 28, 1943). On February 20, 1945 the income-tax Officer made an assessment on a total income of Rupees 26,800 odd which comprised income from the share in the business of Kasi Iron Foundry and the income from the property. This order was revised under S 34 of the Indian Income-tax Act, 1922 hereinafter called the Act. In the revised assessment order the total income of the assessee was computed at Rs 71,731/. In this amount a sum of Rs. 40,000/- was included as income from undisclosed sources. This assessment was challenged before the Appellate Tribunal and was set aside on the ground that there had not been proper service of a notice under S 34. A fresh notice under S 34 was issued in October 1951. On October 16, 1952 a revised assessment order was passed and the total income of the assessee was computed at Rs 85,817/- which included a sum of Rs 49,696/- as income from undisclosed sources. On March 31, 1953 the Income-tax Officer served on the assessee another notice under S 34 in respect of the same assessment year 1944-45. On March 18, 1954 a revised assessment was made in which was included a sum of Rs 32,000/- as the assessee's income from undisclosed sources being the alleged investment of the assessee in the Sarpat and bamboo business prior to February 18, 1944. The total income of the assessee was computed at Rs 1,17,781/-. The income from undisclosed source which came to be included in this computation amounted to Rs 61,696/-. The assessee filed appeals against the assessment order dated October 16, 1952, contending inter alia that there had been no escapement of any income and that in any case the first revised assessment dated October 16, 1952 was barred by time under S 34 (1) (b) of the Act as the provisions of S 34 (1) (a) did not apply. The second revised assessment was challenged on the ground, inter alia, that the Income-tax Officer had no jurisdiction to issue the notice under S 34 as the material facts necessary for making the assessment were fully and truly disclosed to the Income-tax Officer during the assessment proceedings for the year 1945-46. That appeal was also dismissed. Thereafter the assessee filed two appeals before the Income-tax Appellate Tribunal. Before the tribunal it was contended by the assessee that the first revised assessment dated October 16, 1952 was barred by

limitation and that the period of limitation was four years under S. 34 (1) (b) and not eight years under S. 34 (1) (a). The second revised assessment was challenged on the ground that the Income-tax Officer had no jurisdiction to issue a notice and make assessment under S. 34. It was argued that the investment, expenditure and the profits earned from the business of Sarpat and bamboo had been duly shown. As regards the first revised assessment the tribunal held that the income of the assessee from the firm Rajnarain Durga Prasad had escaped assessment by failure on the part of the assessee to disclose fully and truly all the facts necessary for making the assessment and that the provisions of S. 34 (1) (a) were attracted and therefore the period of limitation was eight years and not four years. With regard to the second revised assessment it was urged that all the materials necessary for making the assessment were before the Income-tax Officer and by issuing a notice under S. 34 the Income-tax Officer had changed his opinion and a mere change of opinion did not authorise the Income-tax Officer to take recourse to S. 34. The tribunal disposed of the argument with regard to the second revised assessment in the following words:

"The Income-tax Officer who made the assessment for 1945-46 might have had all the accounts of the business in Sarpat and bamboos before him and might have known the investments made by the assessee in that business. The question for consideration is whether the Income-tax Officer had reason to believe that by the failure on the part of the assessee to fully and truly disclose all the material facts necessary for the making of the assessment for the year 1944-45, income had escaped assessment. Surely, even if the Income-tax Officer had known that the investments made by the assessee in that business were his revenue income, he could not have proceeded u/s 34 because the income could not have been assessed in the assessment year 1945-46. It could be assessed in the assessment year 1944-45. The income appearing by way of deposits in the sarpat business could be assessed only as income from some undisclosed source and the previous year for income from undisclosed source for which the assessee had not elected any previous year would be the financial year. The investments were made in the financial year relevant for the assessment year 1944-45 and were not made in the

financial year relevant for the assessment year 1945-46. The Income-tax Officer had, therefore, no choice but to resort to Section 34 of the Act."

The tribunal, however, found as is apparent from its order dated March 21, 1957 that the unexplained investment which was really the income of the assessee from undisclosed source was Rupees 27,875 instead of Rs. 32,000. The tribunal called for a report on certain other matters with which we are not concerned and which were disposed of by subsequent order dated August 31, 1958. On a petition filed under S. 66 (1) of the Act the tribunal referred the following question to the High Court for decision:

"Whether on the facts and in the circumstances of the case the revised assessments under Section 34 dated 16th October, 1952 and 18th March, 1954 are legal and valid."

As regards the first revised assessment the High Court was of the view that even if the provisions of Section 34 (1) (b) were to apply the assessment could not be said to be barred by time nor could it be said to be barred under S. 34 (1) (a) as the assessee had failed to show that the Income-tax Officer was aware that the assessee had received income from its share in the firm. The question was consequently answered in the affirmative so far as the assessment order dated October 16, 1952 was concerned. The assessment order of March 18, 1954 was challenged before the High Court on the ground that there was no default on the part of the assessee attracting applicability of Section 34 (1) (a). It was noticed by the High Court that although the Income-tax Officer had, during the proceedings for the assessment year 1945-46, made an enquiry about the investments in sarpat and bamboo business no action had been taken in those assessment proceedings against the assessee but it could not be presumed that he had accepted the explanation of the assessee. Having held that the investment represented income from undisclosed source he was bound to treat it as income which accrued in December 1943 when it was invested, being the income during the financial year 1943-44 and therefore it had to be taxed in the assessment year 1944-45. The question referred was answered in the affirmative with regard to the assessment order of March 18, as well.

2. The argument of Mr. S. C. Manchanda in respect of the assessment made in October 1952 is that there was no failure on the part of the assessee to disclose material facts. It is submitted that the share income of the assessee's son from the firm Raj Narain Durga Prasad could not be shown in the assessee's return as the accounting period of that firm closed on April 1, 1944 which was well after the close of the previous year of the assessee which ended on October 28, 1943. It is said that neither the income of the firm nor the share of the assessee's son had been determined till then and it was not possible for the assessee to show the said income in his return. Moreover the Income tax Officer had knowledge of the assessee's interest in the firm Ramnaram Durgaprasad on May 12, 1947 when the assessment for the year 1945-46 was made. Thus the escapement, if any, has not resulted from any default or omission on the part of the assessee. The High Court had disposed of this contention by observing that there was no finding in the order of the appellate tribunal that the share of the income from the said firm was not known at the time when the return was filed. It was admitted that the return filed by the assessee did not disclose that the assessee enjoyed income from his share in that firm. It was no longer open to the assessee to press this contention particularly when the burden lay upon him to show that the Income-tax Officer was aware that the assessee received income from his share in that firm. Mr Manchanda has not been able to persuade us to take a different view in the matter. The real challenge on behalf of the assessee before us has been to the amount which was included as income from undisclosed source in the revised assessment order made in March 1954 being the capital which had been invested in the business of sarpat and bamboos. This amount, as found by the tribunal, came to Rs. 27,000 odd and had been invested in partnership with Ram Narain Durga Prasad for the business of the supply of sarpat and bamboo to the Government, the investment having been made between December 8, 1943 and February 17, 1944. According to Mr. Manchanda no income from the aforesaid business could be shown in the return for the year 1944-45 because the business itself had been commenced after the close of the relevant previous year which ended on October 28, 1943. For the

assessment year 1945-46, however, a sum of Rs. 1,640 was assessed as the assessee's income in this joint venture. During the course of the assessment proceedings for the year 1945-46 the assessee is stated to have filed an affidavit before the Income-tax Officer giving details in respect of the sarpat and bamboo business. Mr. Manchanda has invited our attention to the definition of "previous year" as contained in Section 2 (11) of the Act at the relevant period and has pointed out that the sarpat and bamboo business did not fall within the year upto which accounts had been made i. e., October 28, 1943. It was verily impossible, says Mr. Manchanda to have shown in the return any amount relating to sarpat and bamboo business. The method to be adopted in such a situation has now been settled by a long course of decisions. In Commissioner of Income-tax, Bihar and Orissa v. P. Darolia and Sons, (1955) 27 ITR 515 = (AIR 1955 Pat 478) the facts were that for the assessment year 1947-48 the accounting year of the assessee was the Diwali year corresponding to November 4, 1945 to October 24, 1946. The Income-tax Officer rejected the books of the assessee and ascertained his income from the business at an estimate for that year. He also added to this estimate certain cash credits in its account books entered on the 22nd and 27th of November, 1945, as secret profits from undisclosed sources which dates were after the end of the accounting year. It was found that the amount included as secret profits from undisclosed source was not from the business of the assessee but from a separate source and no account was maintained by the assessee in respect of the amount nor had it exercised any option as regards the previous year with respect to that source. It was held that in the aforesaid circumstances the previous year of the assessee in respect of its undisclosed source of income was the financial year ending on March 31, 1946. In Bisban Dutt v. Commr. of Income-tax U. P. and V. P., (1960) 39 ITR 534 = (AIR 1960 All 722) the previous year of the assessee for the assessment year 1945-46 in respect of his cloth business was July 4, 1943 to June 28, 1944. In the account books of that business for that period a sum of Rs. 9,800/- appeared as credit in the suspense account on September 2, 1943. The Income-tax Officer, in the absence of a satisfactory explanation, held this amount to be income from undisclosed source.

The view expressed by the High Court was that there being nothing to show that any accounts in respect of the undisclosed source of income existed or were maintained or that the assessee exercised any option under S. 2 (11) (i) (a) in respect of such accounts, the only course open to the department was to tax his income from undisclosed source on the basis of the financial year being the previous year. On that basis the amount could be taxed only for the assessment year 1944-45 and not for the assessment year 1945-46. On similar facts the Calcutta High Court expressed the same view in *Jethmal v. Commissioner of Income-tax*, (1963) 49 ITR 633 (Cal). By now it appears to be well settled and no decision even of a High Court has been cited to the contrary that in such circumstances the only possible way in which such undisclosed income can be assessed or reassessed is to make the assessment during the ordinary financial year.

3. Mr. Manchanda has called our attention to S. 68 of Income-tax Act 1961 according to which where any sum is found credited in the books an assessee maintained for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory the sum so credited may be charged to income-tax as the income of the assessee of that previous year. It is, however, obvious that even under the provisions embodied under the new Act it is only when any amount is found credited in the books of an assessee that the section will apply. On the other hand if the undisclosed income was found to be from some unknown source or the amount represents some concealed income which is not credited in his books the position would probably not be different from what was laid down in the various cases decided when the Act was in force.

4. The last argument of Mr. Manchanda is that in order to attract the applicability of S. 34 (1) (a) of the Act the omission or the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment must be found to be wilful and deliberate. In support of his submission he has relied on *P. R. Mukherjee v. Commissioner of Income-tax, West Bengal*, (1956) 30 ITR 535 = (AIR 1956 Cal 197) in which it was observed that a person

cannot be said to have omitted or failed to disclose something when, of such thing, he has no knowledge and that a similar implication is carried by the word "disclose" because one cannot be expected to disclose a thing unless it is a matter which he knows or knows of. It is altogether unnecessary to decide whether this view is sustainable or not. At any rate, in the present case, the assessee had failed to show that he did not know and was not aware of the true position in respect of the sum of Rs. 27,000/- odd which was invested in the sarpat and bamboo business.

5. For all these reasons the appeals fail and are dismissed with costs.

R.G.D.

Appeals dismissed.

AIR 1969 SUPREME COURT 355 (V 56 C 70)

(From: Punjab)*

S. M. SIKRI, R. S. BACHAWAT AND
A. N. GROVER, JJ.

State of Punjab, Appellant v. Brij Lal
Palta, Respondent.

Criminal Appeal No. 173 of 1968, D/-
26-8-1968.

(A) Criminal P. C. (1898), S. 195 (1) (b) and (1) (a) — F. I. R. alleging certain cognizable offences — Informant filing complaint before Magistrate making same allegations — Allegations found to be false by Police — Magistrate cannot take cognizance of offences under Ss. 182, 211 and 193 Penal Code — Penal Code (1860), Ss. 182, 211, 193. AIR 1928 All 765, Overruled.

Once a complaint filed by the informant which is based on the same facts and allegations on which the first information was registered, is being proceeded with it is not open to a Magistrate to take cognizance of any offence alleged to have been committed under S. 211 Penal Code unless there has been proper compliance with the provisions of S. 195 (1) (b) Cri. P. C. AIR 1967 SC 528, Foll. AIR 1928 All 765, Overruled. Case law reviewed. (Para 7)

It is true that the offence under S. 182, Penal Code is distinct from the one under S. 211, Penal Code though the latter is more serious and may include the offence

* (Cri Revn. No. 34-M of 1965, D/-
4-2-1966 — Punj.).

BM/BM/E190/68

under the former section. The Magistrate can take cognizance of an offence under S. 182 on a complaint in writing of the police officer by virtue of the provisions contained in S. 195 (1) (a) of the Cr. P. Code. But it would virtually lead to the circumvention of the provisions of S. 195 (1) (b) if the proceedings under S. 182 can continue where the offence disclosed is covered by S. 211, Penal Code and a complaint is pending which has been filed by the informant on the same facts and allegations as were contained in his first information report. Similarly on a parity of reasoning with regard to an offence under S. 211, no cognizance can be taken by the Magistrate for the alleged offence under S. 193 Penal Code which is one of the sections mentioned in S. 195 (1) (b) Cr. P. C. AIR 1943 Lah 81, Disting. (Paras 8, 9)

(B) Criminal P. C. (1898), Ss. 207-A, 173 and 195 — Penal Code (1860), Ss. 211, 182 — Letter to Police alleging certain cognizable offences — F. I. R. registered on the basis of the letter and investigation started — Informant filing complaint before Magistrate against the same persons making the same allegations—Police Report filed under S. 173 stating that the allegations were false — Charge-sheet submitted by police against Informant under Ss. 408, 467, 474, 193, 385, 109, 211 and 182 Penal Code — Prosecution for offences under Ss. 182, 211 and 193 could not continue for non-compliance of S. 195 (1) (b) Cr. P. C. — Quashing of entire prosecution case held illegal — There could be no objection to the continuance of proceedings relating to the non-cognizable offences under the other sections. C. R. No. 34-M of 1965 D/- 4-2-1966 (Punjab), Reversed. AIR 1965 SC 1185, Rel. on. (Para 10)

Cases Referred: Chronological Paras

- (1967) AIR 1967 5C 528 (V 54) = 1967-1 SCR 520 = 1967 Cri LJ 528, M. L. Sethi v. R. P. Kapur 7
(1965) AIR 1965 SC 1185 (V 52) = 1965 (2) Cri LJ 250, Pravin Chandra Mody v. State of Andhra Pradesh 10
(1962) AIR 1962 Raj 149 (V 49) = 1962 (1) Cri LJ 760, Ramdeo v. State of Rajasthan 8
(1946) AIR 1946 Bom 7 (V 33) = 47 Cri LJ 321, Bajaji Appaji v. Emperor 5
(1943) AIR 1943 Lah 81 (V 30) = 44 Cri LJ 305, Nola Ram v. Emperor 8

- (1939) AIR 1939 Nag 228 (V 28) = 40 Cri LJ 638, Sarup Singh Murat Singh v. Emperor 6
(1932) AIR 1932 Cal 383 (1) (V 19) = 33 Cri LJ 514, Lachmi Shaw v. Emperor 4
(1931) AIR 1931 Mad 702 (V 18) = ILR 54 Mad 1018 = 32 Cri LJ 1215, K. Dholiah v. King Emperor 5
(1928) AIR 1928 All 765 (V 15) = ILR 51 All 382 = 29 Cri LJ 938, Emperor v. Prag Datt 5
(1925) AIR 1925 Pat 483 (V 12) = ILR 4 Pat 323 = 26 Cri LJ 889, Mohammad Yasin v. Emperor 5
(1917) AIR 1917 Cal 593 (V 4) = ILR 43 Cal 1152 = 18 Cri LJ 13, Tayebulla v. Emperor 4
(1917) AIR 1917 Cal 596 (V 4) = ILR 44 Cal 850 = 18 Cri LJ 25, Brown v. Anandlal 4
(1910) 11 Cri LJ 354 = 14 Cal WN 765, Munshi Isser v. King Emperor 4
(1906) 4 Cri LJ 68 = 4 Cal LJ 188, Gati Mandal v. Emperor 4
(1887) ILR 14 Cal 707 (FB), Queen Empress v. Sham Lal 4

Mr. R. N. Sachthey, Advocate, for Appellant; Respondent in person.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave against the judgment of the High Court of Punjab quashing the proceedings pending against the respondent in the court of a Magistrate at Faridkot under Ss. 408, 467, 471, 381, 385, 182, 211, 193 and 109, Indian Penal Code.

2. The factual position as it emerges out of a confused mass of facts stated in the petitions filed under S. 561-A in the High Court and the affidavits etc., may be briefly stated. The respondent submitted an application to the Assistant Superintendent of Police, Faridkot, on November 3, 1963 for registration of a case under Ss. 420 and 406 read with Ss. 34, 120-B of the Indian Penal Code against Shibbu Ram Mittal a Director of Shiv General Finance (P) Ltd., New Delhi, who was originally stated to be residing at Kot Kapura and certain other persons who were the directors of the aforesaid company or connected therewith. The main allegations made by the respondent were that he was induced by Shibbu Ram Mittal to part with a sum of Rs. 25,000/- for the purchase of pro-

property in Delhi with an assurance that the property when purchased would yield profits. The payment of this amount was alleged to have been confirmed by P. D. Srivastava, Managing Director of the said company by a letter dated April 28, 1962. Out of this amount a sum of Rs. 10,000/- was alleged to have been paid over to Om Parkash Gupta Director and Secretary of the company. As no property was purchased by Shibbu Ram Mittal the respondent pressed for the refund of the amount. On October 5, 1963, a sum of Rs. 1500/- was refunded in part payment. The respondent got a report noted in the police station Paharganj, New Delhi, on that date regarding the factum of a visit to Delhi for the purpose of claiming the refund of the entire amount. According to him he pressed for the payment of the balance of the amount of Rs. 23,500/- but ultimately he was told that no amount had ever been entrusted by him to Shibbu Ram Mittal and that all the documents on which he relied were forged. It appears that on the basis of the letter addressed by the respondent to the Assistant Superintendent of Police, First Information Report No. 4 dated January 16, 1964 was registered at the Police Station Kotwali, Faridkot. After investigation Shri Sita Ram, District Inspector, Bhatinda filed a police report dated March 18, 1965 under S. 173 of the Code of Criminal Procedure. In this report it was stated that as a result of the investigation it had been found that the case of the respondent as made out in his application on which the First Information Report had been registered was altogether false and it was the respondent and one Hukum Chand who had been guilty of various offences including forgery. A charge sheet was submitted against them under Ss. 408, 467, 474, 193, 385, 109, 211 and 182 of the Indian Penal Code. Meanwhile on 16-2-1965 the respondent filed a complaint before a Magistrate, First Class at Faridkot against Shibbu Ram Mittal and others making the same allegations which he had made in the application submitted to the Assistant Superintendent of Police on the basis of which the First Information Report No. 4 was registered. The respondent filed a petition under S. 561-A of the Cr. P. C. in the High Court for quashing the proceedings pending against him. Although in that petition a number of points were raised the decision of the High Court rested mainly on the ground that until the First

Information Report which had been registered at the instance of the respondent had been cancelled by the Magistrate it was not open to the police to ask for prosecution of the respondent for the alleged offences. The High Court also referred to the complaint which had been filed by the respondent on the same allegations on which the First Information Report had been registered and which was still pending.

3. The learned counsel for the State contends that there is no warrant for the view expressed by the High Court that once the First Information Report had been registered it had to be cancelled by the Magistrate either under S. 169 or under any other section of the Cr. P. C., before a charge sheet could be submitted disclosing the offences committed by the informant himself including offences under Ss. 182 and 211 of the Penal Code. It is not necessary to decide this point in view of our decision on the second point.

4. It has been contended by the respondent — this point was raised in some form or the other even before the High Court — that in the presence of the complaint which has been filed by the respondent and which is pending before the Magistrate, the police cannot ask for his prosecution for alleged offences under Ss. 182, 211 and 193 of the Penal Code. The respondent has filed an affidavit dated October 22, 1966 in this court in which it has been stated in para 11 that the complaint instituted by him had been referred to the Tehsildar, Faridkot, who had the powers of a Magistrate, 2nd Class in December 1965 for making a report. That Magistrate made a report dated January 7, 1966 that a prima facie case had been made out under Ss. 420/409 read with S. 34 of the Penal Code against Shibbu Ram Mittal and others. Thereafter all these accused persons had been ordered to be summoned by Shri Dina Nath, Judicial Magistrate, First Class, Bhatinda, on April 18, 1966 to appear on May 3, 1966. Shibbu Ram Mittal and others filed a Revision Petition before the Sessions Judge, Bhatinda, against that order but their petition was rejected. No counter-affidavit has been filed controverting those facts. At any rate, it is not disputed that a complaint containing allegations on the same facts which were alleged in the letter of the respondent to the Assistant Superintendent of Police on the basis of which the First Information Report was registered is pending and pro-

ceedings in accordance with law are being taken pursuant thereto. The respondent has invited our attention to a number of cases, some of which may be noticed, in which a view has been taken that during the pendency of a complaint proceedings cannot be held against the complainant for offences under Ss. 182 and 211 of the Indian Penal Code till the disposal of the complaint. [See *Queen Empress v. Sham Lal*, (1887) ILR 14 Cal 707 (FB) *Gab Mandal v. Emperor*, (1906) 4 Cr LJ 68 (Cal) *Munshi Isser v. King Emperor*, (1910) 11 Cr LJ 354 (Cal) and *Lachmi Shaw v. Emperor* 33 Cr LJ 514 = (AIR 1932 Cal 383)] In *Tayebulla v. Emperor*, ILR 43 Cal 1152 = (AIR 1917 Cal 593) a Division Bench consisting of Mookerjee and Sheepshanks JJ made a distinction between a case where a false charge has been made to the police and has not been followed by judicial investigation thereof by the court and where the police makes a report as to the falsity of the information and the complainant insists on a judicial investigation. It was held that in the former case no complaint under S 195 (1) (b) of the Cr P. C., was necessary but in the latter case it should be deemed that a complaint had been preferred to the Magistrate and if the Magistrate found the case to be false sanction would be required as the offence could be said to have been committed in a proceeding in a court. In *Brown v. Anandalal Mullick*, ILR 44 Cal 650 = (AIR 1917 Cal 596) Sanderson C. J., delivering the judgment of the Division Bench went into the matter exhaustively and came to the conclusion that where an information to the police was followed by a complaint to the court based on the same allegations and the same charges and such a complaint had been investigated by the court the sanction or the complaint of the court itself was necessary for the prosecution of the informant under S 211 of the Indian Penal Code even in respect of the false charge made to the police.

5 The Madras High Court in *K. Dholiah v. King Emperor* ILR 54 Mad 1018 = (AIR 1931 Mad 702) had to deal with a case in which a person gave information to the police that certain persons had broken the seal and lock of a temple and entered it. After some investigation the police reported to the Magistrate that the case was false. Thereupon the original informant pressed the same complaint before the Magistrate who dis-

charged the accused persons under S 252 (2) of the Cr P. C., finding the charge against them to be groundless. Subsequently the police filed a complaint against the informant for giving false information and the Sub-Divisional Magistrate convicted him under S 182 of the Penal Code. The High Court held, setting aside the conviction, that as the complaint disclosed an offence under S 211 alleged to have been committed in relation to proceedings in a court the Magistrate could not take cognizance of the case without a complaint in writing by a Magistrate as required by S 195 (1) (b) of the Cr P. C. The Madras Court relied on the Calcutta decisions and referred to *Mohammed Yassin v. Emperor*, ILR 4 Pat 323 = (AIR 1925 Pat 483) in which the Calcutta view had been followed. The Madras Court, however, owing to the conflict between the various decisions, proceeded to say that where the charge was confined to an offence under S 182 it was doubtful whether a complaint by a Magistrate would be required. The Bombay High Court in *Bajaji Appaji v. Emperor*, AIR 1946 Bom 7 discussed numerous decisions given by the various High Courts and the conflict which existed on the question under consideration. In the Bombay case the facts were more or less similar to the present case and it was held that for the purpose of S 195, Cr P. C., the crucial date is the date when the court takes cognizance of the offence. So where the alleged false complaint is first made by A to the police and then to the Court a complaint under S. 211 Penal Code subsequently filed by the police against A is a complaint of an offence alleged to have been committed in or in relation to a proceeding in court and cannot be taken cognizance of except on a complaint of the court. In coming to that conclusion the Bombay High Court relied on two reasons: one is that the complaint before the police becomes merged in the subsequent complaint in court as is the view of the Calcutta High Court and the other is that by making a complaint to the court the informant has withdrawn information from the category of a mere police proceeding and has raised it to the category of a proceeding in a court. This was based on the observation of Ross J., in *Mohd. Yasin's case*, ILR 4 Pat 323 = (AIR 1925 Pat 483) (supra). *Dalal J.*, in *Emperor v. Prag Datt* ILR 51 All 382 = (AIR 1928 All 765) took a view contrary to that of Calcutta,

Bombay and Madras High Courts and held that when a false charge was made to the police and offence under S. 211 of the Penal Code was complete it could not be said that merely because a similar complaint was subsequently made to a court the offence was committed in or in relation to any proceeding in any court within the meaning of S. 195 (1) (b) of the Cr. P. C.

6. According to *Nota Ram v. Emperor*, AIR 1943 Lah 31 where an offence under S. 182 of the Penal Code is complete and prosecution is launched under it the proceedings cannot be quashed because the accused, not content with a false report to the police, subsequently makes a false complaint to the Magistrate and thereby exposes himself to a prosecution under S. 211 of the Penal Code. In *Sarup Singh Murat Singh v. Emperor*, AIR 1939 Nag 228; Pollock J., said that whether it was legal or not it was undesirable that the police should file a complaint under S. 182 where the informant whose report had been found to be false by the police had preferred a complaint to a Magistrate on the same facts. He had no doubt, however, that in such circumstances if the charge was under S. 211 a complaint of the court would be necessary. In *Ramdeo v. State of Rajasthan*, AIR 1962 Raj 149 it has been held that if a complaint by the police in respect to a commission of an offence under S. 182 of the Penal Code is filed after the complainant has preferred a complaint before the Magistrate the proceedings for prosecution of the complainant under S. 211 or S. 182 of the Penal Code on the police complaint are incompetent. Some of the reasons given by the learned Rajasthan Judge deserve notice. One is that if the police files a complaint for prosecution under S. 182 during the pendency of a complaint by the informant it will amount to assertion by the police of a right to prejudge the matter before judicial determination. The other is that such a course will impinge upon the safeguards provided for regulating and controlling prosecution in respect of offences against administration of justice and contempt of lawful authority in the Cr. P. C.

7. It seems to us that so far as prosecution under S. 211 of the Penal Code is concerned, once a complaint filed by the informant is being proceeded with which is based on the same facts and allegations on which the first information was registered it is not open to a Magis-

trate to take cognizance of any offence alleged to have been committed under that section unless there has been proper compliance with the provisions of S. 195 (1) (b) of the Cr. P. C. It will lead to very anomalous results if any other view is accepted e.g., if the complaint is ultimately dismissed and the Magistrate refuses to lodge a complaint under S. 195 (1) (b) its provisions will be defeated or circumvented if the police can move the Magistrate to take cognizance on a police report of an offence under S. 211. We are fortified in the view we are taking by the following observations at p. 528 (of SCR) = (at p. 532 of AIR) in *M. L. Sethi's case*, 1967-1 SCR 520=(AIR 1967 SC 528).

"The question on which the decision in the present case hinges is whether it can be held that any proceedings in any Court existed when that Magistrate took cognizance. If any proceeding in any Court existed and the offence under S. 211, Cr. P. C. in the complaint filed before him was alleged to have been committed in such a proceeding, or in relation to any such proceeding, the Magistrate would have been barred from taking cognizance of the offence. On the other hand if there was no proceeding in any Court at all in which, or in relation to which, the offence under S. 211 could have been alleged to have been committed, this provision barring cognizance would not be attracted at all."

8. As regards the position in similar circumstances in respect of an offence under S. 182, the conflict of judicial opinion has already been noticed. The text books are full of a vast number of cases taking one view or the other. In our opinion the present case is of the type where the facts stated in the police report disclosed an offence under S. 211, Indian Penal Code. It is true that the offence under S. 182 is distinct from the one under S. 211 though the latter is more serious and may include the offence under the former section. The Magistrate can take cognizance of an offence under S. 182 on a complaint in writing of the police officer by virtue of the provisions contained in Section 195 (1) (a) of the Cr. P. Code. But it would virtually lead to the circumvention of the provisions of Section 195 (1) (b) if the proceedings under Section 182 can continue where the offence disclosed is covered by Section 211, Indian Penal Code and a

complaint is pending which has been filed by the informant on the same facts and allegations as were contained in his first information report.

9. On a parity of reasoning which has prevailed with us with regard to an offence under Section 211 of the Penal Code no cognizance can be taken by the Magistrate for the alleged offence under Section 193 of the Penal Code which is one of the Sections mentioned in Section 195 (1) (b).

10. The next question is whether the other offences in respect of which a police report and a charge sheet have been submitted against the respondent can be proceeded with. The High Court has quashed the entire proceedings which would include offences other than those under Sections 182, 211 and 193. Some of them were even non-cognizable offences i. e., Sections 467, 471, 385 etc. It is well settled by now that while investigating the commission of a cognizable offence the police officer is not debarred from investigating any non-cognizable offence which may arise out of the same facts. He can include that non-cognizable offence in the charge-sheet which be presents for a cognizable offence. (Vide *Pravin Chandra Mody v. State of Andhra Pradesh*, AIR 1965 SC 1185.) There can be no objection therefore to the continuance of proceedings relating to offences alleged against the respondent other than those covered by Sections 182, 211 and 193 of the Penal Code.

11. The respondent sought to raise certain other points which do not appear to have been agitated before the High Court. For that reason it was considered neither proper nor necessary to go into them. We would, however, like to make it clear that to the extent they are not covered by our judgment it will be open to him to raise those points before the appropriate courts below.

12. In the result the appeal is allowed to the extent that the proceedings in respect of offences other than those under Sections 182, 211 and 193 shall continue but the proceedings in relation to offences under Sections 182, 211 and 193 which have been committed by the respondent shall stand quashed.

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AIR 1969 SUPREME COURT 360
(V 56 C 71)

(From Ind. Tri. W. B.)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

The Bengal Chemical and Pharmaceutical Works Ltd., Appellant v. Its Workmen and another, Respondents.

Civil Appeals Nos. 660 and 811 of 1966, D/- 16-9-1968.

Industrial Disputes Act (1947), Sch. III Item 2 — Revision of Dearness allowance, claim for — Considerations.

In considering a claim for revision of dearness allowance the following principles have to be considered:

1. Full neutralisation is not normally given, except to the very lowest class of employees.

2. The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living.

3. The basis of fixation of wages and dearness allowance is industry-cum-region.

4. Employees getting the same wages should get the same dearness allowance, irrespective of whether they are working as clerks or members of subordinate staff or factory workmen.

5. The additional financial burden which a revision of the wage structure or dearness allowance would impose upon an employer, and his ability to bear such burden, are very material and relevant factors to be taken into account.

Normally, however, when a claim for revision of dearness allowance is made and a rise in the cost of living index has been established, such a claim has to be considered on its merits. Further no general formula can be laid down as to the date from which a Tribunal should make its award effective and that question has to be decided by the Tribunal on a consideration of the circumstances of each case. Held on facts that the Tribunal did not adopt a wrong approach in providing for a sliding scale of increase or decrease of Re. 1 for rise or fall of five points in the cost of living index. The number adopted by the Tri-

*(Case No. VIII-260 of 1963, D/- 14-1-1965—Ind. Tri. W. B.)

BM/BM/ES60/68

bunal was however changed. AIR 1964 SC 689 and AIR 1963 SC 1327 and AIR 1966 SC 497 and AIR 1967 SC 1175 and AIR 1957 SC 78 and (1962) 1 Lab LJ 287 (SC), Ref. (Paras 23, 24, 26 and 33)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 182 (V 56) = Civil App. No. 1934 of 1967, D/- 30-4-1968, Hydro (Engineers) Pvt. Ltd. v. The Workmen 64
(1968) Civil App. No. 44 of 1968, D/- 1-5-1968 (SC), Burmah Shell Oil Storage and Distributing Co. Ltd. v. Its Workmen 41
(1967) AIR 1967 SC 1175 (V 54) = (1967) 2 SCR 463, Kamani Metals and Alloys Ltd. v. Their Workmen 22, 83
(1966) AIR 1966 SC 497 (V 53) = (1966) 1 SCR 382, Ahmedabad Mills Owners Association v. Textile Labour Association 21
(1964) AIR 1964 SC 689 (V 51) = (1964) 5 SCR 362, Greaves Cotton and Co. v. Their Workmen 20
(1964) AIR 1964 SC 864 (V 51) = (1963) Supp 2 SCR 862, Management of Wenger and Co. v. Workmen 38
(1964) 1964-1 Lab LJ 451 = (1964) 8 Fac LR 12 (SC), Workmen of Jessop v. Jessop and Co. 40, 41
(1963) AIR 1963 SC 1327 (V 50) = (1963) Supp 2 SCR 16, French Motor Car Co. Ltd. v. Workmen 20
(1963) AIR 1963 SC 1332 (V 50) = (1964) 1 SCR 234, Hindusthan Times Ltd. N. Delhi v. Their Workmen 11, 15, 19, 28, 32, 35
(1962) 1962-1 Lab LJ 287 = (1962) 4 Fac LR 508 (SC), Remington Rand of India v. Its Workmen 16, 26
(1962) 1962-2 Lab LJ 352 = (1962) 5 Fac LR 350 (SC), Workmen of Hindusthan Motors v. Hindusthan Motors 11, 19, 20, 28
(1959) AIR 1959 SC 633 (V 46) = (1959) Supp 2 SCR 136, Bengal Chemical Pharmaceutical Works Ltd. v. Their Workmen 8
(1957) AIR 1957 SC 78 (V 44) = 1956 SCR 772, Clerk of Calcutta Tramways v. Calcutta Tramways Co. Ltd. 18

Mr. H. R. Gokhale, Sr. Advocate, (M/s. B. P. Maheshwari and N. M. Shetye, Advocates, with him), for Appellant (In C. A. No. 660 of 1966) and Respondent No. 1 (In C. A. No. 811 of 1966); M/s. D. L. Sen Gupta, Janardan Sharma and

S. K. Nandy, Advocates for the Appellant (In C. A. No. 811 of 1966) and Respondent No. 1 (In C. A. No. 660 of 1966); Mr. A. S. R. Chari, Advocate, (Mr. D. N. Mukherjee, Advocate with him), for Respondent No. 2 (In both the Appeals).

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: In these two appeals, by special leave, the company and the workmen's Union attack the award of the Industrial Tribunal, West Bengal, dated January 14, 1965, in so far as it is against each of them. The Government of West Bengal, by its order dated November 5, 1963, referred for adjudication six issues, viz:

1. Revision of dearness allowance;
2. Revision of the scheme of gratuity;
3. Age of superannuation;
4. Leave and holidays;
5. Canteen facilities; and
6. Shift allowance for supervisors.

2. In both these appeals we are concerned only with issues Nos. 1 to 3. With regard to dearness allowance, the Tribunal had directed that it should stand revised from November 1963. It provided a sliding scale for an increase or decrease of Re. 1 for rise or fall of five points in the cost of living index, with retrospective operation from November, 1963. It further directed that the dearness allowance payable for each month from November 1963 shall be recalculated on that basis and additional amounts due to workmen should be paid in two monthly instalments after the date of publication of the award. There was a further direction to the effect that the dearness allowance for any particular month shall be calculated on the basis of average cost of living index for three immediately preceding months. Regarding gratuity, the Tribunal effected certain modifications to the then existing scheme of gratuity, under Rules 1, 2 and 3. The Tribunal increased the maximum gratuity payable to 15 months' salary, but deleted the provision contained in the scheme that the maximum should not exceed Rs. 4,000. In Rule 2, it further directed the deletion of the qualifying period of 10 years continuous and approved service. It also modified the provisions of Rule 3 by providing for payment of gratuity less any financial loss that has been caused to the employer as a result of misconduct which necessitated the termination of service. It further provided that in case

of a workman leaving service without notice or terminating his employment without the permission of the company, in order to enable him to get gratuity he should have put in service of ten completed years or more. The Tribunal increased the existing age of superannuation from 55 years to 58 years.

3. The Union, in its appeal C. A. No. 811 of 1968, attacks the award in respect of all the above matters, but so far as the company's appeal C. A. No. 660 of 1968 is concerned, though it has challenged the award, again, in respect of all the above matters to the extent to which they are against it, this Court has granted special leave, by its order dated April 28, 1965, only on the question of dearness allowance.

4. Before we proceed to deal with the contentions of the parties regarding the award in question, we can straightway dispose of two applications filed by the company C.M.P. No. 329 of 1967 has been filed by the company for leave to urge additional grounds to the appeal. By this application the appellant seeks permission to raise contentions regarding certain modifications effected by the Tribunal in the gratuity scheme. That is, substantially, the company attempts to reopen the limited leave given by this Court on April 28, 1965. The company has also filed C.M.P. No. 2860 of 1963 referring therein to certain subsequent proceedings and requesting this Court to take them into consideration in considering the question of dearness allowance. Both these applications are opposed by the Union and we see no reason to grant the requests contained in each of them. These two applications are accordingly dismissed.

5. We shall first take up the question of dearness allowance. While, on the one hand, the appellant wants a substantial reduction in the dearness allowance granted by the Tribunal, the Union, in its appeal, seeks a substantial increase in the dearness allowance granted by the award. We have already indicated the decision of the Tribunal in this regard.

6. Before we actually deal with the contentions of Mr. Gokhale, learned counsel for the company, and Mr. Chari and Mr. Sen Gupta, who followed him, for the Union it is necessary to refer to certain previous awards, as well as agreements, with reference to dearness allowance. Though there have been certain

awards prior to 1954, it is enough if we state the history, beginning from the agreement between the company and the Union, entered into on September 15, 1954. Under Clause 11 of this agreement it was provided that the then existing rate of dearness allowance would prevail, unless there was a substantial change in the working class cost of living index in which case the rate would be suitably adjusted. There is no controversy that the rate of dearness allowance, which was continued under this agreement, was Rs. 30 per month.

7. The issue relating to dearness allowance was referred, by the State of West Bengal, to Shri C. Palit, Fifth Industrial Tribunal, West Bengal. It is necessary to refer in some detail to the award of Shri Palit dated August 28, 1957, because the Industrial Tribunal, in the present case, has not chosen to go behind the said award. Shri Palit found that after the agreement of September 15, 1954, there had been a substantial increase in the cost of living index justifying the grant of an increased dearness allowance, as contemplated under Clause 11 of the agreement. According to him, in August 1954 the working class cost of living index stood at 344.1 and in August 1955 it came down to 338.4. It again went up to 391.4 in August 1956. Shri Palit has also stated that in May 1957 the cost of living index reached 400.6 points. Accordingly he has noted that there has been a rise of 56 points, from 344.1 in August 1954 to 400.6 in May 1957 and that the said increase justifies a revision of the original rate of dearness allowance. In considering the quantum of increase in dearness allowance that should be awarded, Shri Palit has again taken note of the fact that at 344 points in September 1954, at the time when the agreement was entered into, the dearness allowance was Rs. 30 per month, and that there is no dearness allowance up to 180 points of the cost of living index. According to him, the dearness allowance of Rs. 30 per month, in September 1954, represented the dearness allowance for the points in excess of 180 points viz., for 164 points and that this roughly worked out at Re. 1 dearness allowance for every 5½ points. On this basis Shri Palit held that to cover 56 points, rise (400 minus 344), the dearness allowance, which could be legitimately claimed by the Union, would be Rs. 10 odd, as it in fact appears to have been claimed. But, as normally only 75 per

cent neutralisation is granted and in view of the fact that the company, which was a chemical industry, was also in a tight corner, be held that full neutralisation should not be granted. On this reasoning Shri Palit allowed Rs. 7 as increase in dearness allowance on the pay scale up to Rs. 50 and increased dearness allowance of Rs. 5 thereafter, for the next Rs. 50 in the pay scale. In view of the fact that the company had already allowed an increase of dearness allowance of Rs. 2, Shri Palit directed that the increase of dearness allowance, as ordered by him, should be adjusted against the amount already paid by the company.

8. Both the company and the Union appealed to this Court against this award of Shri Palit. The decision of this Court is reported as *Bengal Chemical and Pharmaceutical Works Ltd., Calcutta v. Their Workmen*, (1959) Supp 2 SCR 136 = (AIR 1959 SC 683). Referring to the agreement dated September 15, 1954, this Court observed that the rate of dearness allowance, continued under that agreement, was accepted by the parties as reasonable on the date of the agreement till there was a substantial change in the working class cost of living index. This Court further stated that the findings given by Shri Palit were on facts and no permissible grounds had been shown for interference with it in an appeal by special leave. The award of Shri Palit was confirmed by this Court and the company's appeal was dismissed with costs. The Union did not press its appeal and that too was dismissed with costs.

9. On January 6, 1962 there was again a memorandum of settlement between the company and the Union, and under Clause 6 it was provided that the then existing slab of dearness allowance in relation to the basic pay of the employees would be increased by Rs. 3 and that the increase was to have effect from November 1, 1961. The Union made a demand, on May 21, 1962, for revision of the dearness allowance, scheme of gratuity and the age of superannuation. It also presented its demands, on September 8, 1962, to the Assistant Labour Commissioner, West Bengal. With reference to the revision of dearness allowance, the demand of the Union was that there should be hundred per cent neutralisation. As conciliation failed, a reference was made, by the State Government, on November 5, 1963. We have already indicated the nature of the directions given

in the award, in respect of dearness allowance.

10. The Tribunal, in the award in question, has, after elaborately referring to the agreement of September 15, 1954 as well as the award of Shri Palit and the settlement dated January 6, 1962, rejected the contention of the company that no case had been made out for a revision of the dearness allowance. In this connection the Tribunal referred to the chart, filed by the Union, regarding the cost of living index during the years 1961 to 1964 and has noted that the correctness of the chart had not been disputed by the company. It is of opinion that in January 1962, when the settlement was arrived at on January 6, 1962, the index number was 402 and, after referring to the index numbers in the various months between 1962 and 1964, it concluded that there had been a substantial increase in the cost of living index and hence a revision of the dearness allowance was necessary. The Tribunal no doubt took the view that the financial ability of the company to bear the additional burden, did not come in for consideration because by Clause 10 of the settlement dated January 6, 1962, the company had agreed to a modification of the dearness allowance if there was a substantial change in the working class cost of living index.

11. Regarding the rate of variation that had to be fixed, the company appears to have pressed for the acceptance of the principle laid down by this Court in *Hindusthan Times Ltd., New Delhi v. Their Workmen*, (1964) 1 SCR 234 = (AIR 1963 SC 1332) providing for the linking of the dearness allowance with the cost of living index. It also appears to have urged that the provision made in the said decision regarding dearness allowance that it should be increased or decreased by Re. 1 for a rise or fall in the cost of living index by 10 points should be adopted; that is, the appellants pressed that the variation should be linked to a variation of 10 points. On the other hand, the Union appears to have pressed for the acceptance of the method adopted by this Court in a case from West Bengal, in *Workmen of Hindusthan Motors v. Hindusthan Motors*, (1962) 2 Lab LJ 352 (SC) viz., of providing a sliding scale of an increase or decrease of Re. 1 for a rise or fall of every five points in the cost of living index.

12. The Tribunal has, after holding that it cannot go behind the award of Shri Palit as the said award had been confirmed by this Court, accepted the Union's contention that there should be an increase or decrease of dearness allowance by Re 1 for an increase or decrease of every 5 points in the cost of living index. It has also held that the cost of living index at the time when the agreement of January 6, 1962 was entered into was 402 and the dearness allowance of Rs 3 fixed under the said settlement could be referred only to the said figure of 402.

13 The Tribunal then considered the question as to from what date the revision of dearness allowance should be given effect to. Though the company contended that the award should become operative only from the date when it was given and the Union, on the other hand, contended that it should be given effect to from the date when the demand for revision was made by it, the Tribunal ultimately held that the increased dearness allowance granted by it should take effect from the month when the reference was made by Government, viz., November 1963.

14 Mr Gokhale, learned counsel for the company, has urged that the linking of dearness allowance at the rate provided in the award is not justified as it departs from the past practice evidenced by the various awards, as well as the agreements and settlements, entered into by the parties. The Tribunal, counsel urges, has given no special reason to depart from the method adopted on previous occasions. According to the learned counsel, the dearness allowance, if any, should have been given on an ad hoc or lump sum basis as had been done on prior occasions. Mr Gokhale also urged that the financial position, or capacity to bear the additional burden, that will be cast on the company by the grant of increased dearness allowance, which has been held by decisions of this Court to be a relevant factor to be taken into account, has not been considered at all by the Tribunal. In the alternative, counsel urges that even assuming that the method of linking, adopted by the Tribunal, was correct, a very serious mistake has been committed by the Tribunal when it has proceeded on the basis that the increase should be granted on the basis that there has been a rise over

the cost of living index of 402. According to Mr Gokhale, the evidence clearly shows that on the date of the settlement, viz., January 6, 1962, the cost of living index for January 1962 could not have been available and the parties had before them only the cost of living index for the month of November 1961, which was 421 points and it is on that basis that an increase of Rs. 8 was fixed in the settlement of January 6, 1962. Therefore any dearness allowance that is granted must have reference to a rise of the cost of living index above 421 points. Counsel also attacks the direction regarding effect being given to the award from November 1963.

15. While contesting the appeal of the company, Mr Chari, and Mr Sen Gupta, learned counsel for the Unions concerned, have urged that at no stage has the dearness allowance been fixed, in this company, on any scientific basis. According to the learned counsel, the agreement, entered into between the parties, should not be taken as indicative of the fact that complete neutralisation has been effected in the matter of fixing dearness allowance. According to them, Shri Palit has committed a fundamental error in assuming that in the 1954 agreement full neutralisation has been given. Counsel also point out that the extent or degree of neutralisation to be granted is not rigid and that though hundred per cent neutralisation is not normally given, nevertheless in the case of the lowest paid employees such neutralisation is permissible. Counsel also urged that the Tribunal has committed a mistake in not accepting the claim of the Union that the question of dearness allowance *will have to be considered entirely on the materials placed before it, without in any manner being influenced by the award of Shri Palit.* It is also pointed out that even the appellant wanted a sliding scale to be attached to the dearness allowance and provision made for the rate of dearness allowance being liable to be increased or decreased by Re 1 for a rise or fall in the cost of living index by every 10 points as will be seen from the fact that it pressed for the acceptance of the principle laid down by this Court in the *Hindusthan Tunes case*, (1964) 1 SCR 234 = (AIR 1963 SC 1332). It is further urged that the Tribunal was justified in granting dearness allowance for an increase over the cost of living index of 402, as that was the price index in the month

of January 1962 when the settlement between the parties was effected.

16. In the appeal, by the Union, regarding dearness allowance, Mr. Sen Gupta, learned counsel, urges that there should have been cent per cent neutralisation in the award of dearness allowance and that there should have been a complete *de novo* examination of the claim made by the Union for revision of dearness allowance, without being influenced by the award of Shri Palit. In this connection counsel refers to the decision of this Court in *Remington Rand of India v. Its Workmen*, (1962) 1 Lab LJ 287 (SC) where it has been held that when a rise in the cost of living index has been established, the claim for a revision of dearness allowance cannot be rejected without examining its merits solely on the ground that because a provision has been made for adjustment from time to time, by agreement of parties in a scheme, that scheme ought to remain in force for all time and cannot be re-opened or re-examined. Counsel further urges that in any event, the Tribunal should have given effect to its award from May 1962, when the Union had made the demand for revision of dearness allowance.

17. Before we deal with the contentions of the learned counsel, it will be desirable to refer to a few decisions of this Court laying down the principles that have to be borne in mind when a claim for dearness allowance or revision of dearness allowance is considered.

18. In *Clerks of Calcutta Tramways v. Calcutta Tramways Co. Ltd.*, 1956 SCR 772 = (AIR 1957 SC 78) it is observed:

"We can now take it as settled that in matters of the grant of dearness allowance except to the very lowest class of manual labourers whose income is just sufficient to keep body and soul together, it is impolitic and unwise to neutralise the entire rise in the cost of living by dearness allowance. More so in the case of the middle classes."

19. In the *Hindusthan Times* case, (1964) 1 SCR 234 = (AIR 1963 SC 1332) it is stated at p. 247 (of SCR) = (at p. 1338 of AIR):

"As was pointed out in (1962) 2 Lab LJ 352 (SC), the whole purpose of dearness allowance being to neutralise a portion of the increase in the cost of living it should ordinarily be on a sliding scale and provide for an increase on rise in the

cost of living and a decrease on a fall in the cost of living."

20. In *Greaves Cotton and Co. v. Their Workmen*, (1964) 5 SCR 362 = (AIR 1964 SC 689), after referring to the *Hindusthan Motors* case, (1962) 2 Lab LJ 352 (SC) and the *French Motor Car Co.'s* case, (1963) Supp 2 SCR 16 = (AIR 1963 SC 1327), this Court laid down that the basis of fixation of wages and dearness allowance is industry-cum-region and observed, at p. 368 (of SCR) = (at p. 693 of AIR)

"The principle therefore which emerges from these two decisions is that in applying the industry-cum-region formula for fixing wage scales the Tribunal should lay stress on the industry part of the formula if there are a large number of concerns in the same region carrying on the same industry; in such a case in order that production cost may not be unequal and there may be equal competition, wages should generally be fixed on the basis of the comparable industries, namely industries of the same kind. But where the number of industries of the same kind in a particular region is small it is the region part of the industry-cum-region formula which assumes importance particularly in the case of clerical and subordinate staff, for, as pointed out in the *French Motor Car Co.'s* case, (1963) Supp 2 SCR 16 = (AIR 1963 SC 1327), there is not much difference in the work of this class of employees in different industries."

Again, at p. 374 (of SCR) = (at p. 695 of AIR) it is stated:

"Time has now come when employees getting same wages should get the same dearness allowance irrespective of whether they are working as clerks, or members of subordinate staff or factory-workmen."

21. In *Ahmedabad Mill Owners' Association v. The Textile Labour Association*, (1966) 1 SCR 382 = (AIR 1966 SC 497) it has been emphasised that in trying to recognise and give effect to the demand for a fair wage, including the payment of dearness allowance to provide for adequate neutralisation, industrial adjudication must always take into account the problem of the additional burden which such wage structure would impose upon the employer and ask itself whether the employer can reasonably be called upon to bear such burden.

22. In *Kamani Metals and Alloys Ltd. v. Their Workmen*, (1967) 2 SCR 463 =

(AIR 1967 SC 1175) it has been noted that one-hundred per cent neutralisation is not advisable as it will lead to inflation and therefore dearness allowance is often a little less than one-hundred per cent neutralisation.

23 The following principles broadly emerge from the above decisions

1. Full neutralisation is not normally given, except to the very lowest class of employees

2. The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living.

3 The basis of fixation of wages and dearness allowance is industry-cum-region

4 Employees getting the same wages should get the same dearness allowance, irrespective of whether they are working as clerks or members of subordinate staff or factory workmen.

5 The additional financial burden which a revision of the wage structure or dearness allowance would impose upon an employer, and his ability to bear such burden, are very material and relevant factors to be taken into account.

24. Having due regard to the above principles, we are satisfied, in the instant case, that the Tribunal has made substantially a correct approach in considering the claim for revision of dearness allowance

25 We are not impressed with the contention of either the company or the Union that the Tribunal has committed an error in the matter of revising the dearness allowance. The company appears to have been more intent upon pressing that there has been no substantial increase in the cost of living since the settlement, dated January 6, 1962 and that, in any event, the Union, in view of Clause 10 of the settlement, was not entitled to ask for a revision of dearness allowance before the expiry of three years. The Tribunal has referred to the rise in the cost of living index after the date of the settlement of January 6, 1962, and it has also, in our opinion, quite rightly held that Clause 10 of the settlement is no bar for entertaining the claim, therefore, its decision that a revision of the dearness allowance should be made is perfectly correct.

26 The Tribunal is also justified in rejecting the contention of the Union that the revision of the dearness allowance must be made de novo, ignoring the previous award of Shri Palit. Though normally, when a claim for revision of dearness allowance is made and a rise in the cost of living index has been established, such a claim has to be considered on its merits, as held by this Court in the Remington Rand case, (1962) 1 Lab LJ 287 (SC), it cannot be lost sight of, in this case, that the decision of Shri Palit was affirmed by this Court and the appeals, filed by the company and the Union, were dismissed on the ground that the agreement of 1954 was reasonable and the findings of Shri Palit were all on facts. In view of this, the Tribunal, in our view, was perfectly justified in proceeding on the basis that the award of Shri Palit should form the basis for considering the nature of the revision of dearness allowance that would be permissible. We have already referred to the various matters, adverted to by Shri Palit in his award. If really the case of the Union was, as is now sought to be put before us, that the dearness allowance on prior occasions had not been fixed on any scientific basis and that Shri Palit erred in proceeding on such an assumption with reference to previous agreements, the proper stage when these questions should have been canvassed was in the Union's appeal, before this Court, against the award of Shri Palit. Having allowed that appeal to be dismissed as not pressed, it is no longer open to the Union to raise those contentions now. We are therefore satisfied that the Tribunal's view that Shri Palit's award should form the basis for further reconsideration of the claim for revision of dearness allowance is correct.

27 The Tribunal has no doubt stated that the financial ability of the company does not come in for consideration, as the company agreed, by the settlement of January 6, 1962, to pay increased dearness allowance if there was a substantial change in the cost of living index. It is true that the additional financial burden that will be thrown on the company by reason of the revision of dearness allowance is a very material and relevant factor to be taken into account in such circumstances but, in this case, we do not find in the written statement, filed by the company, any plea taken that if the claim of the Union, as made in its charter

of demands in respect of dearness allowance is accepted, it will cast a very heavy financial burden on the resources of the company. In the absence of any such plea having been taken, we consider it unnecessary to pursue this contention of the appellant any further.

28. There is the additional circumstance of the provision for modification, as contained in the settlement of January 1962. The appellant, so far as we can see, has not placed any material before the Tribunal regarding the comparable industries in the region. As pointed out by the Union, the company seems to have pressed for the grant of dearness allowance being liable to be increased or decreased by Re. 1/-, as was done by this Court in the *Hindusthan Times case*, (1964) 1 SCR 234 = (AIR 1963 SC 1332). The Union appears to have pressed for an increase or decrease of Re. 1/- in dearness allowance, with a rise or fall of every 5 points in the cost of living index. It is therefore obvious that the appellant also wanted linking of Re. 1/- for every 10 points. It must also be borne in mind that the alternative way propounded by the Union, for grant of dearness allowance has been rejected by the Tribunal. Under these circumstances it cannot be stated that the Tribunal has committed any error in accepting the claims of the Union, supported as it was by the decision of this Court in the *Hindusthan Motors case*, (1962) 2 Lab LJ 352 (SC).

29. Mr. Gokhale next urged that the view of the Tribunal that the increase of Rs. 3/- as dearness allowance, given in the settlement dated January 6, 1962, must have been on the basis that the index number was 402, was erroneous. The settlement was made on January 6, 1962, on which date the index number for January 1962 could not have been available to the parties. The last month for which the index number was available was for the month of November 1961 and it was 421. The index number at the time when the award was given by Shri Palit was about 400 and it was really for an increase of 21 points that Rs. 3/- as increment was provided in the settlement. Though when the Tribunal gave the present award the index number for January 1962 was already available, that figure could not have formed the basis of the settlement, and it is inconceivable that for a rise of only 2 points, i. e., from 400 in 1957 to 402 in 1962, a rise of Rs. 3/- in the dearness allowance would

have been provided for. Therefore the increase or decrease provided for by the Tribunal must really relate to the cost of living index of 421 points, and not to 402 points.

30. Mr. Sen Gupta, learned counsel for the Union, found considerable difficulty in supporting the reasoning in the award on this matter. We are in agreement with the contentions of Mr. Gokhale in this regard. The Chart, Exhibit 4, furnished by the Union, clearly shows that the index number in November 1961 was 421 points. It also shows that the index for January 1962 was 402 points, but the index for that month was not available till the end of January 1962 and it could not have been before the parties when the settlement was made on January 6, 1962. Therefore, the index number of 421 must have been taken into account on the date of the settlement and it must have been really for the increase of 21 points, after the date of Shri Palit's award, that the additional sum of Rs. 3/- was fixed as dearness allowance. If, on the other hand, the Tribunal's view is correct, there would have been only an increase of 2 points, from 400 to 402, and for that increase of 2 points, the sum of Rs. 3/- was fixed, as dearness allowance. In our opinion, that reasoning of the Tribunal cannot be accepted. Therefore the award of the Tribunal will have to be modified, in this regard, by directing that the sliding scale, providing for an increase or decrease of Re. 1/- for a rise or fall of every 5 points, must be related to the cost of living index of the base of 421 (that being the cost of living index for November 1961) and not of the base of 402, as directed by the Tribunal.

31. The last contention of Mr. Gokhale, bearing upon dearness allowance, is that the direction that the award will have retrospective effect from November 1963 is erroneous. In this connection Mr. Gokhale referred us to CL 10 of the settlement of January 6, 1962 stating that the settlement was to remain operative for three years. According to learned counsel, any rise in dearness allowance should have effect only after the expiry of three years from January 6, 1962, or, at any rate, from the expiry of three years from November 1, 1961, the date on which the increase in the settlement had been given effect to.

32. Mr. Sen Gupta, in the Union's appeal, pressed for the award being given

effect to from May 1962 when the Union had made a demand on the company for revision of dearness allowance, especially when the Tribunal had itself found that there had been a substantial rise in the price index after the date of the settlement. It will be seen that both the parties have a grievance regarding the date from which the revision of dearness allowance should be given effect to. We are not impressed with the contentions of both the parties, in this regard. The Tribunal has taken note of the rise in the cost of living index, as well as the demand having been made by the workmen, as early as May 21, 1962. It has also adverted to the fact that the reference, by the State Government, was made on November 5, 1963. It has further adverted to the fact that though the cost of living index had increased considerably, the company did not choose to adjust the dearness allowance suitably. It was, after having regard to all the circumstances that the Tribunal felt that the workmen should get dearness allowance commensurate with the cost of living index, at least from the month of reference viz., November 1963. As laid down by this Court in the *Hindusthan Times* case, (1964) 1 SCR 234 = (AIR 1963 SC 1332) no general formula can be laid down as to the date from which a Tribunal should make its award effective and that that question has to be decided by the Tribunal on a consideration of the circumstances of each case. In the said decision this Court declined to interfere with the Tribunal's direction that reliefs given by it would become effective from the date of reference.

33 In *Kamari Metals Ltd. case*, (1967) 2 SCR 463 = (AIR 1967 SC 1175) the workmen had made demands on July 1, 1961. The Conciliation Board was moved on September 8 1962 and, when conciliation failed, a reference was made on December 14, 1962. The Tribunal made an award, retrospective from October 1, 1962, a date between the reference to conciliation and the reference to the Tribunal. That decision of the Tribunal was accepted by this Court.

34. Recently, in *Hydro, (Engineers) Pvt. Ltd v The Workmen*, Civil App No 1934 of 1967, D/ 30-4-1968 = (AIR 1969 SC 182) this Court declined to interfere with the direction given by Tribunal that its award should take effect from the date of demand made by the workmen. It has also been pointed out,

in the said decision, that it is a matter of discretion for the Tribunal to decide, from the circumstances of each case from which date its award should come into operation, and no general rule can be laid down as to the date from which a Tribunal should bring its award into force. Therefore it will be seen that when a Tribunal gives a direction regarding the date from which it has to become effective, no question of principle, as such, is involved.

35 From the above decisions of this Court, it will also be seen that this Court has declined to interfere with an award having effect from either the date of demand, or the date of reference, or even a date earlier than the date of reference but after the date of demand. In fact, the direction given by the Tribunal, in the case before us, giving effect to its award from the date of reference, squarely comes within the decision of this Court in the *Hindusthan Times* case, (1964) 1 SCR 234 = (AIR 1963 SC 1332) and, as such, that direction is correct.

36. To conclude, on this aspect of dearness allowance, excepting for the direction that the rate of increase or decrease awarded by the Tribunal should be related to the cost of living index of 421 and not 402 (as directed by the Tribunal), in all other respects the decision of the Tribunal on this point will stand. This closes the discussion on the appeal of the company and the appeal of the Union in so far as they relate to dearness allowance.

37 There are two further points, taken by the Union, in its appeal, one relating to the modifications effected to the gratuity scheme, and the other relating to the age of superannuation. The provisions in the gratuity scheme, which came up for consideration before the Tribunal, were as follows:

"1. On the death of an employee while in the service of the company, one month's salary for each completed year of service subject to a maximum of 12 months salary not exceeding Rs 4,000 on the average of the last three years salary to be paid to his heirs or dependants as the Board may in their discretion decide.

2. On voluntary retirement due to illness or termination of service by the company after 10 years continuous and approved service one month's pay for each year of service subject to a maximum of 12 months pay not exceeding Rs 4,000

3. No employee shall be entitled to claim any gratuity if he is dismissed for dishonesty or misconduct or if he would have left service without notice or terminated his employment without the permission of the Company."

38. The Tribunal has effected certain modifications to R. 3 which, in our opinion, are quite consistent with the decision of this Court in *Management of Wenger and Co. v. Workmen*, (1963) Supp 2 SCR 862 = (AIR 1964 SC 864). Therefore the Union cannot have any grievance regarding the Tribunal's directions, in this regard.

39. So far as Rr. 1 and 2 are concerned, the Tribunal modified them by increasing the ceiling from 12 months' salary to 15 months' salary and deleted the pecuniary limit of Rs. 4,000. In R. 2, the Tribunal further directed the deletion of 10 years' continuous and approved service to enable a workman to get gratuity in the circumstances mentioned therein. Mr. Sen Gupta, learned counsel for the Union, urged that the Tribunal committed an error in prescribing the ceiling of 15 months' basic wages and that the Tribunal should have modified R. 1 by providing that the average last one year's salary should be taken into account for the purpose of calculating gratuity, instead of the three years' period provided in the rule. Mr. Gokhale, learned counsel for the company, pointed out that his client has been prejudiced by the modifications effected by the Tribunal, but the company had now been precluded from raising these objections because of the limited leave given by this Court. Nevertheless, the counsel pointed out, inasmuch as the Tribunal was increasing the ceiling from 12 months to 15 months and deleting the further pecuniary limit of Rs. 4,000/-, as well as the qualifying period to enable a worker to earn gratuity, the Tribunal must have felt that no further modifications were necessary. In our opinion, no case has been made out by the Union for interfering with the directions given by the Tribunal and we are also satisfied that there has been no improper exercise of discretion by the Tribunal in this regard. It has effected certain modifications in favour of the workmen and obviously it did not think it necessary to make any further modifications as pressed by the Union. Therefore, the objections to the modifications, raised on behalf of the Union, have to be rejected.

40. The last point that has been agitated by the Union, in its appeal, is regarding the age of superannuation. The provision regarding age of superannuation, as obtaining then in the company, was as follows:

"The age of retirement as mentioned in the Company's Standing Orders under R. 9 will henceforth be strictly followed in case of all employees. The employees henceforth shall retire at the age of 55. Extension, if any, will depend on Company's discretion."

The Tribunal increased the age of superannuation to 58 years from 55 years. It has relied upon two circumstances in coming to this conclusion: (a) that this Court has raised the age of retirement from 55 to 58 years in *Workmen of Jessop v. Jessop and Co.*, (1964) 1 Lab LJ 451 (SC) which was a case from West Bengal, with regard to clerical and subordinate staff, other than those who were workers under the Factories Act: The appellant's industry which is of a different nature, being a chemical and pharmaceutical industry, all the workmen of such a company — factory workers or non-factory workers — should have the same age of superannuation; (b) the fixation of the age of retirement for its employees, by the Government of West Bengal, at 58 years.

41. Mr. Sen Gupta urged that the age of superannuation should have been raised to 60 years. It is not necessary to refer to the earlier decisions of this Court, on this point. Recently, in *The Management of Messrs. Burmah Shell Oil Storage And Distributing Co. Ltd. v. Its Workmen*, Civil App. No. 44 of 1968, D/1-5-1968 (SC) this Court, after a review of the prior decisions, held that in fixing the age of superannuation the most important factor that has to be taken into consideration is the trend in a particular area. Applying this test, we are satisfied that the Tribunal's fixing of the age of retirement at 58 years is justified. As already noted, it has relied upon Jessop's case, (1964) 1 Lab LJ 451 (SC) which related to West Bengal and the age of retirement fixed by the State Government. Therefore the Tribunal has taken note of the trend in the particular area viz., West Bengal, when it increased the age of superannuation from 55 to 58 years. Therefore the Union's claim that it should be further increased to 60 years cannot be sustained.

42. In the result, excepting for the modification indicated by us with regard to the cost of living index in respect of dearness allowance, in all other respects we confirm the award. The appeal, by the company, is therefore partly allowed to the extent of the modification noted above. The appeal of the Union is dismissed. Parties will bear their own costs GGM/D V C. Order accordingly.

AIR 1969 SUPREME COURT 370
(V 56 C 72)

(From Bombay ILR (1959) Bom 662)

R. S. BACHAWAT AND K. S. HEGDE, JJ

Kumar Shri Digvijaysinghji Hamursinhji, Appellant v Manji Savda and others Respondents

Civil Appeal No 37 of 1965, D/- 23-7-1968

Tenancy Laws — Saurashtra Land Reforms Act (25 of 1951), Sections 18, 19, 20 and 2 (15) — Expression 'grant' in Section 18, interpretation of — Grant by ruler of erstwhile State of Virpur confirmed by Government of India subject to condition that grantee would not evict cultivators from land — Grant accepted by grantee subject to conditions — By a notification under Section 2 (15) of the Act grantee declared to be a Girasdar subject to provisions of S 18 — Application by grantee under Sec. 19 as Girasdar for order of allotment of land for personal cultivation, held, incompetent — Grantee was bound by conditions annexed to grant and Mamlatdar could not pass an order enabling him to evict the tenants.

The Government of India confirmed a grant made by the ruler of the erstwhile State of Virpur subject to a condition that the grantee would not evict the cultivators from the land. Subsequently the Government of Saurashtra issued a notification under Section 2 (15) of the Saurashtra Land Reforms Act declaring the grantee to be a Girasdar for purposes of the Act subject to the provisions of Section 18 i.e., the condition imposed by the Government at the time of his recognition that he cannot evict the tenants. On an application by the grantee under Section 19 of the Act for an order of allotment of land for personal cultivation

Held that the grantee as a Girasdar was subject to provisions of Section 18 and because of Section 18 he was subject to the conditions imposed by the Government at the time of his recognition and hence he had no right to evict the tenants and the Mamlatdar could not pass an order which would enable him to evict them. Therefore the application under Section 19 was incompetent. By filing application under Section 19 the grantee sought an order which would enable him to evict the tenants in contravention of the condition of his grant as on the strength of the order of allotment of land for personal cultivation under Section 20 (2) the Girasdar would be entitled to evict the tenants from the land allotted to him ILR (1959) Bom 662. Affirmed. (Para 7)

The expression "grant" in Section 18 is wide enough to take within its sweep a grant by the government to the Girasdar and is not limited to a grant by the Girasdar to the tenant. The conditions incorporated in the letter confirming the grant were intended for the benefit of the tenants and the grantee was bound by them. The tenants could claim the benefit of the condition that the grantee would not evict him. The condition was annexed to the grant. The right or privilege of the tenant out of that condition was a right or privilege arising out of a grant within the meaning of Section 18 AIR 1962 SC 445, Ref to

(Para 5)
Cases Referred Chronological Para 5
(1962) AIR 1962 SC 445 (V 49) =
1962-3 SCR 970 State of Saurashtra v Jamadar Mohamad Abdulla

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Mr B Sen, Senior Advocate (Mr P V Hathi, Advocate and M/s. K. L. Hathi and Atiqur Rehman, Advocates of M/s. Hathi and Co., with him), for Appellant; Mr M V Goswami, Advocate, for Respondents (Nos 1, 2, 3, 6 and 7); Mr N S Bindra Senior Advocate (Mr S P. Nayar, Advocate with him), for Respondents (Nos 28 and 27)

The following Judgment of the Court was delivered by

BACHAWAT, J.: This appeal raises questions of interpretation of certain provisions of the Saurashtra Land Reforms Act 1951 (Act No XXV of 1951). On June 1, 1947 Narendrasinghji, the then ruler of the Virpur State granted certain agricultural lands situate within the State to the appellant, his paternal uncle. On February 11, 1948 Narendra-

singhji and the appellant effected an exchange under which the appellant returned the lands at Matiya and Guda to Narendrasinghji and in lieu thereof was granted certain lands in Kharedi. The lands in Kharedi are the subject-matter of dispute in this litigation. On February 17, 1948 the grant was recorded in the "Hak Patrak" of the Virpur State. On March 8, 1948 the administration of the Virpur State was assumed by the United State of Saurashtra. The grant to the appellant was questioned by the Saurashtra Government. Thereafter at a conference called the Jamnagar Conference, it was arranged between Narendrasinghji and the Government of India that the lands in Kharedi should be regarded as lawfully granted to the appellant subject to the condition that the grantee would not evict the cultivators from the land. The arrangement was set out in a letter dated November 2, 1949 from the officer on special duty (Integration) Political Department, to the Secretary, Revenue Department, United State of Saurashtra. The letter stated:

"According to the Jamnagar Conference decision as this grant was an exchange, it was acceptable after verification regarding reasonableness of the exchange. It having been decided on enquiry that the exchange was reasonable, the grant is accepted subject however to the liability of the grantee (a) to pay 12½ per cent as assessment (b) to see that no cultivator shall be evicted from the land.... The grantee K. S. Digvijaysinghji may kindly be informed of this assessment charge and the other contents of this letter and may be put in possession of the land and allowed to be retained by him subject to the liabilities specified in this letter."

Though the appellant was not a party to the arrangement, he was aware of and accepted the arrangement and the conditions upon which his grant was confirmed by the Government of India. Had he not accepted those conditions, it was likely that the government would have resumed the grant under the Saurashtra Land Resumption Ordinance No. 84 of 1949 which came into force on January 13, 1950. The Saurashtra Land Reforms Act came into force on September 1, 1951. On January 29, 1954 the Government of Saurashtra issued a notification under Sections 15 (2) (2 (15)?) of the Act declaring the appellant to be a Girasdar for purposes of the Act subject to the provisions of

Section 18 thereof. By a notification dated July 20, 1954 the Saurashtra Government clarified the earlier notification stating that the appellant was a Girasdar subject to the provisions of Section 18 of the Act, i. e., the condition imposed by the government at the time of his recognition that he cannot evict the tenants. In the meantime the appellant had applied to the Mamlatdar, Kalawad, for an order of allotment of land for personal cultivation under S. 18 (19?) of the Act. The application was resisted by the tenants who are the respondents in this appeal. The tenants claimed that they had "chav" rights and that in any event the appellant was not entitled to eject them. The Mamlatdar allowed the application and allotted to the appellant lands out of the holding of four tenants. An appeal from his order was dismissed by the Deputy Collector, Eastern Division, Halar. On a revision application filed by the tenants the Bombay Revenue Tribunal set aside these orders and dismissed the application filed under Section 19. All the tribunals concurrently found that the tenants did not hold "Chav" rights. The Mamlatdar allowed the application under Section 19 on the ground that the conditions imposed upon the appellant before the passing of the Act did not debar him from taking the benefits under the Act. The Deputy Collector affirmed this order on the ground that by obtaining the order of allotment of lands for personal cultivation the appellant was not seeking to evict tenants by exercising his rights as a landlord. The Tribunal disagreed with the views of the Mamlatdar and the Deputy Collector and observed that as the appellant was aware of and accepted the conditions imposed by the arrangement incorporated in the letter dated November 2, 1949, he was bound by them and his rights in the land were limited by the condition that he could not evict the tenants. The Tribunal held that the tenants were entitled to take advantage of the conditions under Section 18 of the Act and the application under Section 19 was therefore not maintainable.

2. The appellant then applied to the High Court of Bombay at Rajkot under Art. 227 of the Constitution challenging the correctness of the order of the Revenue Tribunal. The High Court dismissed the application. It held that the conditions incorporated in the letter of November 2, 1949 having been accepted by the appellant enured for the benefit

of the tenants under Section 18 of the Act. It also held that the rights of the appellant as Girasdar were restricted by the notification under Section 2 (15) of the Act declaring him to be a "Girasdar" and the appellant was bound by those restrictions. The present appeal has been preferred by the appellant under a certificate granted by the High Court.

3 It is not disputed that the Government of India had the power to impose upon the appellant the conditions incorporated in the letter dated November 2, 1949 and that the appellant is bound by them. The Government could refuse to recognise the grant made to the appellant by the ruler of the Virpur State and to annul the grant. Had the Government annulled the grant, the annulment would have been an act of State and could not be questioned before the municipal tribunals (see *State of Saurashtra v Jamadar Mohammad Abdulla*, (1962) 8 SCR 970 = (AIR 1962 SC 445)). Instead of annulling the grant the government elected to confirm it subject to the conditions incorporated in the letter dated November 2, 1949. The appellant accepted the grant subject to those conditions and is bound by them.

4. The question is whether in spite of the conditions incorporated in the letter dated November 2, 1949 the appellant is entitled to allotment of land under Section 19 of the Saurashtra Land Reforms Act, 1951. The Act was passed for the improvement of land revenue administration and for ultimately putting an end to the Girasdari system. It makes provisions to regulate the relationship between the Girasdars and their tenants, to enable the latter to become occupants of the land held by them and to provide for the payment of compensation to the Girasdars for the extinguishment of their rights. Girasdar means any talukdar, bhagdar, bhayat, cadet or mul-grasia and includes any person whom the government may by notification in the official gazette declare to be a Girasdar for the purposes of the Act, S 2 (15). It is common case that the appellant is a Girasdar by virtue of the notification of the Saurashtra Government declaring him to be a Girasdar. The Act overrides other laws. Save as otherwise provided in the Act, its provisions have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law or any usage, agreement,

settlement, grant, sanad or any decree or order of any court or other authority, (S 3). Chapter III regulates the relationship of Girasdars with their tenants. Subject to certain exceptions any person who is lawfully cultivating any land belonging to a Girasdar is for the purposes of the Act deemed to be the tenant, (S 6). Sections 6 to 17 confer on the tenants certain benefits, privileges and immunities in respect of rent, cess, rate, hak, tax, service, termination of tenancy and eviction from dwelling houses. Particularly S 12 provides that no tenancy can be terminated except in accordance with the provisions of Chapter IV or except on certain specified grounds. Section 18 provides —

"Nothing contained in this Act shall be construed to limit or abridge the rights or privileges of any tenant under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a court or otherwise howsoever."

Section 18 shows that the Act is intended to confer on the tenant rights and privileges which he does not otherwise enjoy or possess under any usage or law in force or any contract, grant, decree or order of a court or arising in any other way. If the tenant has any right or privilege apart from the provisions of the Act, he needs no protection under the Act. He can claim protection under his existing rights and privileges. His existing rights and privileges are not limited or abridged by anything in the Act.

5 The conditions incorporated in the letter dated November 2, 1949 were intended for the benefit of the tenants. The tenants can claim the benefit of the condition that the appellant would not evict them. The condition is annexed to the grant to the appellant. The right or privilege of the tenant arising out of this condition is a right or privilege arising out of a grant within the meaning of Section 18. The expression "grant" in Section 18 is wide enough to take within its sweep a grant by the government to the Girasdar and is not limited to a grant by the Girasdar to the tenant.

6 The next question is whether the rights and privileges of the tenant arising out of the conditions incorporated in the letter dated November 2, 1949 are limited or abridged by an order for allotment of land to the appellant under Section 19 for personal cultivation. Chapter IV en-

ables Girasdar to obtain allotment of land for personal cultivation. Any Girasdar may file an application for such allotment before the Mamlatdar under Section 19 within a certain time. On making the necessary enquiries the Mamlatdar may pass an order making an allotment of land to the Girasdar, S. 20 (2). After making the order the Mamlatdar has to issue an occupancy certificate to the Girasdar in respect of the deed, S. 20 (3). No Girasdar can obtain possession of any land held by a tenant except in accordance with such order, S. 20 (4). Nothing contained in Chapter IV applies to any land in respect of which a tenant has acquired chav or buta hak, (S. 27). Under S. 39 the Girasdar may obtain an occupancy certificate in respect of land allotted to him under Chapter IV. Section 50 (2) provides for execution of orders of the Mamlatdar awarding possession. Chapter V provides for acquisition of occupancy rights by tenants. Having regard to S. 30 (1) and the proviso to S. 32 (b) the acquisition of occupancy rights by tenants is subject to an order of allotment to the Girasdar under Chapter IV and any occupancy certificate issued to a tenant ceases to be effective as soon as any agricultural land or any portion thereof is allotted to a Girasdar under Chapter IV either before or after the date on which the occupancy certificate issued to the tenant has become effective.

7. On the strength of the order of allotment of land for personal cultivation under S. 20 (2) the Girasdar is entitled to evict the tenants from the land allotted to him. When the Girasdar applies under S. 19 for allotment of land for personal cultivation, he seeks to evict the tenants from the land. Therefore when the appellant filed his application under S. 19 he sought an order which would enable him to evict the tenants in contravention of the condition of his grant that he would not evict the tenants. In view of S. 18 nothing in Chapter IV enables him to obtain an order limiting or abridging the rights and privileges of the tenants arising under the condition. The Mamlatdar could not under S. 20 pass an order which would have the effect of limiting or abridging those rights and privileges. The appellant had no right to evict the tenants and the Mamlatdar could not pass an order which would enable the appellant to evict them. The application filed by the appellant under S. 19 was therefore incompetent.

8. The appellant as a Girasdar was subject to the provisions of S. 18. The declaration in the notification dated January 29, 1954 that he was subject to the provisions of S. 18 stated what followed from the express provisions of the Act. Because of S. 18, the appellant was subject to the conditions imposed by the Government at the time of his recognition that he cannot evict the tenants. The notification dated July 20, 1954 declared the existing disability of the appellant in respect of eviction of tenants.

9. The application filed by the appellant under S. 19 was rightly dismissed by the Revenue Tribunal and the High Court rightly refused to interfere with this decision under Art. 227 of the Constitution.

10. The appeal is dismissed with costs.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 373
(V 56 C 73)

(From: Gujarat)*

S. M. SIKRI, R. S. BACHAWAT AND
A. N. GROVER, JJ.

State of Gujarat and another, Appellants
v. Acharya Shri Devendraprasadji Pandc,
Respondent.

Criminal Appeal No. 150 of 1966, D/-
26-7-1968.

Bombay Public Trusts Act (29 of 1950)
(As applied to the State of Gujarat), Ss. 37
(1) (c), 67 — Words 'report' and 'state-
ment' — Do not include information
directed to be supplied in respect of cer-
tain specified items — Failure to supply
is not punishable under S. 67 — (Words
and Phrases — Report and statement).

It is abundantly clear from the context
in which the word 'report' has been used
in S. 37 (1) (c) that it can have reference
only to a formal report or some such re-
port as the trustee may be required to
make under the provisions of the Act or
the rules, if any, framed under S. 84 (1)
(b). (Para 10)

Similarly, the word 'statement' used in
S. 37 (1) (c) cannot be equated with the
word 'information' or answering of en-
quiries etc. which would have a much
wider sweep than the word "statement"

*(Criminal Appeal No. 906 of 1963, D/-
21-6-1965 — Guj.).

CM/CM/D590/68

when considered from the point of view of statutory provisions and the rules in which it appears (Para 10)

The inquiries made by the Charity Commissioner on certain specific items relating to the constructions undertaken by the trustee out of the funds of a temple, which only involve the calling of information on various matters mentioned in the letter can hardly be said to fall within the expression 'report or 'statement' used in S 37 (1) (c) and failure to supply the information on the part of the trustee will not make him liable for punishment under S 67 read with S 37 (1) (c) of the Act. (Para 11)

M/s H. R. Khanna and R. N. Sachthey, Advocates, for Appellants M/s L. M. Namavati and B. Datta, Advocates, and Mr O. G. Mathur, Advocate of M/s J. B. Dadachanji and Co., for Respondent.

The following judgment of the Court was delivered by

GROVER, J : This is an appeal by certificate against the judgment of the High Court of Gujarat setting aside an order of a Magistrate by which the respondent was convicted of an offence under S 67 read with S 37 of the Bombay Public Trusts Act 1950 (as adapted and applied to the State of Gujarat), hereinafter referred to as the Act, and sentenced to pay a fine of Rs 300/-, in default of payment of which he was to suffer rigorous imprisonment for two months.

2. The respondent is one of the trustees of a trust known as "Shri Swami Narayan Mandir" at Ahmedabad which is registered as a public trust in the office of the Charity Commissioner. The trust is managed under a scheme prepared by the High Court of Bombay. It appears that the Charity Commissioner learnt about certain constructions having been made by the respondent trustee without permission from him. On March 22, 1962 a letter (Ext. 3) was addressed from his office to the respondent the material part of which may be reproduced.

"An information is received of the Charity Commissioner that opposite the temple near the New Narnarayan building the blocks are being constructed in which shops are constructed on the ground floor of that building.

1. For what purpose it is constructed?
2. From when its construction work is started?

3. What amount is spent till today in construction of the same?

4. What amount is to be spent still?

5. How much income will accrue from it?

8. By which No. and on what date the permission of the Charity Commissioner is taken for constructing the same.

7. To which contractors are given the contracts for constructing the same? His name, address, amount of the contract and other details and a copy of the contract.

8. If the committee has passed a resolution for constructing the same, its true copy.

9. If a contract is given to any contractor, then whether that contractor is related or acquainted to any member of the committee. All these necessary information may please be sent before 15-4-1962. Queries on similar lines were made regarding the constructions near the respondent's bungalow in Gurdhamnagar.

3. As no reply was received from the respondent reminders were sent to him on April 20, 1962 and May 10, 1962 followed by a telegram despatched on May 23, 1962. A reply was sent by the respondent giving the particulars of the buildings which had been constructed. Reference was made to the resolutions of the Committee relating to these constructions together with the amount spent on them.

4. The Inspector appointed under the Act made a report dated May 4, 1963 giving the result of the enquiry made by him relating to the aforesaid constructions. According to him 8 shops had been constructed adjoining the Narnarayan building opposite the Swaminarayan temple, the estimated cost of which was more than Rs 2 lacs. On Plot No 98-A shops were being built in four blocks. Construction was also being made on another plot No 98-A 2 opposite the railway crossing. On May 30, 1962 the Charity Commissioner instituted a complaint in the court of the City Magistrate at Ahmedabad giving most of these facts and stating inter alia that under the provisions of the Act a trustee who desired to invest trust funds in construction of buildings was bound to obtain permission of the Charity Commissioner which had not been done in the present case. According to him the respondent had deliberately committed a breach of the relevant provisions of the Act and had omitted to comply with the notice dated May 22, 1962. The gravamen of the charge was

contained in paragraph 7 according to which the respondent had, without reasonable cause, failed to comply with the order and the directions issued to him under the provisions of S. 37 of the Act.

5. The respondent filed an application (Ext. 6) before the Magistrate submitting that the investment of the trust funds made in the construction of the building adjacent to the Narnarayan Bhavan was legal and had been done in good faith. It was for the benefit of the institution. The scheme committee had given its consent by passing resolutions. By an order dated June 10, 1963, the City Magistrate held that the respondent had not shown the purpose of the new constructions nor had he furnished the date of commencement of the work as also the details of the amount already spent and to be spent on the said constructions. He was accordingly convicted under S. 37 read with S. 67 of the Act. The respondent moved the High Court on the revisional side.

6. It was quite clear that the respondent was not being prosecuted for failure to obtain permission from the Charity Commissioner in the matter of investment of funds but the case for the prosecution as urged by the Assistant Government Pleader before the High Court, was that in the letter dated March 22, 1962, the Charity Commissioner had called for a "statement" or "report" regarding certain construction work which was being carried on by the respondent in his capacity as a trustee and since the same had not been complied with the respondent had been rightly convicted. The High Court was of the view that the words used in Cl. (c) of S. 37 (1) namely, return, statement, account or report have to be interpreted or construed with reference to the other provisions of the Act and the Rules framed thereunder where these words had been employed or used. As regards the word "statement" reference was made to Rules 17, 22 and 23. Similarly the word "report" was mentioned in Ss. 34, 37 and 38. It was finally held that the Charity Commissioner had not called for any "statement" or "report" but for particulars and detailed information regarding the various items set out in his letter which he was not empowered to do.

7. The Act was enacted to regulate and to make better provisions for the administration of public, religious and charitable trusts in the State of Bombay.

Section 2 (13) defines public trust. Section 2 (18) defines the word "trustee" as a person in whom either alone or in association with other persons, the trust property is vested and includes a manager. Section 2 (20) says that words and expressions used but not defined in the Indian Trusts Act, 1882 shall have the meanings assigned to them in that Act. Chapter II of the Act provides for the appointment of the Charity Commissioner, Joint Deputy and Assistant Charity Commissioners as also the subordinate officers and assessors. Chapter III gives charitable purposes and validity of certain trusts. Chapter IV relates to registration of public trusts. Under S. 17 a duty has been cast on the Deputy or Assistant Charity Commissioner in charge of the public trust registration office to keep and maintain such books, indices and other registers as may be prescribed which have to contain the prescribed particulars. Under S. 22 where any change occurs in any of the entries in the register kept under S. 17 the trustee shall, within 90 days from the date of the occurrence of such change, report the same in the prescribed form to the Deputy or Assistant Charity Commissioner in charge of the public trust registration office. Chapter V deals with accounts and audit. Section 32 makes it the duty of every trustee to keep regular accounts in the approved form containing the prescribed particulars. Under S. 34 it is the duty of every Auditor to prepare balance sheet and to report irregularities etc. Section 35 relates to investment of public trust money and provides inter alia that the Charity Commissioner may permit a trustee to invest money in any manner other than that provided in that section. Section 36 prohibits alienation of immovable property of a public trust without the previous sanction of the Charity Commissioner. Chapter VI which contains Ss. 37 to 41 is headed "control". Section 37 gives powers of inspection and supervision to the Charity Commissioner etc. These officers have been given, under sub-s. (1), the power

(a) "to enter on and inspect or cause to be entered on and inspected any property belonging to a public trust;

(b) to call for or inspect any extract from any proceedings of the trustees of any public trust and any books of account or documents in the possession, or under the control, of the trustees or any person on behalf of the trustees;

(c) to call for any return, statement, account or report which he may think fit from the trustees or any person connected with a public trust".

Sub-section (2) says that it shall be the duty of every trustee to afford all reasonable facilities to any officer exercising any of the powers under Sub-section (1) and to comply with any order or direction made by him. Sections 38 and 39 provide for calling of an explanation from the trustee or any other person concerned on the report of the Auditor and the making of a report by the Deputy or the Assistant Charity Commissioner to the Charity Commissioner about the gross negligence, breach of trust etc. of the trustee. Under S 40 the Charity Commissioner after considering the report submitted under S 39 and giving an opportunity to the person concerned and holding such enquiry as he thinks fit can determine the various matters set out in that section and under S 41 if he decides that any person is liable to pay to the public trust any amount for the loss caused to the trust he may direct that that amount shall be surcharged on that person. Section 54 provides for what is called Dharmada and an account is to be submitted in the prescribed form. Section 58 (N) (2) (h) includes among the general duties of a Committee in which the management of certain endowments vests under S 56 (D) to supply such returns, statistics, accounts and other information with respect to such endowments as the State Government may, from time to time, require. It is unnecessary to notice the other sections with the exception of Ss 67 and 69. Section 67 provides for contravention inter alia of any order or direction made under the Act by the Charity Commissioner. Section 69 relates to the duties, functions and powers of the Charity Commissioner. Under Cl. (b) he can enter on and inspect any trust property and call for and inspect any proceedings of a trust. He can further call for any returns, statement, books of account, document or report from trustees or any person connected with a public trust under S 37.

8. The relevant rules in the Bombay Public Trust (Gujarat Rules 1961) may next be examined. Rule 17 is to the effect that every trustee shall keep regular accounts of all receipts and of moveable and immovable property and of all encumbrances created on the trust

property and of all payments, alienations etc. made on behalf of the trust. The accounts have to contain all such particulars as in the opinion of the Charity Commissioner will facilitate preparation of the balance sheet and income and expenditure account in the Form of Schedules VIII and IX and the preparation of a statement of income chargeable to contributions in the Form of Schedule IXC. According to the proviso to R. 17 where the trustees of a public trust are entitled to file statements in the Form of Schedules IXA and IXB by virtue of any exemption granted under S 33 (4) (b) the accounts may contain particulars which shall facilitate the preparation of statements in the aforesaid Form of Schedules IXA and IXB. Schedule IXC is headed "statement of income liable to contributions" and has reference to sub r (3) of R. 32 which provides for contributions to the Public Trust Administration Fund by every public trust other than a trust exclusively for the purpose of advancement and propagation of secular education or exclusively for the purpose of medical relief or veterinary treatment of animals. Certain deductions specified therein shall be allowed in calculating the gross annual income of a public trust or where the public trust is a Dharmada, its gross annual collection by receipts for the purpose of assessing the contribution. Schedules IXA and IXB are headed "statements of income and expenditure" respectively and have as stated before reference to S 33 (4) (b) which provides that the Government may, by general or special order, exempt any public trust or class of public trusts from the provisions of sub s (2) of S 33 according to which the accounts shall be audited annually in such manner as may be prescribed and by a person who is a Chartered Accountant or by such persons as may be authorised by the State Government. Rule 18 which relates to the powers in respect of audit empowers the Deputy or the Assistant Charity Commissioner inter alia to require the production before the auditor of any book, deed, account etc. by the trustee or to give such information as may be necessary regarding the same. Rules 22 and 23 provide for inspection and grant of entries in the public trust register and other documents. Thus inspection and grant of copies can be obtained of any entry or portion thereof in the register of public trust or any statement, notice, intimation, account,

audit report or any other document filed under the Act.

9. In other similar legislation on public trusts the expressions which have been used may be noticed. In the (English) Charitable Trusts Act 1853 it was provided by Section 10 that the Board (consisting of the Charity Commissioner) may require all trustees or persons acting or having any concern in the management or administration of any charity or the estate, funds or property thereof to render to the said Board accounts and statements in writing in relation to such charity or the funds, estate, property, income or monies thereof or may also require such trustee to return answers in writing to any questions or enquiries addressed to them by the Board relating to the aforesaid matters. Under Section 14 if any person from whom the Board required any account or statement or answers to any question or enquiry etc. refused or wilfully neglected to render to the Board such account or statement or to make answers to questions or enquiries he was to be guilty of contempt of court and was liable to be committed therefor. The Orissa Hindu Religious Endowments Act 1939 contains mention of account, report or returns. Under Section 29 (1) (a) the Commissioner is empowered to suspend, remove or dismiss a trustee for persistent default in submission of the same. The Madras Hindu Religious Endowments Act 1951 was enacted for amending and consolidating the law relating to the administration and governance of Hindu Religious and Charitable Institutions and Endowments in the State of Madras. Section 27 provides that the trustee of every religious institution shall furnish to the Commissioner such accounts, returns, reports or other information relating to the administration of the institution etc. as the commissioner may require. Section 89 of that Act contains the penalties inter alia for refusal, neglect or failure to furnish such accounts, returns or reports or other information relating to the administration of the trust or its funds.

10. In the present case in the High Court it was argued on behalf of the State that the enquiries which were made by means of the letter in question would fall within the meaning of either 'statement' or 'report'. Counsel before us has not been able to show how any of

the enquiries made would be covered by the word "report" particularly with reference to the sections in which it appears. It is abundantly clear from the context in which this word has been used in Section 37 (1) (c) that it can have reference only to a formal report or some such report as the trustee may be required to make under the provisions of the Act or the rules, if any, framed under S. 84(1)(b) which reads "form in which the trustee has to make a report regarding the change under Section 22". Similarly the word "statement" has been employed in a number of provisions of the Act and the rules which have been referred to in detail and it would seem that this word appearing in Section 37 (1) (c) has to be construed with reference to them. It is difficult to impute to the legislature the intention of using the word "statement" in its widest connotation so as to take in the answering of all enquiries and giving of all kinds of information. It is significant that in Section 37 (1) (c) the words "other information" are not to be found in the same way as they are to be found in Section 27 of the Madras Hindu Religious Charitable Endowments Act 1951. It is also noteworthy that the language analogous to that employed in the English Charitable Trusts Act in Sections 10 and 12 has not been employed in Section 37 (1) (c) of the Act. There, in Section 10, the words used are "accounts and statements" and in Section 14 "accounts or statement" but in addition answers have to be returned to any questions or enquiries and the refusal to do so is punishable with contempt of court. In the Act itself the legislature was fully aware of the true import of the word "information" as is clear from S. 56 (2) (h) and Rule 18. It is difficult, therefore, to equate the word "statement" as used in Section 37 (1) (c) with the word "information" or answering of enquiries etc. which would have a much wider sweep than the word "statement" when considered from the point of view of statutory provisions and the rules in which it appears.

11. In view of the above discussion it is difficult to hold that any of the items mentioned in the letter dated March 22, 1962 fall within the meaning of the words "report" or "statement". The enquiries which have been made can only involve the calling of information on various matters mentioned in the letter which could hardly be said to fall within the aforesaid expressions used in S. 37 (1) (c).

12. The view of the High Court, therefore, must be upheld, with the result that the appeal fails and is dismissed.

D.R.R.

Appeal dismissed.

AIR 1969 SUPREME COURT 378
(V 58 C 74)

(From Kerala (1) AIR 1967 Kerala 114;
(2) From Kerala)*

**J. C. SHAH, V. RAMASWAMI AND
A. N. CROVER, JJ.**

In Civil Appeals Nos. 1052, 1054 to 1058, 1060 to 1087, 1089 to 1095, 1097, 1100 to 1112, 1114 to 1118, 1120 to 1129, 1131 and 1133 to 1145 of 1968.

The State of Kerala (In all the Appeals), Appellants v. Haji K. Haji K. Kutty Naha and others etc., Respondents; The Malankara Rubber and Produce Company Ltd. (In C. A. No. 1144 of 1968), Intervener.

In Civil Appeals Nos. 1146 and 1147 of 1968.

The State of Kerala (In both appeals), Appellant v. Hydrose Ali etc., Respondents.

Civil Appeals Nos. 1052, 1054 to 1058, 1060 to 1087, 1089 to 1095, 1097, 1100 to 1112, 1114 to 1118, 1120 to 1129, 1131 and 1133 to 1145 and 1146 and 1147 of 1968, D/- 13-8-1968.

Kerala Buildings Tax Act (19 of 1961), Section 4 and Sch. — Constitutional validity — Violates equality clause of the Constitution and is ultra vires — (Constitution of India, Articles 13, 14, 265 and Sch. 7, List II Entry 49 — Power to tax lands and buildings — Cannot be used arbitrarily and in a manner inconsistent with fundamental rights).

The power of the State Legislature to legislate for levying taxes on lands and buildings under Schedule 7, List II, Entry 49 cannot be used arbitrarily and in a manner inconsistent with the fundamental rights guaranteed to the people under the Constitution. No tax may be levied or collected under our constitutional set-up except by authority of law and the law must not only be within the legislative competence of the State, but it must also not be inconsistent with any provision of the Constitution. The validity of a taxing statute is open

* (Writ Appeals Nos. 42 and 240 of 1965,
D/- 19-9-1968—Kerala.)

to question on the ground that it infringes fundamental rights. AIR 1961 SC 552 and AIR 1963 SC 591, Ref. to.

(Para 8)

The charging section of the Kerala Buildings Tax Act (19 of 1961), viz. S. 4 read with Schedule to the Act is violative of the equality clause of the Constitution and as such is ultra vires. In enacting the Kerala Buildings Tax Act no attempt at any rational classification is made by the Legislature. The Legislature has not taken into consideration in imposing tax the class to which a building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation. They have adopted merely the floor area of the building as the basis of tax irrespective of all other considerations. Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, refusal to make a rational classification may itself in some cases operate as denial of equality. AIR 1967 SC 1801, Foll.; AIR 1967 Ker 114, Affirmed. (Paras 5, 6)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1801 (V 54) =
(1967) 2 SCR 679, New Manek
Chowk Spinning and Weaving
Mills Co. Ltd. v. Municipal Corpn.
of City of Ahmedabad 5
(1963) AIR 1963 SC 591 (V 50) =
(1963) 3 SCR 809, Khandige
Sham Bhat v. Agricultural L.T.
Officer, Kasaragod 3, 4
(1961) AIR 1961 SC 552 (V 48) =
(1961) 3 SCR 77, K. T. Moopil
Nair v. State of Kerala 5
(1958) AIR 1958 SC 538 (V 45) =
1959 SCR 279, Shri Ram Krishna
Dalmia v. Justice S. R. Tendolkar 4

Mr. B. R. L. Iyengar, Senior Advocate (Mr. A. C. Pudissery, Advocate with him), for Appellant (In all the Appeals); M/s. Sardar Bahadur. Vishnu Bahadur and Miss Youngindra Khushalani, Advocates (In C. As. Nos. 1080 and 1137 of 1968), Mr. H. R. Cokhale, Senior Advocate (Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co. with him) (In C. As. Nos. 1094 and 1144 of 1968), Mr. A. V. V. Nair, Advocate (In C. As. Nos. 1053, 1112 and 1139 of 1968), Miss Lily Thomas, Advocate (In C. As. Nos. 1056, 1087 and 1128 of 1968), and Mr. A. Sreedharan Nambiar, Advocate (In C. As. Nos. 1067, 1075, 1091 and 1136 of 1968), for Respon-

dents; Mr. M. C. Chagla, Senior Advocate, (Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., and Mr. Thomas Vellapally Advocate with him) (In C. A. No. 1144 of 1968), for the Intervener.

The following Judgment of the Court was delivered by

SHAH, J.: This group of appeals arises out of an order passed by the High Court of Kerala holding that the Kerala Buildings Tax Act 19 of 1961 is ultra vires the Legislature in that it infringes the equality clause of the Constitution. The State of Kerala has appealed against the decision with special leave granted by this Court.

2. The material provisions of the Kerala Buildings Act, 1961, may be briefly set out. The Act extends to the whole of the State of Kerala: Sec. 1 (2), and shall be deemed to have come into force with effect from March 2, 1961: Section 1 (3). An "assessee" is defined by Section 2 (b) as meaning a person by whom building tax or any other sum of money is payable under the Act and includes every person in respect of whom any proceeding under the Act has been taken for the assessment of building tax payable by him. Section 2 (d) defines "building" as meaning a house, out-house, garage or any other structure or part thereof whether of masonry, bricks, wood, metal, or other material, but does not include any portable shelter or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure. "Floorage" is defined by Section 2 (e) as meaning the area included in the floor of a building, and where a building has more than one floor of a building, the aggregate area included in all the floors together. By Section 3 buildings owned by the State Government, the Central Government or any local authority and buildings used principally for religious, charitable, or educational purposes or as factories or workshops are exempt from payment of tax under the Act. By Section 4 it is provided that there shall be a charge to tax in respect of every building the construction of which is completed on or after March 2, 1961, and which has a floor area of one thousand square feet or more, and that the building tax shall be payable by the owner of the building. The Schedule to the Act sets out the rates of building tax. Buildings

having a total floor area of less than 1000 sq. ft. are not liable to pay tax.

3. The Act, on a bare perusal, discloses some singular provisions. The liability to tax in respect of buildings having total floor area between 1000 and 2000 sq. ft. varies between Rs. 100 to Rs. 200; for buildings with a floor area between 2000 to 4000 sq. ft. it varies between Rs. 400 to Rs. 800; for buildings having total floor area between 4000 to 8000 sq. ft. it varies between Rs. 1200 to Rs. 2400; for buildings with total floor area of 8000 to 12000 sq. ft. it varies between Rs. 3200 to Rs. 4800; and in respect of buildings having total floor area exceeding 12000 sq. ft. a rate of 50 nP. per sq. ft. i. e. Rs. 6000 or more per annum. For determining the quantum of tax the sole test is the area of the floor of the building. The Act applies to the entire State of Kerala, and whether the building is situate in a large industrial town or in an insignificant village, the rate of tax is determined by the floor area; it does not depend upon the purpose for which the building is used, the nature of the structure, the town and locality in which the building is situate, the economic rent which may be obtained from the building, the cost of the building and other related circumstances which may appropriately be taken into consideration in any rational system of taxation of building. Under the Seventh Schedule List II Entry 49, the State Legislature has the power to legislate for levying taxes on lands and buildings. But that power cannot be used arbitrarily and in a manner inconsistent with the fundamental rights guaranteed to the people under the Constitution. No tax may be levied or collected under our constitutional set-up except by authority of law and the law must not only be within the legislative competence of the State, but it must also not be inconsistent with any provision of the Constitution. It has been frequently said by this Court that the validity of a taxing statute is open to question on the ground that it infringes fundamental rights. In *K. T. Moopil Nair v. State of Kerala*, (1961) 3 SCR 77 = (AIR 1961 SC 552) Sinha, C. J. delivering the judgment of the majority observed at p. 89 (of SCR) = (at p. 557 of AIR):

"Article 265 imposes a limitation on the taxing power of the State in so far as it provides that the State shall not levy or collect a tax, except by authority of

law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof and secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution. One of such conditions envisaged by Article 13 (2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Article 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Article 14 of the Constitution, it must be struck down as unconstitutional. Similar observations were made in *Khandige Sham Bhat v Agricultural Income-tax Officer*, (1963) 3 SCR 809 = (AIR 1963 SC 591).

4. The principles which have been expounded by this Court in determining whether there has been denial of equal protection of the laws are also well settled. See *Ram Krishna Dalmia v Shri Justice S. R. Tendolkar*, 1959 SCR 279 = (AIR 1958 SC 538). It is true that in the application of the principles, the Courts, in view of the inherent complexity of fiscal legislation admit a larger discretion to the Legislature in the matter of classification, so long as it adheres to the fundamental principles underlying the doctrine of equality. The power of the Legislature to classify is, it is said, of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways. (1963) 3 SCR 309 = (AIR 1963 SC 591).

5. But in enacting the Kerala Buildings Tax Act no attempt at any rational classification is made by the Legislature. As already observed the Legislature has not taken into consideration in imposing tax the class to which a building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation. They have adopted merely the floor area of the building as the basis of tax irrespective of all other considerations. Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform

tax, discrimination may result, for, in our view, refusal to make a rational classification may itself in some cases operate as denial of equality. This Court in a recent judgment has decided that the levy of tax in exercise of the power under Entry 49, List II of the Seventh Schedule in respect of factory buildings in a municipal area based on floor area was illegal. *New Manek Chowk Spinning & Weaving Mills Co. Ltd v Municipal Corporation of City of Ahmedabad*, (1967) 2 SCR 679 = (AIR 1967 SC 1801). The Court held in that case that the method of adopting a flat rate for a floor area for determining the annual value adopted by the Corporation of Ahmedabad in exercise of the powers conferred upon it by the Bombay Provincial Municipal Corporation Act 49 of 1949 was against the provisions of the Act and the Rules made thereunder as well as all recognised principles of valuation for the purpose of taxation. If levy of tax in a municipal district based on floor area in respect of a factory building violates Article 14 of the Constitution when the tax is sought to be levied by the Municipal Corporation, we see no reason to uphold the tax imposed under the impugned Act when the State in exercise of legislative authority conferred by Entry 49, List II Sch. VII, imposes liability to tax buildings solely on floor area. The vice of the Act in the present case is more pronounced than it was in *New Manek Chowk Spinning and Weaving Mills case*, (1967) 2 SCR 679 = (AIR 1967 SC 1801), in that case the Rules under which the tax was sought to be levied on the basis of floor area were restricted in their operation to factory buildings within the Corporation limits of Ahmedabad, whereas Act 19 of 1961 which is challenged in the present case applies to the whole State of Kerala in respect of buildings completed on or after March 2, 1961, whatever may be the nature or class of the building, the use to which it is put, materials used in its construction and the extent of profitable user to which the building may be put, its cost and its economic rental. It is unnecessary in the circumstances to consider whether imposition of a tax only on buildings constructed after March 2, 1961, and exempting buildings completed before that date may not violate Article 14 of the Constitution.

6. The High Court was, in our judgment, right in holding that the charging section of the Act is violative of the equality clause of the Constitution.

7. The appeals therefore fail and are dismissed with costs. Parties appearing in different groups of appeals through the same Advocate in this Court will be entitled to one hearing fee.

KSB Appeals dismissed.

AIR 1969 SUPREME COURT 381
(V 56 C 75)

(From: Calcutta)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Bibhuti Bhusan Das Gupta and another,
Appellants v. State of West Bengal, Res-
pondent.

Criminal Appeal No. 73 of 1966, D/-
16-9-1968.

(A) Criminal P. C. (1898), Ss. 342, 205
and 540-A — Personal appearance of the
accused dispensed with — Examination
of pleader in place of accused is not a
sufficient compliance — Except where the
accused is a Company or the juridical
person accused alone has got to be ex-
amined. AIR 1962 Cal 203 (FB), Over-
ruled.

Even in a case where the Magistrate
has dispensed with the personal appear-
ance of the accused, a pleader cannot re-
present the accused for purposes of S. 342
of the Criminal P. C. Except where the
accused is a Company or a juridical person
and hence cannot be examined personal-
ly, in all other cases only the accused can
be examined under S. 342 of the Criminal
P. C. Examination of a pleader is not a
sufficient compliance with S. 342. AIR
1962 Cal 203 (FB), Overruled; AIR 1950
Cal 61 and AIR 1926 Bom 218, Ref.

(Paras 8 and 11)

(B) Criminal P. C. (1898), Ss. 537 and
342 — Mere non-examination or defec-
tive examination of accused is not a
ground for interference unless prejudice
is established — (Examination of pleader).
AIR 1956 SC 241 and AIR 1962 SC 1239,
Rel. on. (Para 12)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 97 (V 53) =
1935-3 SCR 235 = 1966 Cri
LJ 82, Harbhajan Singh v.
State of Punjab 2

*(Criminal Revn. No. 921 of 1963, D/-
31-3-1965 — Cal.).

CM/CM/E859/68

(1962) AIR 1962 SC 1204 (V 49) = 1962 Supp 3 SCR 230 = 1962 (2) Cri LJ 284, State of Mahara- shtra v. Laxman Jairam	5
(1962) AIR 1962 SC 1239 (V 49) = (1962) Supp 1 SCR 49 = 1962 (2) Cri LJ 296, Ram Shankar Singh v. State of West Bengal	12
(1962) AIR 1962 Cal 203 (V 49) = 1962 (1) Cri LJ 565 (FB), Prova Debi v. Mrs. Fernandes	4
(1956) AIR 1956 SC 238 (V 43) = 1955-2 SCR 1043 = 1956 Cri LJ 441, Tilakeshwar Singh v. State of Bihar	12
(1956) AIR 1956 SC 241 (V 43) = 1955-2 SCR 1057 = 1956 Cri LJ 444, K. C. Mathew v. State of Travancore-Cochin	12
(1953) AIR 1953 SC 468 (V 40) = 1953 Cri LJ 1938, Hate Singh v. State of Madhya Bharat	5
(1950) AIR 1950 Cal 61 (V 37) = ILR (1950) 2 Cal 602 = 51 Cri LJ 394, Express Dairy Ltd. v. Corporation of Calcutta	11
(1926) AIR 1926 Bom 218 (V 13) = 27 Cri LJ 440, Dorabshah v. Emperor	9
(1923) AIR 1923 Cal 470 (V 10) = 24 Cri LJ 248, Promotha Nath v. Emperor	6

Mr. P. K. Chatterjee, Advocate, for Ap-
pellants; Dr. B. K. Bhattacharya, Senior
Advocate, (Mr. G. S. Chatterjee, Adv-
ocate for Mr. P. K. Bose, Advocate, with
him), for Respondent.

The following judgment of the Court
was delivered by

BACHAWAT, J.: The complainant
Sarajit Kumar Bose was a forest ranger
having his headquarters at Bara Bazar
range in the district of Purulia. Bibhuti
Bhusan Dasgupta was the editor and
Ram Chandra Adhikari was the printer
and publisher of "Mukti" a local Bengali
weekly journal with its registered office
at Purulia town. At the instance of
Sripati Gope, a resident of Bhuni, P. S.
Patanda, District Singhbhum they pub-
lished a letter in the weekly issue of
Mukti dated the 4th Asar, 1358 B. S.
corresponding to June 19, 1965. The
letter which bore the caption "Wild law
in the land of the Nags (barbarians)",
contained several defamatory statements
concerning Sarajit Bose. On his com-
plaint, Sripati Gope and Bibhuti Das-
gupta were charged with an offence
punishable under Section 500 of the
Indian Penal Code and Ram Adhikari

was charged with an offence punishable under Section 501 I P C. They were tried jointly by Shri S M Chatterjee, Magistrate, First Class, Purulia. The Magistrate convicted all of them of the offences with which they were respectively charged and passed appropriate sentences. The appeals filed by them against the order were dismissed by the Sessions Judge Purulia. The order concerning the conviction and sentence of Sripati Gope has now become final. The two courts rejected his claim for protection under the first exception to S 499 I P C. A revision petition filed by Bibhuti Dasgupta and Ram Adhikari was dismissed by the High Court. They have filed the present appeal after obtaining a certificate under Article 134 (1) (c) of the Constitution.

2. All the courts concurrently found that the publication was not made by the appellant in good faith for the public good and that they were not entitled to the protection of the ninth exception to S 499 as claimed by them. Mr Chatterjee attacked this finding. The ninth exception to S 499 provides that "it is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or any other person, or for the public good." Section 52 provides that "nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." The appellants' case is that on their behalf one Dol Gobinda Chakravarty made enquiries and was satisfied about the truth of the defamatory statements. It appears that Dol Gobinda did not make any report to the appellants in writing. The enquiries made by him did not reveal that all the defamatory imputations in the publication were true. On the materials on the record it is impossible to say that the appellants published the statements in good faith or with due care and attention. In *Harbhan Singh v State of Punjab*, 1965-3 SCR 235 = (AIR 1966 SC 97) the Court held that the accused person was entitled to the protection of the ninth exception to Section 499 if he succeeded in proving a preponderance of probability that the case was within the exception. We do not find that the courts below placed upon the appellant any heavier burden of proof.

3. Mr Chatterjee next contended that the trial of Bibhuti Dasgupta was illegal

as he was not personally examined under Section 342 of the Code of Criminal Procedure. To appreciate this argument it is necessary to refer to the following facts. On September 27, 1961 the Magistrate examined the complainant and issued summons to the three accused. On the application of Bibhuti Dasgupta the Magistrate passed an order on December 12, 1961, dispensing with his personal appearance and permitting him to appear by his pleader. On September 17, 1962 the examination of prosecution witnesses was concluded. On the same day Ram Adhikari was examined under Section 342. On December 21, 1962 the lawyer representing Bibhuti Dasgupta filed a petition stating that he was undergoing an operation in Calcutta and that the lawyer may be examined on his behalf under Section 342. On the same date the Magistrate allowed the application and examined his lawyer. On April 17, 1963 the Magistrate delivered judgment. The plea that the trial of Bibhuti Dasgupta was vitiated on account of his non-examination under S 342 was not taken before the Magistrate or the Sessions Judge or at the hearing of the revision petition in the High Court. It was taken for the first time in the petition for grant of the certificate under article 134 (1) (c). In this background let us examine the contention.

4. As a general rule a case where the Magistrate dispenses with the personal attendance of the accused person the first step in a criminal proceeding is to bring him before the Magistrate. The attendance of the accused is secured if necessary by summons or by warrant of arrest. Thereafter the inquiry or trial proceeds in his presence. Section 205 of the Code of Criminal Procedure empowers the Magistrate whenever he issues a summons to dispense with the personal attendance of the accused and permit him to appear by a pleader. The section runs as follows—

"205 (1) Whenever a Magistrate issues a summons, he may, if he sees reason to do so, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinabove provided."

The form of summons issued to the accused runs as follows:—

"Whereas your attendance is necessary to answer to a charge of (state shortly the offence charged) you are hereby required to appear in person (or by pleader, as the case may be) before the (Magistrate) ofon theday ..ofHerein fail not."

Section 540-A empowers the Magistrate at any stage of an inquiry or trial to dispense with the personal attendance of the accused if he is represented by a pleader. The section is as follows:—

"540-A (1). At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused."

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately." The point in issue is whether the pleader can represent the accused for purposes of Section 342 and whether the examination of the pleader in place of the accused is sufficient compliance with the section in a case where the Magistrate has dispensed with the personal attendance of the accused and permitted him to appear by a pleader. On this question there is a sharp conflict of judicial opinion. Most of the decisions upto 1962 are referred to in *Prova Debi v. Mrs. Fernandes*, AIR 1962 Cal 203 (FB). In that case a Full Bench of the Calcutta High Court by a majority decision held that the Magistrate can in his discretion examine the pleader on behalf of the accused under Section 342. This view is supported by numerous decisions of other High Courts, but from time to time many judges expressed vigorous dissents and came to the opposite conclusion. The two sides of the question are ably discussed in the majority and minority judgments of the Calcutta case. After a full examination of all the decided cases on the subject,

we are inclined to agree with the minority opinion.

5. The main arguments in favour of the view that the examination of the pleader is sufficient compliance with the provisions of S. 342 may be summarised as follows. The pleader authorised to appear on behalf of the accused can do all acts which the accused can do. The representation of the pleader extends throughout the trial except as provided in S. 366 (2). The form of the summons shows that the pleader may answer to charge on behalf of the accused at every stage of the proceedings. He may even plead guilty under Sections 242, 243, 251-A, 255 and 271. There is no reason why he cannot be examined under S. 342. That section is subject to and controlled by S. 205. The accused can refuse to answer questions under Section 342 and there is no point in insisting on his personal attendance if he has no intention to answer them. Accused persons will suffer harassment and inconvenience if the Magistrates have no discretion to dispense with their personal examination under S. 342. Having considered all these arguments we are not convinced that pleader can be examined in place of the accused under S. 342.

Section 342 reads as follows:—

"342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)."

Sub-section (1) of Section 342 consists of two parts. The first part gives a discretion to the Court to question the accused at any stage of an inquiry or trial without previously warning him. Under the second part the Court is required to question him generally on the case after the witnesses for the prosecution have been examined and before he is called for his defence. The second part is mandatory and imposes upon the Court a duty to examine the accused at the close of the prosecution case in order to give him an opportunity to explain any circumstances appearing against him in the evidence and to say in his defence what he wants to say in his own words. He is not bound to answer the questions but if he refuses to answer or gives false answers, the consequences may be serious, for under sub-section (2) the Court may draw such inference from the refusal or the false answer as it thinks fit. Under sub-section (3) the answers given by the accused may be taken into consideration in the inquiry or trial. His statement is material upon which the Court may act, and which may prove his innocence, (see *State of Maharashtra v. Laxman Jairam*, 1962 Supp 8 SCR 230 = (AIR 1962 SC 1204)). Under sub-section (4) no oath is administered to him. The reason is that when he is examined under Section 342, he is not a witness. Before Section 342-A was enacted, he was not a competent witness for the defence. His statement under Section 342 was intended to take the place of what he could say in his own way in the witness box. (see *Hate Singh v. State of Madhya Bharat*, AIR 1953 SC 468, at p. 470). Under Section 342-A, he is now a competent witness. But the provisions of Section 342-A do not affect the value of his examination under S. 342. Under sub-section (3) of S. 342 his answers may be put in evidence for or against him in other inquiries or trials for other offences. For instance, if in a trial for murder he says that he concealed the dead body and did not kill the victim his statement may be used as evidence against him in a subsequent trial for an offence under Section 201.

6. The privilege of making a statement under Section 342 is personal to the accused. The clear intention of the section is that only he and nobody else can be examined under it. This conclusion is reinforced if we look at S. 364. The whole of his examination including every question put to him and every

answer given by him must be recorded in full and interpreted to him in a language which he understands, and he is at liberty to explain or add to his answers; and when the whole is made conformable to what he declares is the truth the record has to be signed by him and the Magistrate. The idea that the pleader can be examined on his behalf is foreign to the language of Sections 342 and 364. It was well observed by Rankin J. in *Promotha Nath v. Emperor*, AIR 1923 Cal 470, at p. 481.

"....the intention of the statute is that at a certain stage in the case, the Court itself shall put aside all Counsel, all pleaders, all witnesses, all representatives, and shall call upon an individual accused with the authority of the Court's own voice, to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating.....what is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips."

7. The proposition that a pleader authorised to appear on behalf of the accused can do all acts which the accused himself can do at the trial is too wide. If the statute gives the accused a personal privilege or imposes upon him a personal duty, only he can exercise the privilege or perform the duty. Thus under S. 364 (2) the accused must hear the judgment in person unless the sentence is one of fine only or unless he is acquitted. Under Section 342-A only the accused can give evidence in person and his pleader's evidence cannot be treated as his. The answer of the accused under Section 342 is intended to be a substitute for the evidence which he can give as a witness under Section 342-A. The privilege and the duty of answering questions under Section 342 cannot be delegated to a pleader. No doubt the form of the summons shows that the pleader may answer the charges against the accused, but in so answering the charges, he cannot do what only the accused can do personally. The pleader may be permitted to represent the accused while the prosecution evidence is being taken. But at the close of the prosecution evidence the accused must be questioned and his pleader cannot be examined in his place.

8. Sections 205 and 540-A do not expressly mention that the pleader cannot be examined under S. 342, but this does not lead to the inference that the pleader can be so examined. On the other hand, Sections 353, 360, 361 and 366 expressly provide that the pleader may represent the accused for certain purposes, but from this fact alone no inference can be drawn that the pleader cannot represent the accused for purposes of Section 342 or other sections. It is from the scheme, purpose and language of Section 342 that we are driven to the conclusion that the examination under the section must be of the accused person and not his pleader.

9. In *Dorabshah v. Emperor*, AIR 1926 Bom 218, the Bombay High Court held that where the accused is permitted to appear by his pleader under S. 205 the pleader may on his behalf be examined and may plead guilty under Ss. 242 and 243. Whether the Court can act upon an admission of guilt by the pleader under Sections 242, 243, 251-A, 255 and 271 does not directly arise in this case and we express no opinion on it. It is sufficient to say that the language of those sections and the effect of admissions under them are entirely different.

10. We are not impressed with the argument that an accused person will suffer inconvenience and harassment if the Court cannot dispense with his attendance for purposes of Section 342. The examination under the section becomes necessary when at the close of the prosecution evidence the magistrate finds that there are incriminating circumstances requiring an explanation by the accused. If there is no evidence implicating the accused, no explanation from him is necessary and he need not be examined under Section 342. If there is evidence implicating him, it is in his interest that he should be examined personally.

11. There are exceptional cases when an examination of the accused personally under Section 342 is not necessary or possible. Where the accused is a company or other juridical person it cannot be examined personally. It may be that the Court may then examine a director or some other agent on its behalf (see *Express Dairy Ltd. v. Corporation of Calcutta*, ILR (1950) 2 Cal 602 = (AIR 1950 Cal 61)). Exceptional cases apart, only the accused

in person can be examined under S. 342. We therefore hold that the Magistrate should have examined Bibhuti Dasgupta personally and the examination of his pleader was not sufficient compliance with Section 342.

12. This conclusion does not dispose of Bibhuti Dasgupta's appeal. Under Section 537 the conviction and sentence are not reversible on account of any error, omission or irregularity in any proceedings during the trial unless the error, omission or irregularity has in fact occasioned a failure of justice. Mere non-examination or defective examination under Section 342 is not a ground for interference unless prejudice is established. (see *Tilakeshwar Singh v. State of Bihar*, 1955-2 SCR 1043 = (AIR 1956 SC 238), *K. C. Mathew v. State of Travancore-Cochin* 1955-2 SCR 1057 at pp. 1061-62 = (AIR 1956 SC 241 at p. 244), *Ram Shankar Singh v. State of West Bengal*, (1962) Supp 1 SCR 49 at p. 64 = (AIR 1962 SC 1239 at p. 1245). Looking at the facts of this case we do not find that any prejudice was caused to Bibhuti Dasgupta by his non-examination under Section 342. The prosecution evidence was closed on September 17, 1962. Ram Adhikari appeared in Court and was examined personally. Bibhuti Dasgupta did not appear in Court on that date. After 3 months on December 21, 1962 his pleader was examined on his behalf at his express request. The Magistrate delivered judgment on April 17, 1963. On that date Bibhuti Dasgupta was present in Court. He made no complaint at any time before the Magistrate or the Sessions Judge or the High Court that he had suffered any prejudice. Even in this Court Mr. Chatterjee could not point out what further explanation could have been given by Bibhuti Dasgupta if he had been examined personally. We are satisfied that the omission to examine him under Section 342 did not cause him any prejudice and has not in fact occasioned a failure of justice. We are, therefore, not inclined to interfere with his conviction and sentence.

13. In the result, the appeal is dismissed.

GGM/D. V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 386

(V 56 C 76)

(From Delhi)*

J M SHELAT, V BHARGAVA AND
C A. VAIDIALINGAM, JJMunicipal Corporation of Delhi, Appel-
lant v Kishan Dass and another, Respon-
dentsCivil Appeal No 1049 of 1968, D/- 19-
9-1968

Municipalities — Delhi Municipal Cor-
poration Act (68 of 1957), Sec. 338 (3) (a)
— Delhi Development Act (61 of 1957),
Section 14 — Permission for erection of
building or execution of work—When can
be refused — Mere preparation of Master
Plan under Development Act — Plan
not indicating any particular and definite
use of any land — Permission cannot
be refused on ground of contravention
of Section 14.

It is clear from Section 338 of the
Corporation Act, that the Commissioner
has to give sanction for the erection of a
building or the execution of a work,
unless such building or work would con-
travene any of the provisions of sub-
section (2) of Section 338 or the provi-
sions of Section 340. Therefore, in
order to sustain the validity of the order
of rejection passed by the Commissioner
the corporation has to establish that the
proposed building or the use of the site
for the building, by the petitioner would
contravene the provisions of any other
law (Para 13)

It is certainly not the scheme of the
Development Act that the moment a
Master Plan has come into operation and
if it contains a proposal regarding the
width that a road should have all use
of land adjoining that road is prohibited
for an indefinite period. The reason-
able interpretation, therefore to be plac-
ed on Section 14 will be that if any
particular and definite use of land is in-
dicated in a Master Plan, a different
use of that land cannot be permitted.
Similarly if a Zonal Development Plan
provides for a particular use of any land
or any building in that Zone it cannot be
put to a different use. If neither of the
plans provide for the particular use of
any land or building in the area or zone,
Section 14 will have no application what-
soever (Para 21)

* (L. P. A. No 85 of 1967, D/- 11-8-1967
— Delhi.)

CM/CM/E868/68

Where, therefore, there is no indica-
tion in the Master Plan in any manner
that the lands of the petitioner are be-
ing taken up by any part of the proposed
road, mentioned in the Master Plan,
there is no violation of Section 14 of
the Development Act. It also follows
that there is no violation of 'any other
law' under Clause (a) of sub-section (2)
of Section 338 of the Corporation Act
and the permission asked for erection of
building or execution of work by
the petitioner cannot be refused by the
Commissioner (Para 22)

Mr Niren De, Solicitor General of
India (M/s B P Maheshwari and R. K.
Maheshwari, Advocates, with him), for
Appellant, Mr M C Chagla, Senior
Advocate (Mrs Urmila Kapoor, Advo-
cate, with him), for Respondents

The following Judgment of the Court
was delivered by

VAIDIALINGAM, J. This appeal by
the Municipal Corporation of Delhi by
special leave, is directed against the
judgment and order dated August 11,
1967 passed by the High Court of Delhi
in Letters Patent Appeal No 85 of 1967.
The Letters Patent Bench had confirm-
ed an order of the learned Chief Justice,
Delhi High Court, dated May 10 1967
whereby a writ of mandamus had been
issued to the appellant to approve the
plans submitted by the respondents and
grant the sanction asked for

2. The circumstances leading up to
the issue of the writ of mandamus against
the appellant may be briefly adverted
to. The respondents are the owners and
are in possession of the building bear-
ing municipal door Nos 3766 to 3778,
situated in the main Chawn Bazar,
Delhi. As the building was an
old construction and required urgent
and extensive repairs, on October 18,
1965 the respondents submitted to the
appellant plans for its sanction for ex-
ecution of work consisting of repairs,
additions as well as alterations to the
said building. The Commissioner of the
appellant Corporation, by letter dated
February 4, 1966 informed the respon-
dents that their application for execution
of construction work in respect of house
Nos 3766 to 3778 had been refused on
the grounds "that the proposal was
under acquisition and also effected in
the "ROW" and the land was residential
against proposal of commercial"

3. A controversy appears to have
been raised by the appellant before the

High Court that the application by the respondents, related also to certain other municipal door numbers, but as that is not material for the present purpose, we do not refer to the same. Attempts made by the respondents to satisfy the Commissioner that their application was quite legal and that there was no violation of any law or rules having failed, they filed Civil Writ Petition No. 410-D of 1966 in the Circuit Bench of the Punjab High Court at Delhi, under Article 226 of the Constitution praying for the issue of an order or direction in the nature of mandamus directing the appellant to accord sanction to the plan for execution of work in respect of the building as per their application of October 16, 1965. According to the respondents it was incumbent on the Commissioner of the appellant, under Section 336 of the Delhi Municipal Corporation Act, 1957 (Act LXVI of 1957) (hereinafter referred to as the Corporation Act), to sanction the plans of a building or execution of a work unless such a building or work contravened any of the provisions of sub-section (2) of Section 336 or Section 340 of the Corporation Act. It was further stated that the plan submitted by them did not contravene any of the provisions of sub-section (2) of Sec. 336 or Section 340 of the Corporation Act. The reasons given for rejection, by the Commissioner, were also challenged as being vague and unintelligible apart from being extraneous to the provisions of the Act. The respondents further averred that the buildings required extensive repairs as was clear from the notice, dated March 3, 1966, issued by the Commissioner of the appellant stating that the building posed a danger to the residents of the area and that the necessary repairs had to be carried out immediately after obtaining sanction from the building department, and threatening penal consequences if the respondents did not comply with the notice. On these grounds they urged that the order dated February 4, 1966 passed by the Commissioner refusing to accord sanction was illegal and ultra vires and in consequence they prayed for the issue of a writ of mandamus directing the appellant to accord sanction, as asked for by them.

4. On behalf of the appellant, the Assistant Engineer had filed a counter affidavit. The material averments, relevant for the present purpose, are that

the respondents are the owners of the premises and that the construction was old and required repairs; but the plans submitted by the respondents did not conform to bye-laws and contravened Section 336 (2) (a) in respect of land use and Section 340 (2) with respect to requisitioning of land by the Delhi Development Authority for their Scheme and that the plans were also affected by road widening.

5. In their reply affidavit the respondents controverted the averments of the Assistant Engineer that the plans did not conform to bye-laws or the provisions of Section 336 (2) or any other law in respect of land use. They stated that according to the Master Plan prepared under the Delhi Development Act, 1957 certain areas, including Chawri Bazar, would be the Central Business District of Delhi and that the proposed user, mentioned by them in the Plan sent for sanction was not in contravention of the Master Plan. They also denied that the Delhi Development Authority had any scheme for road widening. They further referred to a letter, dated April 30, 1966 of the Delhi Development Authority stating that the Zonal Development Plan has not been prepared for the area in question. They finally reiterated the plea that the order refusing sanction was not based on any of the grounds envisaged by Section 336 (2) or Sec. 340 or any other provision of the Corporation Act or of any other Act.

6. The learned Chief Justice of the Delhi High Court, who heard the writ petition in the first instance, by his judgment and order dated May 10, 1967 accepted the writ petition filed by the respondents and issued a mandamus to the appellant to approve the plans and grant the sanction asked for. The learned Chief Justice has expressed the view that the Commissioner could decline the sanction only if there was a contravention of sub-section (2) of Section 336 or Section 340 of the Corporation Act. In this case, according to the learned Chief Justice, there was no such contravention established by the appellant and if that were so the Commissioner had no power to refuse to accord the sanction asked for by the respondents. He was of the further view that the grounds on which the Commissioner refused sanction were wholly irrelevant and not germane to the sanction asked for. Taking the further view that the Commissioner had a

statutory duty to grant the sanction asked for, the learned Chief Justice directed the issue of a writ of mandamus. This judgment of the learned Chief Justice as mentioned earlier, was affirmed by the judgment of the Letters Patent Bench of the Delhi High Court dated August 11, 1967.

7 The learned Solicitor General, on behalf of the Corporation, has urged that the order of the Commissioner refusing sanction is legal and is justified by the provisions of Clause (a) of sub sec. (2) of Section 336 of the Corporation Act. Even at the outset he has made it clear that he is relying upon only one of the grounds given in the order dated February 4, 1966 of the Commissioner, viz., that the plan submitted was affected by the proposals contained in the Master Plan in respect of widening of the road in the area in question. The expression 'ROW' used in the order refers to 'right of way' which is with reference to the road proposed under the Master Plan. The Master Plan has been prepared under Section 7 of the Delhi Development Act, 1957 (Act LXI of 1957) (hereinafter referred to as the Development Act) and it has come into operation, under Section 11, in the area concerned. The building operation proposed by the respondents as per the plans submitted by them will be contrary to the Master Plan and, as such, will be hit by Section 14 of the Development Act. In short, the contention of the learned Solicitor General is that the Master Plan prepared by the Authority for Delhi, which has statutory force, has come into effect under the Development Act. Under Section 336 (2) (a) of the Corporation Act, the Commissioner is entitled to refuse sanction of a building or work if the building or work or use of the site for building or work would contravene 'any other law'. As the proposed construction would not be in conformity with the Master Plan, Section 14 of the Development Act will be violated, in which case there will be a contravention of 'any other law'. Hence the order of rejection passed by the Commissioner is legal and valid.

8 In this connection the learned Solicitor General referred us to the Master Plan wherein it is stated that the proposed road (in Chawri Bazar, which is the area with which we are concerned) from Hauz Kazi to Jama Masjid is recommended to have a width of 60 feet.

The width of the existing road is only 48 feet. The object of the Development Act is to freeze new building constructions which will be inconsistent with the Master Plan, and, if the Master Plan mentions the width of a proposed road and the width of an existing road is less, no new construction will be permissible on either side of the road till the excess area required for the road is found. The Solicitor General has further urged that though a Zonal Development Plan for each of the Zones in which Delhi will have to be divided will have also to be prepared and has not come into operation for the zone concerned, nevertheless till such a Zonal Development Plan comes into operation, the Master Plan will hold the field. If a Zonal Development Plan comes into force and has made any alteration, the Zonal Development Plan will then have effect and the Master Plan will stand abridged or modified. At present, it is the Master Plan that holds the field and, as according to it an excess area of 12 feet for the proposed road will have to be found, all building operations on either side of the proposed road will have to come to a standstill. That is, the learned Solicitor General was prepared to take the stand that, so to say, there is a freezing of all building operations, on either side of the existing road which according to him, is warranted by Section 14 of the Development Act. In support of his contentions, the learned Solicitor General drew our attention to certain provisions contained in the Corporation Act and the Development Act.

9 The stand taken by the learned Solicitor General has been very strenuously controverted by Mr M G Chagla, learned counsel for the respondents. Mr Chagla, apart from criticising the order dated August 11, 1967 as laconic and unintelligible and not containing any valid reasons has urged that the Master Plan, so strongly relied on by the learned Solicitor General, does not, as such, refer to the survey numbers in respect of which the respondents had asked for sanction. Before the High Court the appellant has not relied upon the Master Plan nor did it place any material to show that any part of the proposed road shown in the Master Plan will pass through any of the properties of the respondents. The Master Plan prepared under the Development Act is nothing but a broad outline of what Delhi would

look like, in future. The plan, which may probably give more accurately the lands in the area which are reserved for roads, is the Zonal Development Plan, the preparation of which is mandatory under Section 8 of the Development Act. Admittedly no such plan has been prepared much less has come into operation in the concerned zone. So long as the Master Plan does not state that any part of the property belonging to the respondents will be covered by the proposed road, it cannot be stated that when the respondents are attempting to renovate the building they are using the land in the zone otherwise than in conformity with the Master Plan. Mr. Chagla further points out that if the contentions advanced on behalf of the appellant are accepted, the entire building operations in Delhi will have to come to a standstill for an indefinite number of years and according to him, that position is not envisaged either by the Master Plan or the provisions of the Development Act. He finally urged that Section 14 of the Development Act has no application at all.

10. From the contentions of both the parties set out above, it will be noticed that according to the appellant if building operations are allowed to be carried on, there will be a violation of the Master Plan, and in consequence of the provisions of Section 14 of the Development Act; whereas, according to the respondent, there is no violation of either the Master Plan or any provisions of the Development Act or of any other law.

11. A reference to the material provisions of the Corporation Act and the Development Act, which will be made by us presently, will clearly establish that the contentions of the learned Solicitor General cannot be accepted.

12. We shall first take up the provisions of the Corporation Act. Section 332 prohibits the erection or commencement of the erection of any building, or execution of any of the works specified in Section 334, except with the previous sanction of the Commissioner. Section 333 makes it mandatory on a person intending to erect a building to apply to the Commissioner in that behalf. Section 334 makes it obligatory on a person, who intends to execute any of the works mentioned therein, to apply for sanction to the Commissioner. Section 336 deals with sanction or refusal of building or

work. It is only necessary to refer to sub-section (1) and Clause (a) of sub-section (2) of this section, because, as we have already stated, the order of rejection by the Commissioner is sought to be justified under this provision. These provisions are:

"336. (1) The Commissioner shall sanction the erection of a building or the execution of a work unless such building or work would contravene any of the provisions of sub-section (2) of this section or the provisions of Section 340.

(2) The grounds on which the sanction of a building or work may be refused shall be the following, namely:—

(a) that the building or work or the use of the site for the building or work or any of the particulars comprised in the site plan, ground plan, elevation, section or specification would contravene the provisions of any bye-law made in this behalf or of any other law or rule, bye-law or order made under such other law;

Sub-section (3) of Section 336 provides for the Commissioner communicating the sanction to the person who has given the notice; and in cases where he refuses sanction on any of the grounds specified in sub-section (2) of Section 336 or under Section 340, to record a brief statement of his reasons for such refusal and communication of the refusal along with the reasons to the party concerned.

13. It will be clear from a perusal of Section 336, that the Commissioner has to give sanction for the erection of a building or the execution of a work, unless such building or work would contravene any of the provisions of sub-section (2) of Section 336 or the provisions of Section 340. Therefore, in order to sustain the validity of the order of rejection passed by the Commissioner, the appellant has to establish, as it seeks to, that the proposed building or the use of the site for the building, by the respondents, would contravene the provisions of 'any other law'. If the proposed building or use of the site for the building would contravene the provisions of 'any other law', the Commissioner has ample powers under Clause (a) of Section 336 (2) to refuse sanction. Section 340 gives power to the Commissioner to refuse sanction for erection of any building on either side of a new street, under the circumstances mentioned therein.

14 We shall now refer to some of the provisions of the Development Act in order to appreciate the scheme of that statute. The Development Act is an Act to provide for the development of Delhi according to plan and for matters ancillary thereto. Section 2, Clauses (d) and (e), define the expressions 'development' and 'development area' respectively. Chapter II deals with the Delhi Development Authority and its objects. Section 3, therein, provides for the Central Government constituting for the purposes of the Act an authority to be called the Delhi Development Authority. It is referred to in the Act as the Authority. Section 5 provides for the Authority constituting an Advisory Council for the purpose of advising the Authority on the preparation of the Master Plan and the Zonal Development Plans and on such other matters in connection with the administration of the Act. Such Advisory Council also has been duly constituted. Section 6 provides that the object of the Authority shall be to promote and secure the development of Delhi according to plan and clothes the Authority with the various powers mentioned therein.

15 Chapter III deals with Master Plan and Zonal Development Plans. Section 7, therein, provides for the Authority carrying out a civic survey of and preparing a Master plan for Delhi. Under sub-section (2) the Master Plan shall—

"(a) define the various zones into which Delhi may be divided for the purposes of development and indicate the manner in which the land in each zone is proposed to be used (whether by the carrying out thereon of development or otherwise) and the stages by which any such development shall be carried out, and

(b) serve as a basic pattern of framework within which the zonal development plans of the various zones may be prepared.

Section 8 provides for the preparation by the Authority of a zonal development plan for each of the zones into which Delhi may be divided and also refers to the various matters which are to be indicated in the same. The material provisions of Section 8 which, according to us, will have a vital bearing in considering the soundness of the stand taken by the appellant are as follows:

"8. (1) Simultaneously with the preparation of the master plan or as soon as

may be thereafter, the Authority shall proceed with the preparation of a zonal development plan for each of the zones into which Delhi may be divided.

(2) A zonal development plan may—

(a) contain a site-plan and use-plan for the development of the zone and show the approximate locations and extents of land uses proposed in the zone for such things as public buildings and other public works and utilities, roads, housing, recreation, industry, business, markets, schools, hospitals and public and private open spaces and other categories of public and private uses.

(d) in particular, contain provisions regarding all or any of the following matters, namely—

(ii) the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, schools, markets and other public purposes,

Section 9 (1) states that the expression 'plan' in that section and in Sections 10, 11, 12 and 14 means the Master Plan as well as the Zonal Development Plan for a zone. Sub-section (2) provides for the plan—which means the Master Plan as well as the Zonal Development Plan—being submitted after preparation by the Authority to the Central Government for approval and it also gives power to the Government to approve the plan, without modification or with such modifications as it may consider necessary or reject the plan with directions to the Authority to prepare a fresh plan. Section 10 provides for the procedure to be followed in the preparation and approval of plans. A perusal of that section shows that ample opportunity has to be provided for persons and every local authority to submit objections at the stage of the draft, and it also requires the authority to consider any objections, suggestions and representations that may have been made, before the final plan is prepared and submitted to the Central Government for its approval. It also empowers the Central Government to call for any information that it thinks necessary from the Authority for the purpose of approving any plan submitted to it. Section 11 provides for the date of operation of the Plan.

16. There is no controversy, in this case that the Master Plan has been prepared under Section 7 by the Authority

on September 1, 1962 and it has also come into force, as contemplated by Section 11. Though Section 8 contemplates the preparation of a Zonal Development Plan simultaneously with the preparation of the Master Plan, or as soon as may be thereafter, no Zonal Development Plan for the zone concerned has been prepared up to now. It may also be pointed out that if and when such a Plan is prepared, containing the various matters referred to in sub-section (2) of Section 8, before it is finalized and sent to the Central Government for approval, parties and local authorities will have to be given an opportunity of sending their objections and suggestions and representations, which have all to be duly and properly considered by the Authority concerned.

17. Chapter III-A deals with modifications to the Master Plan and the Zonal Development Plan. Section 11-A, therein, provides for the Authority and the Central Government making modifications in the Master Plan or the Zonal Development Plan under the circumstances and after following the procedure, mentioned therein.

18. Chapter IV deals with development of lands. Sub-section (1) of Section 12 gives power to the Central Government, by notification in the Official Gazette, to declare any area in Delhi to be a development area for the purposes of the Act. Sub-section (2) prohibits the Authority, except as otherwise provided for in the Act, to undertake or carry out any development of land in any area which is not a development area. Sub-section (3) provides that after the commencement of the Act no development of land shall be undertaken or carried out in any area by any person or body (including a department of Government) except in the manner provided therein.

19. Section 14, on which considerable reliance has been placed, on behalf of the appellant, is as follows:

"14. After the coming into operation of any of the plans in a zone no person shall use or permit to be used any land or building in that zone otherwise than in conformity with such plan:

Provided that it shall be lawful to continue to use upon such terms and conditions as may be prescribed by regulations made in this behalf any land or building for the purpose and to the ex-

tent for and to which it is being used upon the date on which such plan comes into force."

20. A copy of the Master Plan for Delhi has been placed before us by the learned Solicitor General. Chapter I deals with the Land Use Plan under various sub-heads. Chapter II deals with Zoning and Sub-division Regulations. There are certain maps annexed to this Plan. Under the heading 'Proposed rights of way in Old City', in paragraph 11 of Chapter I, item 7 refers to the area concerned, viz., Chawri Bazar. Against that it is stated that the road from Hauz Kazi to Jama Masjid which is approximately 1800 feet long is recommended to have a road width of 60 feet. There is no controversy that the existing road is only 48 feet wide. Our attention has also been invited to two of the maps annexed to this Master Plan, viz., the Zonal Map and the Proposed Circulation Pattern of Walled City and it was stated that the area marked 'A' in the Zonal Map refers to the Walled City which is divided into 27 zones. The second map viz., the Proposed Circulation Pattern of Walled City, is an enlargement of the area 'A' shown in the Zonal Map and the Chowri Bazar is shown there.

21. As stated earlier, considerable reliance has been placed by the learned Solicitor General on the statement in the Master Plan that the road in Chawri Bazar is to have a width of 60 feet and on the two maps annexed to the Master Plan which, according to him, will show the lay out of the proposed road. The Master Plan and the two maps relied on by the appellant do not give any indication that any part of the land belonging to the respondents will be covered by any portion of the proposed road. The provisions of Section 7 of the Development Act clearly indicate—and that is borne out by the various matters mentioned in the Master Plan—that the Master Plan will only give a very broad outline of Delhi as it will look like in future. Though there is an obligation on the Authority to prepare the Zonal Development Plan simultaneously with the preparation of the Master Plan or as soon as there may be thereafter, no such Zonal Development Plan has been prepared. That assumes considerable importance in this case because it is the Zonal Development Plan, under Section 8 (2) (a) which will show the approximate locations and extents of land-uses

proposed in a zone for roads, further, under sub-clause (ii) of Clause (d) of sub section (2) of Section 8, the said Zonal Development Plan will also contain provision regarding the allotment or reservation of land for roads. It is only when such allotment or reservation of land for roads is made that it will be possible to know clearly as to which part of a person's land and what portion thereof is allotted or reserved for a road. If such an indication is made available by the Zonal Development Plan, then Section 14 will quite naturally stand attracted, because any user of a land or building otherwise than in conformity with the Zonal Development Plan will be hit by that section. In the absence of any indication in the Master Plan, in this case, that any part of the land of the respondents will be covered by a road or portion of a road, it is not possible to accept the contention of the learned Solicitor General that there will be any violation of Section 14 of the Development Act if the respondents be permitted to use the land, as asked for by them. To attract Section 14, the appellant will have to establish that any land or part of a land or a building in a Zone has been dealt with in a particular manner by the Master Plan and that it is proposed to be used in a different manner. If a Zonal Development Plan is prepared for the area, before it comes into operation in the Zone, the procedure indicated in Section 10 will have to be followed and parties will have to be given an opportunity of placing any objections or making any representations or offering any suggestions. So far as we can see, it is certainly not the scheme of the Development Act that the moment a Master Plan has come into operation and if it contains a proposal regarding the width that a road should have, all use of land adjoining that road is prohibited for an indefinite period. The reasonable interpretation to be placed on Section 14 will be that if any particular and definite use of land is indicated in a Master Plan, a different use of that land cannot be permitted. Similarly, if a Zonal Development Plan provides for a particular use of any land or any building in that Zone, it cannot be put to a different use. If neither of the plans provide for the particular use of any land or building in the area or Zone, Section 14 will have no application whatsoever.

22 We have already stated that the respondents' lands are not in any manner indicated as being taken up by any part of the proposed road, mentioned in the Master Plan and, if that is so, there is no violation of Section 14 of the Development Act. It also follows that there is no violation of 'any law' under Cl (a) of sub section (2) of Section 336 of the Corporation Act.

23. The High Court was perfectly justified, in the circumstances, in issuing the writ of mandamus. The result is that the appeal fails, and is dismissed. The appellant will pay the costs of the respondents.

D.R.R.

Appeal dismissed.

AIR 1969 SUPREME COURT 392 (V 56 C 77)

(From Punjab 65 Pun LR 1072)
S M SIKRI AND R. S BACHAWAT, JJ
Jaimal and another, Appellants v The Financial Commissioner, Punjab and others, Respondents

Civil Appeal No 2354 of 1966, D/- 25-9-1968

Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), Ss. 18 and 2 (1) and (6) — Application under Section 18 — Sub-tenant is not entitled to make.

A sub tenant is not entitled to apply under Section 18 of Act for purchase of lands from the land-owner (1963) 65 Pun LR 1072, Affirmed. (Para 13)

Before a person can apply under Section 18, he must be a tenant of a land-owner. A tenant of a tenant cannot be a tenant of the land-owner. (Para 7)

The fact that by sub-letting the tenant is also not able to apply under Sec. 18 by virtue of the first Proviso to sub-section (1) cannot confer rights on the sub-tenant because he must himself be a tenant of land-owner within Sec. 18 of the Act. (Para 13)

Mr M C Chagla, Senior Advocate, (Mr Janardan Sharma, Advocate, with him), for Appellants. Mr B C Misra, Senior Advocate, (M/s S K. Mehta and K. L. Mehta, Advocates, with him) for Respondent No 3.

The following Judgment of the Court was delivered by

SIKRI, J. This appeal by certificate granted to the appellants by the High

Court of Punjab under Article 133 (1) (c) of the Constitution raises one point, namely, whether a sub-tenant is entitled to purchase the land from the land-owner under Section 18 of the Punjab Security of Land Tenures Act (Punj. Act X of 1953)—hereinafter referred to as the Act.

2. It would be sufficient to give few facts. The appellants, Jaimal and Ram Singh, applied under Section 18 of the Act to the Assistant Collector, 1st Grade, Hissar, to purchase 280 Kanals 4 marlas of land situate in village Mehnda, Tehsil Hansi, District Hissar. The land was originally owned by respondents Nos. 4 to 10, who had given this land on lease to Sheo Parshad, respondent No. 3. It is not in dispute that the Appellants and their fathers had been in occupation of the land in dispute for the last 30 years, as sub-tenants under Sheo Parshad, respondent No. 3. During the pendency of the application, respondents Nos. 4 to 10 sold the land in dispute, on October 25, 1957, to Sheo Parshad, and also in favour of his two sons. The Assistant Collector, by his order dated November 30, 1959, accepted the application of the appellants and allowed them to purchase 274 Kanals of land for Rs. 6730. On appeal, the Collector varied the order but the variation is not material for the purpose of this appeal. The appellants then preferred an appeal to the Commissioner and Sheo Parshad filed Revision Petition to him against the order of the Collector. The Commissioner upheld the claim of the appellants to purchase the land under Section 18 of the Act at the price assessed by the Assistant Collector, but he modified the order in respect of 85 kanals 8 marlas which had been sold to the sons of Sheo Parshad. The final order in the proceedings was passed by the Financial Commissioner who, by his order dated August 27, 1962, held that the appellants were not entitled to purchase the land under Section 18 of the Act. Thereupon the appellants filed a petition under Article 226 of the Constitution, seeking to quash the order of the Financial Commissioner. The High Court was also of the opinion that the appellants being sub-tenants were not entitled to apply under Section 18 of the Act.

3. The answer to the question whether the appellants are entitled to apply under Section 18 of the Act depends

upon the interpretation of Section 18, which reads as follows:

“18. Right of certain tenants to purchase land.

(1) Notwithstanding anything to the contrary contained in any law, usage or contract, a tenant of a land-owner other than a small land-owner—

(i) who has been in continuous occupation of the land comprised in his tenancy for a minimum period of six years, or

(ii) who has been restored to his tenancy under the provisions of this Act and whose periods of continuous occupation of the land comprised in his tenancy immediately before ejectment and immediately after restoration of his tenancy together amount to six years or more, or

(iii) who was ejected from his tenancy after the 14th day of August, 1947, and before the commencement of this Act, and who was in continuous occupation of the land comprised in his tenancy for a period of six years or more immediately before his ejectment,

shall be entitled to purchase from the land-owner the land so held by him but not included in the reserved area of the land-owner, in the case of a tenant falling within clause (i) or clause (ii) at any time, and in the case of a tenant falling within clause (iii) within a period of one year from the date of commencement of this Act.

Provided that no tenant referred to in this sub-section shall be entitled to exercise any such right in respect of the land or any portion thereof, if he had sublet the land or the portion, as the case may be, to any other person, during any period of his continuous occupation, unless during that period the tenant was suffering from a legal disability or physical infirmity, or if a woman, was a widow or was unmarried;

Provided further that if the land intended to be purchased is held by another tenant who is entitled to pre-empt the sale under the next preceding section, and who is not accepted by the purchasing tenant, the tenant in actual occupation shall have the right to pre-empt the sale.

(2) A tenant desirous of purchasing land under sub-section (1) shall make an application in writing to an Assistant Collector of the First Grade, having jurisdiction over the land concerned, and the Assistant Collector, after giving

notice to the landlord and to all other persons interested in the land and after making such inquiry as he thinks fit, shall determine the value of the land which shall be the average of the price obtaining for similar land in the locality during 10 years immediately preceding the date on which the application is made.

(3) The purchase price shall be three-fourth of the value of land as so determined.

(4) (a) The tenant shall be competent to pay the purchase price either in a lump sum or in six monthly instalments not exceeding ten in the manner prescribed.

(b) On the purchase price or the first instalment thereof, as the case may be, being deposited, the tenant shall be deemed to have become the owner of the land, and the Assistant Collector shall, where the tenant is not already in possession, and subject to the provisions of the Punjab Tenancy Act (XVI of 1887), put him in possession thereof.

(c) If a default is committed in the payment of any of the instalments, the entire outstanding balance shall on application by the person entitled to receive it, be recoverable as arrears of land revenue.

(5) If the land is subject to a mortgage at the time of the purchase, the land shall pass to the tenant unencumbered by the mortgage, but the mortgage debt shall be a charge on the purchase money.

(6) If there is no such charge as aforesaid the Assistant Collector shall, subject to any direction which he may receive from any court, pay the purchase money to the landowner.

(7) If there is such a charge, the Assistant Collector shall, subject as aforesaid, apply in the discharge of the mortgage debt so much of the purchase money as is required for that purpose and pay the balance, if any, to the landowner, or retain the purchase money pending the decision of a civil Court as to the person or persons entitled thereto.

4. "Land-owner" is defined in S 2(1) of the Act to mean "a person defined as such in the Punjab Land Revenue Act 1887 (Act XVII of 1887), and shall include an 'allottee' and 'lessee' as defined in clauses (b) and (c) respectively, of Section 2 of the East Punjab Displaced Persons (Land Resettlement) Act,

1949 (Act XXXVI of 1949), hereinafter referred to as the "Resettlement Act". The explanation to S 2 (1) reads

"In respect of land mortgaged with possession, the mortgagee shall be deemed to be the land-owner."

5. The word "tenant" is defined in S 2 (6) as follows

"Tenant" has the meaning assigned to it in the Punjab Tenancy Act, 1887 (Act XVI of 1887) and includes a sub-tenant and self-cultivating lessee, but shall not include a present holder, as defined in Section 2 of the Resettlement Act."

6. In the Land Revenue Act, 1887, "land-owner" has been defined as follows, in S 3 (2)

"land-owner" does not include a tenant or an assignee of land revenue, but does include a person to whom a holding has been transferred, or an estate or holding has been let in farm, under this Act for the recovery of an arrear of land-revenue or of a sum recoverable as such an arrear and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate."

7. It will be noticed that before a person can apply under S 18 of the Act he must be a tenant of a land-owner other than a small land-owner. There is no dispute that the land-owner in this case is not a small land-owner. The only question is whether the appellants, who were sub-tenants, can be said to be tenants of the land-owner within the meaning of S 18. If we look at the definitions of the words "tenant" and "land-owner", it seems clear that a tenant of a tenant cannot be a tenant of the land-owner, because the definition expressly says that a land-owner does not include a tenant. Apart from this, the first proviso to sub-s (1) of S 18 makes it clear that a tenant who has sublet the land or a portion, as the case may be, to any other person during the period of his continuous occupation is disabled from applying under Section 18 unless during the period of his continuous occupation the tenant was suffering from legal disability or physical infirmity or if a woman was a widow or was unmarried. In other words, for example, a tenant who is a widow would be entitled to apply under

S. 18 even though she had sublet the land which she desired to purchase. No satisfactory answer was given by the learned counsel for the appellants as to what would happen if both the sub-tenant and the widow applied to purchase.

8. Both sides have relied on the scheme of the Act, but it seems to us that the scheme of the Act and the objects underlying the Act do not assist us in determining this question. It is well known that the main objects of the Act were to provide security to the tenants, settle tenants on land declared surplus and fix a ceiling on the total holding of land-owners and tenants. It is also well known that it was a measure of agrarian reform. But these matters do not assist us in interpreting S. 18.

9. The answer must depend upon the language of S. 18, fairly construed. If it was intended that a sub-tenant should be entitled to purchase under S. 18, we would have expected some provision in the Act to solve the difficulties which would arise if there was competition between the tenant and the sub-tenant.

10. There was some debate before us whether a tenant who has sublet would be treated to be in continuous occupation of the land during the period of sub-tenancy within S. 18 (1) (i), but we think that the proviso to S. 18 (1) proceeds on the basis that the tenant is in continuous occupation even though he has sublet the land.

11. It will again be noticed that under sub-s. (4) (b) of S. 18 on the purchase price being deposited, the tenant becomes owner of the land. If the contention of the appellant was correct, the sub-tenant would become the owner under sub-s. (4) (b); but what will happen to the rights of the tenant? No satisfactory answer was given to this question.

12. Again it will further be noticed that sub-s. (5) of S. 18 talks of the mortgage of the land but it does not speak of the mortgage of the rights of a tenant.

13. It seems to us that the High Court was right in holding that the legislature did not intend to confer any rights under S. 18 on the sub-tenant. The fact that by sub-letting the tenant is also not able to apply under S. 18 by virtue of the first proviso to sub-s. (1) cannot confer

rights on the sub-tenant because he must himself be a tenant of land-owner within S. 18 of the Act.

14. Mr. Chagla says that it is a very hard case for the appellants have been in possession for over 30 years, but if it is a hard case it is for the legislature to intervene and provide for such hard cases.

15. In the result the appeal fails and is dismissed. There will be no order as to costs.

MVJ/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 395
(V 56 C 78)

(From: Madhya Pradesh)*

M. HIDAYATULLAH C. J. AND
A. N. GROVER, J.

Narbada Prasad, Appellant v. Chhaganlal and others, Respondents.

Civil Appeal No. 2 of 1968, D/- 30-7-1968.

(A) Representation of the People Act (1951), Ss. 33 (5), 36 (2) (b) — Requirements of valid nomination paper — Non-compliance — Effect.

Candidate an elector of a different constituency—Copy of electoral roll of that constituency or relevant part thereof or certified copy of relevant entry therein must either be filed along with nomination paper or produced at time of scrutiny before returning officer — Non-compliance of — Candidate merely producing certificate from officer who was not authorised to issue certified copy of electoral roll — Certificate based on gist of relevant entry given in affidavit of candidate attached to such certificate — Returning officer is justified in rejecting nomination paper under S. 36 (2) (b) — Order of rejection cannot be recalled on subsequent production of relevant evidence — Law requiring particular thing to be done in certain manner — It must be done in that manner or not at all — Other modes of compliance are excluded. (Para 5)

(B) Representation of the People Act (1951), S. 116-A — Appeal to Supreme Court — Finding of fact and appreciation of evidence — Practice.

*(Election Petn. No. 5 of 1967, D/- 30-11-1967 — M. P.).

CM/CM/E138/68

An appeal before the Supreme Court under Section 116-A is an appeal as of right and is open both on facts and law, still the practice of the courts has uniformly been to give the greatest assurance to the assessment of evidence made by the Judge who hears the witnesses and watches their demeanour and judges of their credibility in the first instance. In an appeal the burden is on the appellant to prove how the judgment under appeal is wrong. To establish this he must do something more than merely ask for a re-assessment of the evidence. He must show wherein the assessment has gone wrong. Where the court of first instance relies upon probabilities alone, the appellate court may be in as good position as the court of trial in judging of the probabilities, but where the court of trial relies upon its own sense of the credibility of a witness the appellate court is certainly at a disadvantage, because it has not before it the witness but the dead record of the deposition as recorded. Where the evidence which the Judge considers truthful not on the probabilities of the case but because the Judge on his observation of the manner in which the witness deposed, the appellate Court should be slow to depart from the conclusion of the trial judge (Paras 10, 11)

(C) Representation of the People Act (1951), S 123 (2) (ii)—Corrupt practice—Undue influence — Speech exhorting voters that if they voted for the Congress or a Congress candidate they would be committing the sin of go-hatya amounts to an attempt to induce voters to believe that they would become objects of divine displeasure or spiritual censure falling within the mischief of S 123 (2) (ii) (Paras 12, 13)

Mr S V Gupte, Senior Advocate (M/s R. K. Vijayavargiya and S S Khanduja, Advocates with him), for Appellant M/s V K. Sanghi, G L. Sanghi and A. G. Ratnaparkhi, Advocates, for Respondent No 1.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C J This is an appeal against the judgment, November 30, 1967, of a learned Single Judge of the High Court of Madhya Pradesh at Indore setting aside the election of the appellant to the Khategaon Legislative Assembly Constituency No 259. The facts on which the petition was

based and the judgment of the High Court has been rested, may now be stated.

2 At the last General Election to the Madhya Pradesh Legislative Assembly from the Khategaon Constituency there were five contesting candidates. They were the appellant and respondents 2 to 5. The appellant received 9622 votes as against the second respondent who obtained 8030 votes. The other contesting candidates received fewer votes in comparison. The present election petition was filed, not by any of the defeated candidates, but by an elector to the Legislative Assembly Constituency in the array of the respondents in the High Court one Ram Kisben s/o Lakshmi Naram Deswali was also joined because his nomination paper was rejected by the Returning Officer. A point was made about this rejection in the High Court and we shall come to it in due course.

3 The election petition was based on two broad facts. The first was that the nomination paper of Ram Kisben was wrongly rejected and the other fact comprised allegations of corrupt practices on the part of the returned candidate and his election agent. These corrupt practices consisted of oral speeches connected with the Manifesto of the Jan Sangh relating to cow slaughter in India. During the course of the speeches, it was alleged the returned candidate, who belongs to the Jan Sangh and his election agent Ram Niwas Somani made speeches at 19 villages in which they referred to this election manifesto and claimed that the Congress had not abolished cow slaughter in India and on the other hand was promoting it and that the Jan Sangh would stop cow slaughter. They added to these statements, which might have been quite innocuous, two other statements, namely, that to vote for the Congress was to commit the sin of go-hatya and that the Congress candidate Shrimati Manjulabai herself ate beef. There were other allegations regarding exhibition of posters which depicted the Congress as a butcher intent upon slaughtering a cow. This part of the case however, was not accepted in the High Court and we need not say anything about it. The petition therefore succeeded on the two grounds which we have mentioned, namely, that the nomination paper of Ram Kisben was wrongly rejected and that the corrupt practice attributed to the Jan Sangh

candidae and his election agent was established.

4. In this appeal we are only required to consider these two points and we shall take them in the same order. In so far as the rejection of the nomination paper is concerned it may be pointed out that Ram Kishen s/o Lakshmi Narain Deswali was registered as a voter, not in the Electoral Roll relating to Khategaon Tehsil but in the Harda Tehsil. Along with this nomination paper Ram Kishen produced a certificate from the Tehsildar of Harda which reads as follows:—

"I certify that there is an entry of the name of Ram Kishen, son of Laxmi-chand, village Dholgaon, at Anukaran No. Harda 217, Electoral roll of 1966, part of Anukaran No. 177, District Hoshangabad, Tehsil Harda, under the heading Ra-Ni-Ma, Serali, Serial No. 196, House No. 91/2, with particulars Ram Kishen Laxmi Chand, male, aged 45 years.

16-1-1967.

Sd/-
16-1-67

Tehsildar, Harda."

5. He did not produce the kind of evidence which Section 33 (5) of the Representation of the People Act, 1951, requires to be produced when a candidate is registered as a voter in some other constituency. Section 33 (5) of the Representation of the People Act requires that where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny. The nomination paper of Ram Kishen was filed on February 20, 1967. The date of scrutiny was 21st of the same month. Ram Kishen had two alternatives before him. One was to produce any of the documents mentioned before the returning officer or to have filed it earlier with his nomination paper. He did neither. He produced a certificate from an officer who it is not proved to our satisfaction had the authority to issue a certified copy of the electoral roll. He also added an affidavit on his own part in which the gist of the entry was given. Indeed the certificate of the Tehsildar was based on the affidavit which was annexed to the certifi-

cate. There was no compliance with the provisions of S. 33 (5) of the Representation of the People Act and there was no power in the court to dispense with this requirement. It is a well-understood rule of law that if a thing is to be done in a particular manner it must be done in that manner or not at all. Other modes of compliance are excluded. Even the certificate of the Tehsildar was not a certified or a true copy of the entry. It only gave the gist of the entry taken from the affidavit. It contains a mistake because the village "Dholgaon" is mentioned without the addition of the word "Kalan". It appears that there are two villages, Dholgaon Kalan and Dholgaon Khurd. The entry in the electoral roll clearly shows that it is Dhalgaon Kalan. In other words the certificate was inaccurate. The affidavit of Ram Kishen was also inaccurate inasmuch as it described the house as No. 91 whereas in Electoral Roll the house is given the number 91/2. We, however, do not go by these small inaccuracies because again the law is that which can be made certain is certain, but the fact is clear that the requirements of S. 33 (5) had to be and were not complied with. The rejection of the nomination paper of Ram Kishen by the Returning Officer was thus justified. Ram Kishen explained that he was running about trying to get the other evidence and indeed he did arrive at 5 p. m. having earlier sent a telegram that he was coming with the required evidence. Unfortunately both the telegram and Ram Kishen arrived after the rejection of the nomination paper and therefore the Returning Officer could not recall what he had ordered. We are satisfied that the learned Single Judge erred in holding that the nomination paper of Ram Kishen was wrongly rejected. It was rightly rejected.

6. If the matter had rested there the appellant would have been entitled to succeed, but there remains still the question of corrupt practice. A great deal of argument was addressed to us on this subject and we were taken through the evidence of all the witnesses who have deposed to corrupt practice on the part of the returned candidate and his election agent. We are satisfied that the reading of this evidence by the learned Judge, although some times strained, was clearly right and that the corrupt practice had been brought home to the

candidate and his election agent. Without going too much into the details we shall scan that evidence once again to show that this fact stood duly proved.

7 Out of the 19 villages at which speeches were made the learned judge selected two, for having his conclusion and we shall therefore confine ourselves to evidence relating to these villages. They are Khatagaon and Kannod. The speeches at Khatagaon took place on the 11th and at Kannod on the 16th February. It appears that February 11, was a day of many speeches. Earlier in the day the Congress held its own session to persuade the voters to vote for that party. The Chief Minister (D P Misra) addressed a gathering of about 2000 persons. The speeches made at that meeting need not be referred to here because they do not bear upon the present matter. The Jan Sangh then followed and held its own meeting. Many spoke at that meeting including the returned candidate, Narbada Prasad who also goes under the name of Kinkari. The election petitioner examined in this connection three witnesses and also examined himself. These witnesses are Bal Chand (P W 2) Babu Lal (P W 7) and Chandra Gopal (P W 15). The election petitioner is P W 17. It is argued by the learned counsel for the appellant that the testimony of P Ws 2, 7 and 15 should not have been accepted because there were many discrepancies in the versions of these witnesses as to what was said at the meeting. There are also some arguments regarding the credibility of each of these witnesses and we shall briefly refer to these two points now.

8. P W 2 Bal Chand stated that he had not gone specifically to the meeting but that the meeting was thrust upon him. He had gone on the 11th to the house of an ailing relative and was with him in the evening when the meeting took place. This meeting was held right opposite the residence of his relative and he was therefore in a position to hear what was said. He did say that he attended the meeting but he might well have been so close to it although his explanation of how he happened to be there is acceptable (sic). He stated that Kinkari was one of the speakers. Kinkari complained of the division of Kashmir and also that the Congress 'had increased price level'. He stated further that to bring Hindu Raj, the voters

must not vote for Congress but cast their votes for the Jan Sangh. He added.

"In the Congress Raj thousands of cows are cut every day. To vote to Congress is to take on your heads the sin of gohatya. Manjula Bai the Congress candidate herself eats cow flesh. You should go away from here after swearing to yourselves that you would not vote Congress and bring on yourself the sin of gohatya."

It is convenient to compare what the other two witnesses said in this behalf. P W 7s (Babulal) version was that Kinkari "spoke of Kashmir, Pakistan and said that the Congress wala did not get sugar or grain for them". He concluded.

"The Congress men get thousands of cows killed. Manjula Bai Wagle who stands on the Congress ticket eats cow's flesh. It is necessary to bring the Hindu Raj and so give vote to the deepak and make it victorious. You better swear by the cow that you will not vote Congress but vote Jan Sangh. If you do not vote Jan Sangh you will be getting the sin of cow killing."

The version of P W 15 (Chandergopal) was to this effect. When he went there Kinkari was speaking and said

"The Congress party is a batyara party. It gets thousands of cows and hells killed. The candidate who stands against me in this election is Manjula Bai set up by the Congress and she eats cow's flesh. I have been set up by the Jan Sangh for bringing the Hindu Raj. To bring it please vote on my deepak mark."

9. A point is made by the learned counsel for the appellant that since P W 15 does not speak of the sin of gohatya, we should discount the evidence of the other two witnesses who have exaggerated the whole story. He also contends that even if the words were used about the sin of gohatya we should not give too much meaning to the word 'sin' which bears different shades of meanings and the strongest meaning need not necessarily be chosen. He also contends that this speech, even if it is accepted from the version of P Ws 2 and 7, did not amount to the kind of corrupt practice which is made a ground for setting aside elections under S 123 (1) (ii).

10. Whether we should believe the witnesses or not involves how far we should enter into facts. No doubt, an appeal before this Court under S 116-A

is an appeal as of right and is open both on facts and law; still the practice of the Courts has uniformly been to give the greatest assurance to the assessment of evidence made by the Judge who hears the witnesses and watches their demeanour and judges of their credibility in the first instance. In an appeal the burden is on the appellant to prove how the judgment under appeal is wrong. To establish this he must do something more than merely ask for a re-assessment of the evidence. He must show wherein the assessment has gone wrong. Where the court of first instance relies upon probabilities alone, the appellate court may be in as good position as the court of trial in judging of the probabilities; but where the court of trial relies upon its own sense of the credibility of a witness the appellate court is certainly at a disadvantage, because it has not before it the witness but the dead record of the deposition as recorded. If it was a question only of the probabilities of the case, we would have undoubtedly gone into the matter more closely. The matter has however been put before us strictly on the ground of credibility of the witnesses and it is there we feel that the appellate court is at a disadvantage. This has been laid down both by this Court and the Privy Council in cases which are quite familiar and need not be quoted.

11. Applying these tests, we go once again into the submissions of the learned counsel for the appellant to see how far he has been able to prove to our satisfaction that the appraisal of the evidence of these witnesses is such that we must reject the conclusion of the learned High Court Judge and substitute for it another conclusion. It is said about P. W. 2 (Balchand) that he claimed that he was not interested in the Congress but P. W. 11 Parasram stated that Balchand worked for the Congress. Learned counsel submits that here at the very start we have a lie from the witness and we should not therefore believe him. He further comments that P. W. 2 (Balchand) did not attend the meeting, that he only heard what was being said at the meeting, that he was an unsummoned witness and did not go to Manjula Bai but went to Chaganlal the elector who had no connection with the election and thus has shown considerable interest in the success of the election petition. All these things were

before the learned Judge who tried the case. In spite of them he has chosen to draw an inference from the testimony of these witnesses taken with other material on the record. In this connection it is pertinent to point out that the learned Judge referred to the evidence of Tiwari P. W. 10 and Ramchandra Agrawal P. W. 13 (particularly the former) about whom he said that he was considerably impressed by the way in which he deposed and it appeared to him that that witness was speaking the truth. Where there is evidence which the Judge considers truthful not on the probabilities of the case but because the Judge on his observation of the manner in which the witness deposed, the appellate Court should be slow to depart from the conclusion of the trial Judge. In this case Kunjilal Tiwari P. W. 10 admitted that he was a member of the Jan Sangh. He further said that he did not approve of the methods of the Jan Sangh in making such speeches and had therefore come forward to depose truthfully as to what had happened. This witness no doubt spoke about Kannod but he lent assurance to the statements of P. Ws. 2, (Balchand) P. W. 7 (Babulal) and P. W. 15 (Chandergopal) about Khategaon. The learned Judge although he examined the two incidents separately, seemed to have viewed the entire propaganda of Kinkarji as integrated and has drawn the conclusion from both aspects of the case taken together. Therefore the case comes to this, that the witnesses who spoke about the speech at Khategaon were not unanimous as to the version of the speech, but that in our opinion is not a circumstance of vital importance, because speeches were also made at Kannod in which the returned candidate made similar observations about the sin of gohatya. The witnesses here are P. W. 4 (Narsingh Dass), P. W. 8 (Mazharul Haq) and P. W. 10 (K. L. Tiwari). We shall now refer to what they stated. P. W. 4 (Narsingh Dass) stated that on February 16, 1967 there was a meeting in his village in front of Ramniwas Somani's house. This Somani was the election agent of the returned candidate. At this meeting both Somani and Kinkarji spoke. When he went there Kinkarji was speaking. This is the version which he gave of the speech.

"The Congress gets cows killed so you

should not vote for Congress, but you should put your stamp on the deepak

our emblem. If you still vote for Congress you shall get the sin of killing a cow

P W 8 (Mazharul Haq) also said that Kinkarj recited some slokas and when he came to the end of the speech he said

"Congress gets cows killed. The Congress candidate Manjula Bai Wagle eats cow's flesh. We have to bring Hindu Raj put the seal on the deepak mark." P W 10's (Kunja Lal Tiwari's) version was that Kinkarj said that the Congress was getting the cows killed. Manjula Bai should not be given any votes. If she was voted for there would be a sin. He also spoke that the Congressmen were doing blackmarketing.

12 It thus appears that at Kannod also there was a repetition of the same kind of speech which the other witnesses stated had been made at Khategaon. The question is do we believe these witnesses or not? In our judgment there is ample evidence in this case that there was a reference to cow slaughter and the campaign of the Jan Sangh that cow slaughter should be abolished in India. One cannot say that it is wrong to make such a propaganda. It would be perfectly legitimate for any party to promise that if it came into power it would abolish cow slaughter. That is not the gravamen of the charge. The gravamen of the charge is that it was added that if the voters voted for the Congress Candidate, they would be guilty of the sin of gohatya and here the law of election steps in. Section 123 provides that it is an election offence of undue influence that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent or of any other person with the consent of the candidate or his election agent with the free exercise of any electoral right when any such person, as is referred to therein, induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure.

13 The question is whether in stating that if they voted for the Congress or a Congress candidate, they would be committing the sin of gohatya, amounted to an attempt to induce the voters to believe that they would become or would be rendered an object of divine

displeasure or spiritual censure. In our opinion a statement of this kind falls within this provision of the section. It is not necessary to enlarge upon the fact that cow is venerated in our country by the vast majority of the people and that they believe not only in its utility but its holiness. It is also believed that one of the cardinal sins is that of gohatya. Therefore, it is quite obvious that to remind the voters that they would be committing the sin of gohatya would be to remind them that they would be objects of divine displeasure or spiritual censure. Kinkarj went beyond the permitted limits of canvassing and exhortation when he added to the legitimate manifesto of his party this observation that by voting for the Congress or the Congress candidate the voters would be objects of divine displeasure or spiritual censure. In our opinion both spiritual censure and divine displeasure are implicit in the speeches as made. The case, therefore, falls clearly within S 123 (2) (u) of the Representation of the People Act, 1951.

14 It will be encumbering this judgment if we record the incidents which relate to the election agent, except to say that the election agent Somani made similar speeches and the fact has been well established by reliable evidence. We are accordingly satisfied that the returned candidate was guilty of corrupt practice and the High Court was right in holding that the election of the returned candidate should be avoided.

15 We may point out that there was a further statement that the Congress candidate Manjula Bai ate beef. Manjula Bai did not appear in the witness box to deny this. In fact she showed little interest in the election petition and is reported to have left the matter to the elector who filed this petition. No one on her behalf appeared to deny this fact and therefore we leave the matter there. We do not express any opinion that any corrupt practice in relation to that statement was committed either in fact or in law.

16 In the result the appeal must fail. It will be dismissed with costs.

KSB

Appeal dismissed.

AIR 1969 SUPREME COURT 401

(V 56 C 79)

(From Madhya Pradesh)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

State Bank of India, Appellant v.
Rajendra Kumar Singh and others, Res-
pondents.

Criminal Appeal No. 32 of 1965, D/-
25-9-1968.

(A) Criminal P. C. (1898), Ss. 520 and
517 — Order of return of seized prop-
erty — Opportunity of being heard to
aggrieved party must be given before
passing such order — Cri. Misc. Case
No. 135 of 1962, D/- 5-4-1963 (M. P.),
Reversed.

It is true that the statute does not ex-
pressly require a notice to be issued or
a hearing to be given to the parties
adversely affected. But though the sta-
tute is silent and does not expressly re-
quire issue of any notice, there is in the
eye of law a necessary implication that
the parties adversely affected should be
heard before the Court makes an order
of return of the seized property. Thus
an order of the High Court reversing the
order of the Sessions Court directing
disposal of property under Section 517,
without giving notice to the person to
whom the property is directed to be
delivered by the Sessions Court, is vitiated
by law. Cri. Misc. Case No. 135 of 1962,
D/- 5-4-1963 (M. P.), Reversed; (1863)
14 C. B. N. S. 180 and (1963) 2 WLR
935 and AIR 1962 SC 1110, Rel. on.

(Paras 4 and 5)

(B) Criminal P. C. (1898), Ss. 517 and
520 — Bank receiving currency notes in
ordinary course of its business without
suspicion of the notes being involved in
commission of an offence — Seizure of
notes by police during investigation of
offence — Direction of High Court to
hand over notes to person from whom
accused had received them, held illegal
— Bank had a "right to possess" the notes
within Section 517 — Cri. Misc. Case
No. 135 of 1962, D/- 5-4-1963 (M. P.),
Reversed.

R and V had handed over 21 currency
notes of the denomination of Rs. 1000
each to K "for the criminal purpose of
duplication". In the course of an investi-
gation of a case under Sections 420, 406
and 120B, I. P. C. against K, the police

* (Criminal Misc. No. 135 of 1962, D/-
5-4-1963—M. P.)

seized the currency notes in question
from the State Bank, which had received
the notes in the normal course of its
business and without any knowledge or
suspicion of their having been involved
in the commission of an offence. In the
proceedings that followed the investiga-
tion in that case, K was acquitted and
the Sessions Court directed the return
of currency notes to the Bank on the
application made under Section 517 (1).
In appeal to High Court the order of
acquittal was set aside and K was con-
victed under Sections 420, 406 and 120B,
I. P. C. The High Court on the appli-
cation made by R ordered the currency
notes to be handed over to R and V:

Held, that the High Court had not
exercised its discretion, conferred under
Ss. 517 and 520, according to proper
legal principles and hence its order of
return of property to R and V was liable
to be set aside. Cri. Misc. Case No.
135 of 1962, D/- 5-4-1963 (M. P.), Rever-
sed. (Para 5)

The property in coins and currency
notes passes by mere delivery when the
transferee of the coin or currency notes
takes in good faith for value and without
notice of a defect in the title of the
transferor. This is an exception to the
rule *Nemo dat quod non habet*. The
Bank, therefore, had a "right to possess"
the currency notes within the meaning
of Section 517. (1863) 14 C. B. N. S. 248
(257-58), Rel. on. (Paras 5 and 6)

Cases Referred: Chronological Paras
(1963) 1963-2 WLR 935 = 1964

AC 40, Ridge v. Baldwin 4

(1962) AIR 1962 SC 1110 (V 49) =

ILR (1962) 2 All 661, Board of
High School and Intermediate
Education U. P. Allahabad v.

Ghanshyam Das Gupta 4

(1863) 14 CBNS 180 = 143 ER

414, Cooper v. Wandsworth

Board of Works 4

(1863) 14 CBNS 248 = 143 ER

441, Whistler v. Forster 5

Mr. Niren De, Solicitor-General of
India (Mr. H. L. Anand Advocate of
M/s. Anand, Das Gupta and Sagar, and
M/s. I. M. Bhardwaj and K. B. Mchta,
Advocates with him), for Appellant; Mr.
B. C. Misra, Senior Advocate (Mr. C. P.
Lal Advocate, with him), for Respon-
dents Nos. 1 and 2.

The following Judgment of the Court
was delivered by

RAMASWAMI, J.: This appeal is
brought from the order of the High

Court of Madhya Pradesh dated 5th April, 1963 in Criminal Miscellaneous Case No 135 of 1962 under Section 520 of the Code of Criminal Procedure directing the return of 21 currency notes of the denomination of Rs 1,000 each to respondents Rajendra Kumar Singh and Virendra Singh.

2. The currency notes of the total value of Rs 21,000 were seized by the Madhya Pradesh Police from the Beawar Branch of the State Bank of India in the course of an investigation of a case under Sections 420, 406 and 120B of the Indian Penal Code registered in P S Thuko Ganj Indore City as Crime No 113 of 1961 against Kishan Gopal, the third respondent. It appears that the third respondent had come into possession of a sum of Rs 1,50,000 in Government currency notes by cheating the first and second respondents. The currency notes seized from the appellant were said to be part of the property obtained by Kishan Gopal by the commission of the said offence. The case of the appellant was that it had come into possession of the said currency notes in the usual course of its business partly through the Bank of Rajasthan Limited and partly through the Mahalaxmi Mills Company Limited without any knowledge that the said currency notes had been the subject matter of an offence. In the proceedings that followed on the investigation of the said case, the accused persons including the third respondent were acquitted by the Court of the Fourth Additional Sessions Judge, Indore in Sessions Case No 3 of 1962 by an order made on 24th April, 1962. In the course of the trial the appellant made an application under Section 517 (1) of the Code of Criminal Procedure asking for delivery of the aforesaid 21 currency notes to it on the ground that the said currency notes had been seized by the police from the appellant and that the appellant was an innocent third party who had received the said notes without any knowledge or suspicion of their having been involved in the commission of an offence. By his order dated 24th April, 1962 the 4th Additional Sessions Judge, Indore allowed the application and directed that the currency notes should be returned to the appellant. Subsequently an appeal was filed to the High Court by the State of Madhya Pradesh being Criminal Appeal No 205 of 1962. The appeal was allowed and the High Court set aside the order of acquit

tal of the third respondent and convicted him under Sections 420 406 and 120B of the Indian Penal Code and sentenced to undergo imprisonment. The first respondent, Rajendra Kumar Singh, made an application to the High Court asking for delivery of the currency notes as they belonged to him and the second respondent and as they had been deprived of the said property by the third respondent by the commission of the aforesaid offence. The application was allowed by the High Court by its order dated 5th April, 1963 and the currency notes were ordered to be handed over to the first and the second respondents. The relevant portion of the order of the High Court reads as follows

"Now the bulk of the recovered property consists of Government currency notes either of the denomination of rupees one thousand each or money obtained after the tender of one thousand rupee notes by Kishan Gopal. The position of the recovered money in short is thus —

	Rs
1. 37, one thousand rupee notes were recovered from the pillow of accused Kishan Gopal after his arrest amounting to	37,000
2. Money directly traceable to one-thousand rupee notes recovered from Dayabhai P W 52, with whom it was deposited by accused Kishan Gopal and Mst. Tulsabai	59,500
3. Money recovered from Mst. Tulsabai the sister of accused's concubine	10,000
4. Money in Beawar Bank consisting of two drafts of ten thousand each one in the name of accused Kishan Gopal and the other in the name of Rukmanibai, his witness for which the accused tendered twenty one (sic) thousand rupee notes and one thousand rupee notes with which he opened an account with his Bank.	21,000
Total	1,27,500

This amount (Rs 1,27,500) is directly traceable to the conversion of one thousand rupee notes. We, therefore, direct it be given to Virendra Singh P.

W. 1, and Rajendra Kumar P. W. 73, who shall proportionately divide it between themselves. No other order is made in respect of other property and the parties are left to establish their claim in Civil Court".

3. Section 517 of the Code of Criminal Procedure states:

"517. (1) Then an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

(2) When a High Court or a Court of Session makes such order and cannot through its own officer conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

Section 520 provides as follows:—

"Any Court of appeal, confirmation, reference or revision may direct any order under S. 517, Section 518 or Section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just".

4. In support of this appeal, it was contended in the first place that the High Court had reversed the order of the Sessions Judge directing the return of the currency notes without giving a notice to the appellant and without giving an opportunity to it for being heard. The argument was stressed that there was a violation of the principle of natural justice and the order of the High Court dated 5th April, 1963 was illegal. It was, however, contended on behalf of the respondents that there was no provision in Section 520 of the Code of Criminal Procedure for giving notice to the affected parties and the order of the High Court cannot be challenged on the ground that no hearing was given to the appellant. In our opinion, there is no warrant or justification for the argument advanced on behalf of the respondents. It is true that the statute does not expressly require a notice to be issued,

or a hearing to be given to the parties adversely affected. But though the statute is silent and does not expressly require issue of any notice there is in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order for return of the seized property. The principle is clearly stated in the leading case of *Cooper v. Wandsworth Board of Works*, (1863) 14 CB NS 180. In that case Section 76 of the Metropolis Local Amendment Act, 1855 authorised the District Board to demolish the building if it had been constructed by the owner without giving notice to the Board of his intention to build. The statute laid down no procedure for the exercise of the power of demolition, and, therefore, the Board demolished the house in exercise of the above power without issuing a notice to the owner of the house. It was held by the Court of Common Pleas that the Board was liable in damages for not having given notice of their order before they proceeded to execute it. *Erle C. J.* held that the power was subject to a qualification repeatedly recognised that no man is to be deprived of his property without his having an opportunity of being heard and that this had been applied to "many exercises of power which in common understanding would not be at all a more judicial proceeding than would be the act of the district board in ordering a house to be pulled down". *Wills J.* said that the rule was "of universal application and founded upon the plainest principles of justice" and *Byles J.* said that "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". The same principle has been reaffirmed in a recent case *Ridge v. Baldwin*, (1963) 2 WLR 935. In that case, Section 191 of the Municipal Corporations Act, 1881 provided that a watch committee may at any time suspend or dismiss any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same. The appellant, who was the chief constable of a borough police force, was dismissed by the watch committee on the ground that he was negligent in the discharge of his duties as chief constable. He brought an action against the members of the watch committee by stipulating that his dismissal was illegal and ultra vires the powers. It was held by the House of

Lords that the decision of the watch committee was ultra vires because they dismissed the appellant on the ground of neglect of duty and as such they were bound to observe the principles of natural justice by informing him of the charges made against him and giving him an opportunity of being heard. The same principle was applied by this Court in Board of High School and Intermediate Education, U P Allahabad v Ghanshyam Das Gupta, AIR 1962 SC 1110. It was held in that case that an examination committee of the Board of Secondary Education in Uttar Pradesh was acting quasi-judicially when exercising its power under Rule 1 (1) of Chapter VI of the Regulations dealing with cases of examinees using unfair means in examination halls and the principles of natural justice which require that the examinee must be heard, will apply to the proceedings before the Committee. Though there was nothing express one way or the other in the Act or the Regulations casting a duty on the committee to act judicially, where no opportunity whatever was given to the examinee to give an explanation and present their case before the Committee the Resolution of the committee cancelling their results and depriving them from appearing at the next examination was defective. Applying the principle to the present case it is manifest that the High Court was bound to give notice to the appellant before reversing the order of the Sessions Judge directing the disposal of the property under S 517 of the Code of Criminal Procedure. As no such notice was given to the appellant, the order of the High Court dated 5th April, 1963 is vitiated in law.

5 The next question which arises in this appeal is whether the High Court was justified on merits in ordering the currency notes to be returned to respondents 1 and 2. It was argued by Mr Mishra that the High Court had a discretion under the statute as to whom the property was to be returned and there was no reason why this Court should interfere with such exercise and discretion by the High Court. We are unable to accept this argument. It is true that Sections 517 and 520 of the Code of Criminal Procedure confer a discretion on the High Court as regards the disposal of the property seized or produced before it or regarding where any offence was said to have been committed. But as we shall presently show

that the High Court has not exercised its discretion according to proper legal principle and its order is hence liable to be set aside. It was stated by Mr Mishra that the question involved in this case is whether as to which out of two innocent parties should suffer, viz., the person who lost the property due to the criminal act of another or the person to whom the property (currency notes) had been delivered in the normal course of business. It is not, however, correct to say that respondents 1 and 2 are equally innocent because respondents 1 and 2 had admittedly handed over the currency notes to respondent No 3 "for the criminal purpose of duplication" was indeed urged on behalf of the appellant that respondents 1 and 2 had entered into a criminal conspiracy with respondent No 3 for 'duplicating' the currency notes. In any event, we are satisfied that the High Court was in error in directing the return of the currency notes to respondents 1 and 2. The reason is that the property in coins and currency notes passes by mere delivery and it is that clearest exception to the rule *Nemo dat quod non habet*. This exception was engrafted in the interest of commercial necessity. But the exception only applies if the transferee takes the coin or currency notes in good faith for value and without notice of any defect in the title of the transferor. The rule is stated by Wills J in *Whistler v Forster*, (1883) 14 CBNS 248, 257, 258 as follows —

"The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would render it unavailable in the hands of a previous holder."

6 In the present case the appellant asserted that it had obtained the currency notes in the normal course of its business and without any knowledge or suspicion of their having been involved in the commission of any offence. The respondents have not alleged fraud or lack of good faith on the part of the

appellant. The appellant hence contended that the property in the currency notes, passed in its favour by mere delivery and the appellant "had a right to possess" the currency notes within the meaning of Section 517 of the Code of Criminal Procedure. We do not wish to express any concluded opinion in this case on the ultimate question of liability for payment of the money as between the appellant on the one hand and respondents 1 and 2 on the other. But we are of opinion that in the circumstances of this case the High Court should have directed the return of the said currency notes to the appellant which had the "right to possess" the currency notes within the language of Section 517 of the Code of Criminal Procedure.

7. We accordingly allow this appeal, set aside the order of the High Court dated April 5, 1963 and direct that the 21 currency notes of the denomination of Rs. 1000 each seized by the Madhya Pradesh Police should be returned to the appellant.

JWM/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 405
(V 56 C 80)

(From Calcutta)*

S. M. SIKRI AND R. S. BACHAWAT JJ.
Caltex (India) Ltd., Appellant v. Bhagwan Devi Marodia, Respondent.
Civil Appeal No. 2347 of 1966, D/- 26-9-1968.

Contract Act (1872), Section 55 — Lease of land — Stipulations as to time giving an option for renewal are essence of the contract — Delay on part of lessee to apply for renewal due to oversight — Lessee not entitled to renewal.

At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain, the reason being that a renewal of a lease is a privilege and if the tenant wishes to

claim the privilege he must do so strictly within the time limited for the purpose. A lessee not having exercised the option of renewal within the time limited by the clause is not therefore entitled to a renewal. Where no time is however, fixed for the purpose, an application for renewal for the lease may be made within a reasonable time before the expiry of the term. A delay on the part of lessee to apply for renewal arising by mere neglect on his part and which could have been avoided by reasonable diligence will not entitle him to claim renewal. (1966) 2 QB 130 and (1798) 3 Ves Jun 690 and AIR 1933 Cal 477 and AIR 1918 Cal 59, Rel. on.

(Paras 3, 4, 5 and 6)

Cases Referred: Chronological Paras
(1966) 1966-2 QB 130 = 1966-2 WLR 441, Hare v. Nicoll 3
(1933) AIR 1933 Cal 477 (V 20) = 37 Cal WN 9, Hemanta Kumari Devi v. Sefatulla Biswas 6
(1918) AIR 1918 Cal 59 (V 5) = 29 Cal LJ 314, Ram Lal Dubey v. Secy. of State 6
(1915) AIR 1915 PC 83 (V 2) = 43 Ind App 26, Jamshed Khodaram Irani v. Burjorji Dhunjibhai 2
(1831) 9 LJ Ch 245, Reid v. Blagrave 5
(1798) 3 Ves Jun 690 = 30 ER 1223, Eaton v. Lyon 4
(1792) 1 Ves 476 = 29 ER 683, Bayley v. Corporation of Leominster 4

Mr. M. C. Chagla, Senior Advocate, (Mr. S. N. Mukherji Advocate, with him), for Appellant; Mr. S. V. Gupte, Senior Advocate, (M/s. M. G. Poddar and D. N. Mukherjee, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: By an indenture of lease dated February 17, 1954, the respondent leased to the appellant a plot of land at premises No. 22, Jatindra Mohan Avenue, Calcutta, for a term of 10 years commencing from February 1, 1954. Clause 3 (c) of the deed provided for a renewal of the lease and was in the following terms:—

"3(c) The lessor will on the written request of the lessees made two calendar months before the expiry of the term hereby created and if there shall not at the time of such request be any

* (Appeal No. 251 of 1965, D/- 3-6-1966 — Cal.)

existing breach or non-observance of any of the covenants on the part of the lessees hereinabove contained grant to it one renewal of 10 years from the expiry of the said term at the same rent and containing the like covenants and provisos as are herein contained except that as regards the clause for renewal for further period the rent shall be as may be agreed between the lessor and the lessees."

On December 1, 1963 the time fixed for applying for the renewal of the lease expired. On December 13 the appellant made a written request for the renewal. On December 23, 1963 the respondent's solicitors replied stating that the request being out of time was ineffective and asking the appellant to vacate the land on the expiry of the lease. The appellant had erected structures on the land for the purpose of running a petrol delivery station and was a Thika tenant within the meaning of the Calcutta Thika Tenancy Act, 1949. In February 1964 the respondent filed an application before the Controller asking for eviction of the appellant under Sections 3 (vi) and 5 of the Calcutta Thika Tenancy Act. The Controller allowed the application. An appeal from this order was dismissed by the appellate Authority. A revision petition against the order was dismissed by the High Court. While dismissing the revision petition, the High Court stayed the execution of the order of eviction for a month and observed that the authorities under the Calcutta Thika Tenancy Act had no power to decide whether the appellant was entitled to a renewal of the lease. Thereafter the appellant filed the present suit on the Original Side of the Calcutta High Court asking for a declaration that it was entitled to a renewal of the lease, specific performance of the covenant for renewal, an injunction restraining execution of the order of eviction passed by the Controller and for other reliefs. In paragraphs 13 and 14 of the plaint the appellant alleged that the delay in giving notice of renewal should be excused in view of the following special circumstances: (a) the delay was due to oversight, (b) the respondent had not altered her position for the worse or to her detriment within the space of 12 days (c) neither party had treated the matter of time as being of the essence of the transaction, (d) the appellant had constructed a service station for petroleum products of immense utility

to the public of the locality, (e) the appellant was in possession of the land. The respondent contended that the application for renewal being made out of time was ineffective and that there was no ground for excusing the delay. S P Mitra J accepted the respondent's contention and dismissed the suit. An appeal under Clause 15 of the Letters Patent was dismissed by a Divisional Bench of the High Court. Both the Courts concurrently held that the letter dated December 13, 1963 was not a proper exercise of the option by the appellant under the lease dated February 17, 1954 and that there were no special circumstances for excusing the delay in giving the notice. The appellant has filed the present appeal after obtaining a certificate from the High Court under Article 133 (1) (a) and (b) of the Constitution.

2. The appellant neglected to make the application for renewal of the lease within the stipulated time. Mr Chagla has submitted that the time is not of the essence of the contract having regard to Section 55 of the Indian Contract Act, 1872 as interpreted in the case of Jamsbed Khodaram Irani v Burjorji Dhanjibhai, 43 Ind App 26 = (AIR 1915 PC 83). Section 55 of the Indian Contract Act provides that "when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract." In Jamsbed's case 43 Ind App 26 = (AIR 1915 PC 83) (supra) Viscount Haldane observed that the section did not lay down any principle as regards contracts to sell land in India different from those which obtained under the law of England. It is well known that in the exercise of its jurisdiction to decree specific performance of contracts the Court of Chancery adopted the rule, especially in the case of contracts for the sale of land, that stipulations as to time were not to be regarded as of the essence of the contract unless they were made so by express terms or unless a clear indication of a contrary intention appeared from the nature of the contract or the surrounding circumstances. In his well considered judgment Viscount Haldane carefully refrain-

ed from saying that time was not to be regarded as of the essence in all contracts relating to land.

3. At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain. As stated in Halsbury's Laws of England, 3rd ed., Vol. 3, Article 281, p. 165: "An option for the renewal of a lease, or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse." This passage was quoted with approval by Danckworts L. J. in *Hare v. Nicoll*, 1966-2 QB 130, 145. A similar statement of law is to be found in Foa's General Law of Landlord and Tenant, 8th ed., Art. 453 p. 310, and in Hill and Redman's Law of Landlord and Tenant 14th ed., p. 54. The reason is that a renewal of a lease is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited for the purpose.

4. With regard to equitable relief against the failure of the tenant to give notice of renewal within the stipulated time, the law is accurately stated in Halsbury's Laws of England, 3rd ed. Vol. 23 p. 626 Article 1329, footnote (u) thus:—"Relief will not be given in equity against failure to give notice in time, save under special circumstances". The decided cases show that in such cases relief is not given in equity save upon the ground of unavoidable accident, fraud, surprise, ignorance not wilful or inequitable conduct on the part of the lessor precluding him from refusing to give the renewal. The limits of the equitable interference in such cases were clearly stated by the Master of the Rolls (Sir R. P. Arden) in *Eaton v. Lyon*, (1798) 3 Ves Jun 690, 692-3; 695-6 = 30 ER 1223, 1224-1225-6. He observed:—

"At law a covenant must be strictly and literally performed; in equity it must be really and substantially performed according to the true intent and meaning of the parties so far as circumstances will admit; but if unavoidable accident, if by fraud, by surprise or ignorance not wilful, parties may have been prevented

from executing it literally, a Court of Equity will interfere; and upon compensation being made, the party having done everything in his power, and being prevented by means, I have alluded to, will give relief.....I decide this case upon the principles on which, Lord Thurlow decided *Bayley v. Corporation of Leominster*, (1792) 1 Ves 476, and I hope now, it will be known, that it is expected, these covenants shall be literally performed where it can be done; and that Equity will interpose, and go beyond the stipulations of the covenant at law, only where a literal performance has been prevented by the means, I have mentioned, and no injury is done to the lessor."

We are of the opinion that the stipulation as to time in Clause 3 (c) of the indenture of lease dated February 17, 1954 should be regarded as of the essence of the contract. The appellant not having exercised the option of renewal within the time limited by the clause is not entitled to a renewal.

5. The appellant claims relief against the consequences of its default on the grounds enumerated in paragraphs 13 and 14 of the plaint. Grounds (b) and (c) cannot be regarded as special circumstances. As to the ground (d), it is not shown that the service station is of immense public utility. The fact that the appellant constructed a service station is an irrelevant consideration. Ground (c) is not established and it is not shown that the time is not of the essence of the bargain. As to ground (a) there is some evidence to show that the delay in giving the notice of renewal was due to oversight. But it is not shown that the delay was due to any unavoidable accident, excusable ignorance, fraud or surprise. The delay arose from mere neglect on the part of the appellant and could have been avoided by reasonable diligence. As observed by the Master of the Rolls in *Reid v. Blagrove*, (1831) 9 LJ Ch 245, 248: "This rule is now well established, that no accident will entitle a party to renew unless it be unavoidable. I am of opinion, that nothing but accident, which, could not have been avoided by reasonable diligence, will entitle the plaintiff to a renewal in this Court."

6. We may add that where no time is fixed for the purpose, an application of renewal for the lease may be made within a reasonable time before the ex-

piry of the term (see Foa's General Law of Landlord and Tenant, 8th ed., article 455, pp 311 12, Ram Lal Dubey v Secretary of State for India, 29 Cal LJ 314 = (AIR 1918 Cal 59), Hemanta Kumari Devi v Safatulla Biswas, 37 Cal WN 9 = (AIR 1933 Cal 477)) In the present case, the lease fixes a time within which the application for renewal is to be made. The time so fixed is of the essence of the bargain. The tenant loses his right unless he makes the application within the stipulated time. Equity will not relieve the tenant from the consequences of his own neglect which could well be avoided with reasonable diligence.

7 The appeal is dismissed with costs.
CGM/DVC Appeal dismissed.

AIR 1969 SUPREME COURT 408
(V 56 C 81)

(From Mysore AIR 1968 Mysore 258)
J C SHAH V RAMASWAMI AND
A. N GROVER, JJ

The III Income tax Officer, Mangalore Appellant v M Damodar Bhat, Respondent.

Civil Appeal No 1654 of 1967, D/- 6-9 1968

(A) Income-tax Act (1961), Ss 156, 220 221, 222, 226 (3) and 297 (2) (i) — Tax liability for assessment year 1961-62 determined under Income-tax Act 1922 — Notice of demand under S 156 of 1961 Act — Subsequent notice under S 226 (3) including this tax liability is valid — For issue of notice under S 220 (3) assessee need not be in default — Interpretation of S 226 (3) leading to absurd result of nullifying S 297 (2) (i) should be avoided — Procedure of new Act applicable *mutatis mutandis* to all cases contemplated by S 297 (2) (i) — AIR 1968 Mys 258, Reversed.

The assessment proceedings for the assessment year 1961-62 were taken and concluded under the old Act and tax of Rs 2947.56 was imposed and demanded. In appeal the tax liability was, however, reduced to Rs 485.55. Thereupon the Income-tax Officer issued a notice to the assessee dated December 11, 1963 purporting to be under S 156 of the new Act. The limit of 35 days for payment of the amount expired on January 22, 1964. The impugned notice under S 226 (3) was issued on April 23 1965 and this

notice included the tax liability as one of the items.

Held that the Income-tax Officer had authority to issue the notice dated December 11, 1963 under S 156 of the new Act with respect to the tax liability of Rs 485.55 incurred by the assessee under the old Act. (Para 4)

The view that in the case of an assessment under the Income-tax Act, 1922 no notice under S 156 of the 1961 Act is possible and there is no way of taking advantage of the provisions for recovery and collection of tax under Ss 220 to 234 of the new Act is incorrect in law as it is based on the wrong premise that all recoveries are possible only when the stage mentioned in S 220 (4) is reached and that action under S 226 can be taken only when the assessee is in default. The effect of taking such view is that the provisions of S 297 (2) (i) of the new Act are nullified and declared to be of no consequence. An interpretation of S 226 (3) of the new Act which leads to such a startling result should be avoided as it is opposed to all sound canons of interpretation. There is nothing in the language of S 226 (3) of the new Act to warrant the conclusion that the assessee should be in default or should be deemed to be in default before the issue of the notice under that sub section. It is true that the group of sections from S 220 to S 232 of the new Act is placed under the heading collection and recovery. But in a case falling within S 297 (2) (i) of the new Act, for example in a proceeding for recovery of tax and penalty imposed under the old Act, it is not required that all the sections of the new Act relating to recovery and collection should be literally applied but only such of the sections will apply as are appropriate in the particular case and subject if necessary to suitable modifications. In other words the procedure of the new Act will apply to the cases contemplated by S 297 (2) (i) of the new Act *mutatis mutandis*. AIR 1968 Mys 258, Reversed. AIR 1968 SC 162, Ref (Para 4)

(B) Income tax Act (1961), Ss 226 (3) and 156 — Notice under S 226 (3) issued after service of notice of demand under S 156 — Fact that time fixed for payment in notice of demand had not expired cannot invalidate notice under S 226 (3) AIR 1968 Mys 258, Reversed.

Where a notice under S 226 (3) in respect of penalty for assessment year 1962-63 and tax for assessment year 1963-64

was issued on 23-4-1965 but before this a notice of demand under S. 156 was served on the assessee for payment of these sums, the notice under S. 226 (3) would be perfectly valid even though the time fixed for payment in the notice of demand was due to expire on 21-5-1965. The liability to pay income-tax is a present liability though the tax becomes payable after it is quantified in accordance with ascertainable data. Hence, it could not be said that the amount of tax and penalty was not due by the assessee when the impugned notice under S. 226 (3) was issued to the assessee on 23-4-1965. AIR 1966 SC 1370, Rel. on; AIR 1968 Mys 258, Reversed. (Para 5)

(C) Constitution of India, Art. 226 — Interference in discretionary matter — Absence of pleading — Writ petition challenging that notice under S. 226 (3) I. T. Act was issued not in proper exercise of discretion — Writ petition merely stating that order under S. 220 (6) in treating the assessee in default was passed in exercise of discretion in arbitrary manner — In absence of specific particulars in writ petition to support allegation it is not open to High Court to go into that question. AIR 1968 Mys 258, Reversed. (Para 6)

1. Tax for the assessment year 1960-61	Rs. 7,056.50
2. Tax for the assessment year 1961-62	Rs. 485.55
3. Penalty for 1962-63	Rs. 1,890.00
4. Tax for the assessment year 1963-64	Rs. 64,307.00

and quashing the notice to that extent.

2. The impugned notice was issued under S. 226 (3) of the new Act. The respondent Sri M. Damodar Bhat was in arrears in respect of income-tax and

1. Tax for the assessment year 1960-61	Rs. 7,056.15
2. Tax for the assessment year 1961-62	Rs. 485.55
3. Balance of tax for the assessment year 1962-63	Rs. 346.42
4. Penalty for assessment year 1962-63	Rs. 1,890.00
5. Tax for the assessment year 1963-64	Rs. 64,307.90

Rs. 74,086.02

8. It is necessary at this stage to set out the relevant provisions of the Income-tax Act, 1961 (Act 43 of 1961) and of the Income-tax Act, 1922 (Act 11 of 1922), hereinafter referred to as the 'old Act'. Section 156 of the new Act is to the following effect:

"Notice of demand.— When any tax, interest, penalty, fine or any other sum is payable in consequence of any order pass-

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 162 (V 55) =
1967-66 ITR 680, Kalawati Devi
Harlalka v. C. I. T. West Bengal 4
(1966) AIR 1966 SC 1370 (V 53) =
1966-59 ITR 767, Kesoram Industries and Cotton Mills Ltd.
v. Commr. of Wealth-tax (Central)
Calcutta 5

Mr. B. Sen, Senior Advocate (M/s. R. Gopalakrishnan, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Appellant; M/s. K. Srinivasan, M. K. Ramamurthi, Vineet Kumar and Mrs. Shyamala Pappu, Advocates, for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought by certificate on behalf of the III Income-tax Officer, Mangalore from the judgment of the Mysore High Court dated February 1, 1967 in Writ Petition No. 846 of 1965 holding that the notice under S. 226 (3) of the Income-tax Act, 1961, hereinafter called the 'new Act', bearing Nos. 770-d/60-61, 61-62, 62-63 and 63-64 issued by the III Income-tax Officer to M/s. Rajarajeswari Motor Service, Mangalore, produced as Ex. VIII with the writ petition was invalid and inoperative in respect of the following items of tax and penalty included therein:—

penalty levied on him in respect of three or four assessment years. The total amount shown as due in the notice was Rs. 74,086.02 and was made up as follows:

ed under this Act, the Income-tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable." Sections 220, 221 and 222 of the new Act provide:

"220. When tax payable and when assessee deemed in default.— (1) Any amount, otherwise than by way of advance tax specified as payable in a notice of de-

mand under Section 158 shall be paid within thirty five days of the service of the notice at the place and to the person mentioned in the notice . . .

(2) If the amount specified in any notice of demand under Section 158 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at nine per cent per annum from the day commencing after the end of the period mentioned in sub-section (1).

(4) If the amount is not paid within the time limited under sub-section (1) or extended under sub-section (3), as the case may be, at the place and to the person mentioned in the said notice the assessee shall be deemed to be in default. . .

(6) Where an assessee has presented an appeal under Section 246 the Income-tax Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of . . .

221. Penalty payable when tax in default.—(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of Section 220 be liable to pay by way of penalty, an amount which, in the case of a continuing default, may be increased from time to time, so, however, that the total amount of penalty does not exceed the amount of tax in arrears.

Provided that before levying any such penalty the assessee shall be given a reasonable opportunity of being heard.

(2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded.

"222. Certificate to Tax Recovery Officer.—(1) When an assessee is in default or is deemed to be in default in making a payment of tax, the Income-tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee, and the Tax Recovery Officer on

receipt of such certificate, shall proceed to recover from such assessee the amount specified therein by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule—

(a) attachment and sale of the assessee's movable property,

(b) attachment and sale of the assessee's immovable property,

(c) arrest of the assessee and his detention in prison,

(d) appointing a receiver for the management of the assessee's movable and immovable properties

(2) The Income-tax Officer may issue a certificate under sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

Section 226 states as follows

"226 Other modes of recovery.—(1) Notwithstanding the issue of a certificate to the Tax Recovery Officer under Section 222, the Income-tax Officer may recover the tax by any one or more of the modes provided in this section. . .

(3) (i) The Income-tax Officer may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may, subsequently hold money for or on account of the assessee, to pay to the Income-tax Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held), so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such account shall be presumed, until the contrary is proved to be equal.

(iii) A copy of the notice shall be forwarded to the assessee at his last address known to the Income-tax Officer, and in the case of a joint account to all the joint-holders at their last addresses known to the Income-tax Officer.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section

shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income-tax Officer, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear of tax due from him, in the manner provided in Sections 222 to 225 and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his powers under Section 222.

Section 297 provides as follows:

"297. Repeals and savings.— (1) The Indian Income-tax Act, 1922 (11 of 1922), is hereby repealed.

(2) Notwithstanding the repeal of the Indian Income-tax Act, 1922 (11 of 1922) (hereinafter referred to as the repealed Act),—

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act;

(j) any sum payable by way of income-tax, super-tax, interest, penalty or otherwise under the repealed Act may be recovered under this Act, but without prejudice to any action already taken for the recovery of such sum under the repealed Act;

Section 29 of the old Act reads:

"When any tax, penalty or interest is due in consequence of any order passed

under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

Section 6 of the General Clauses Act (Act 10 of 1897), states:

"Effect of repeal.— Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not —

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

4. As regards the second item in the impugned notice, viz., tax in respect of assessment year 1961-62 to the extent of Rs. 485.55 the material facts are as follows: The assessment proceedings were taken and concluded under the old Act and tax of Rs. 2,947.56 was imposed and demanded. Thereafter, the respondent preferred an appeal to the Appellate Assistant Commissioner. In appeal the tax liability was reduced to Rs. 485.55. Thereupon the Income-tax Officer issued a notice to the respondent dated December 11, 1963 purporting to be under S. 156 of the new Act. The limit of 35 days for payment of the amount expired on January 22, 1964. The impugned notice under S. 226 (3) was issued nearly two years thereafter on April 23, 1965. The argument on behalf of the respondent was that both the assessment order as well as the appellate order having been made

under the old Act, the provisions of S 226 of the new Act were not applicable. The High Court has accepted this contention of the respondent and has held that the notice was invalid to the extent it included the tax of Rs 485.55 for the assessment year 1961-62. The contention of the appellant is that the High Court was in error in holding that action under S 226 of the new Act was possible only in the case of an assessee who was "in default" and that in the case of an assessment under the old Act, no notice under S 156 of the new Act was possible and there was no way of taking advantage of the provisions for recovery and collection of tax contained in Ss 220 to 234 of the new Act. In our opinion, the argument on behalf of the appellant is well founded and must be accepted as correct. In the first place, it is necessary to notice that S 220 (4) of the new Act mentions in what circumstances the assessee shall be deemed to be in default and S 222 provides that when an assessee is in default or is deemed to be in default in making payment of tax, the Income-tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee, and the Tax Recovery Officer on receipt of such certificate, shall proceed to recover from the assessee the amount specified therein by one or more of the modes mentioned in the section. Section 226 however, provides for other methods of recovery and there is no reference in S 226 (3) to any default on the part of the assessee. Section 226 (3) merely states that the Income-tax Officer may, "at any time or from time to time", by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may, subsequently hold money for or on account of the assessee, to pay to the Income-tax Officer either forthwith so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount. In a proceeding under S 226 (3) of the new Act therefore it is not necessary that the assessee should be in default or should be deemed to be in default and no such condition or limitation is imposed by the language of that sub-section. We are accordingly of the opinion that the Income-tax Officer had authority to issue the notice dated December 11, 1963 under S 156 of the new

Act with respect to the tax liability of Rs 485.55 incurred by the respondent under the old Act. The High Court has expressed the view that "in the case of an assessment under the old Act no notice under Section 156 of the new Act was possible", and "there was no way of taking advantage of the provisions for recovery and collection of tax contained in Sections 220 to 234 of the new Act". The High Court has based its opinion on the premise that all recoveries are possible "only when the stage mentioned in Section 220 (4) was reached, namely that the assessee had become or deemed to have been an assessee in default" and the action under Section 226 could be taken only when an assessee was in default. In our opinion, the reasoning adapted by the High Court and the conclusion reached by it are not correct in law. The effect of the judgment of the High Court on this point is that the provisions of Section 297 (2) (j) of the new Act are nullified and declared to be of no consequence. An interpretation of Section 226(3) of the new Act which leads to such a startling result should be avoided as it is opposed to all sound canons of interpretation. As we have already stated, there is nothing in the language of Section 226 (3) of the new Act to warrant the conclusion that the assessee should be in default or should be deemed to be in default before the issue of the notice under that sub-section. It is true that the group of sections from Section 220 to Sec 232 of the new Act are placed under the heading "Collection and recovery". But in a case falling within Section 297 (2) (j) of the new Act, for example in a proceeding for recovery of tax and penalty imposed under the old Act, it is not required that all the sections of the new Act relating to recovery and collection should be literally applied but only such of the sections will apply as are appropriate in the particular case and subject if necessary, to suitable modifications. In other words, the procedure of the new Act will apply to the cases contemplated by Section 297 (2) (j) of the new Act *mutatis mutandis*. In this connection it is relevant to refer to the decision of this Court in *Kalawati Devi Harilalka v C. I. T., West Bengal, 1967-68 ITN 680 = (AIR 1968 SC 162)*, in which it was pointed out that Section 6 of the General Clauses Act will not apply in respect of those matters where Parlia-

ment had clearly expressed its intention to the contrary by making detailed provisions for similar matters mentioned in that section. For these reasons we are of opinion that the Income-tax Officer had authority to issue the notices under Section 156 and Section 226 (3) of the new Act with respect to the liability of the respondent under the old Act. The High Court was therefore in error in holding that the impugned notice was inoperative in regard to the amount of Rs. 485.55 for the assessment year 1961-62.

5. As regards items 4 and 5 for the assessment years 1962-63 and 1963-64 the argument of the respondent is that the impugned notice issued on April 23, 1965 was not legally valid as notices of demand were served on the respondent for payment of these sums and time given in this notice was due to expire on May 21, 1965. The impugned notice was issued on April 23, 1965, nearly a month before that date. As the tax and penalty covered by the notice were not due till May 21, 1965 it was said that notice of attachment under Sec. 226 (3) of the new Act could not legally be issued on April 23, 1965. In our opinion, there is no warrant for this argument. As we have already observed, there is nothing in the language of Sec. 226 (3) of the new Act to suggest that the assessee must be in default before a notice under that sub-section could be issued. It is true that Section 220 of the new Act deals with the question as to when the tax is payable and when the assessee is deemed to be in default but so far as Section 226 (3) of the new Act is concerned, the question of any default of the assessee is irrelevant. It was argued by Mr. Srinivasan on behalf of the respondent that the amount of tax must be "due to be paid" by the assessee before a notice can be issued under Sec. 226 (3) of the new Act. It is not disputed in this case that the notices of demand under Section 156 of the new Act were served on the respondent before the issue of the notice under Section 226 (3) of the new Act. As pointed out by this Court in *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth-tax (Central), Calcutta, 1966-59 ITR 767 = (AIR 1966 SC 1370)*, the liability to pay income-tax is a present liability though the tax becomes payable after it is quantified in accordance

with ascertainable data and therefore the amount of the provision (sic) for payment of income-tax and super-tax in respect of the year of account ending March 31, 1957 in that case, was a "debt owed" within the meaning of Section 2 (m) of the Wealth-tax Act and was as such deductible in computing the net wealth. It was further observed in that case that there was a perfected debt at any rate on the last date of the accounting year and not a contingent liability. In the present case, there is the additional circumstance that the assessments of tax and penalty have been made against the respondent and demand notices have also been issued under Section 156 of the new Act. It is therefore not possible to argue that the amount of tax and penalty for the assessment years 1962-63 and 1963-64 were not "due by the assessee" on April 23, 1965 when the notice under Section 226 (3) of the new Act was issued. We are accordingly of the opinion that Mr. Srinivasan is unable to make good his argument on this aspect of the case. It follows therefore that the impugned notice dated April 23, 1965 was validly issued as regards items 4 and 5, viz., Penalty for assessment year 1962-63, i. e., Rs. 1,890 and tax for the assessment year 1963-64, i. e., Rs. 64,307.90.

6. We proceed to consider the next question arising in this appeal, viz., whether the High Court was right in taking the view that the Income-tax Officer did not properly exercise the statutory discretion in issuing the impugned notice with regard to the first item, viz., tax for the assessment year 1960-61 amounting to Rs. 7,056.15. It was argued on behalf of the respondent that there was an appeal pending with the Appellate Assistant Commissioner against the order of assessment and therefore it was incumbent upon the Income-tax Officer to exercise the statutory discretion properly under Section 220 (6) of the new Act in treating the assessee as being in default. The finding of the High Court is that the Income-tax Officer "was not shown to have applied his mind to any of the facts relevant to the proper exercise of his discretion". In our opinion, the finding of the High Court cannot be upheld, because the respondent has not alleged in his writ petition any specific particulars in support of his case that the Income-tax Officer has exercised his discretion in an arbitrary manner. In paragraph 12 (b) of the writ

petition the respondent had merely said that "the order of the Income-tax Officer made under Section 220 was arbitrary and capricious". No other particulars were given by the respondent in his writ petition to show in what way the order was arbitrary or capricious. In the counter affidavit the allegations of the respondent have been denied in this respect. We are of opinion that in the absence of specific particulars by the respondent in his writ petition it is not open to the High Court to go into the question whether the Income-tax Officer has arbitrarily exercised his discretion. In the result we hold that the respondent is unable to substantiate his case that the impugned notice is in any way defective with regard to item No 1 i.e., tax for the assessment year 1960-61 amounting to Rs 7056 15.

7 For the reasons expressed we set aside the judgment of the Mysore High Court dated February 1 1967 and order that the writ petition No 846 of 1965 filed by the respondent should be dismissed. We accordingly allow this appeal with costs.

KSB

Appeal allowed.

AIR 1969 SUPREME COURT 414 (V 56 C 82)

M HIDAYATULLAH C J J C
SHAH V RAMASWAMI G K
MITTER AND A N GROVER JJ

Som Datt Datta, Petitioner v Union of India and others Respondents

Writ Petn. No 118 of 1968 D/- 20-9-1968

(A) Army Act (1950), Sections 125, 126 — Offences under Army Act — Jurisdiction for trial — Offence triable by court martial and ordinary criminal Courts — Order by authority under Section 125 for trial by court martial — Not illegal merely because police officer had started investigation.

When an offence is for the first time created by the Army Act, such as those created by Sections 34 35 36 37 etc., it would be exclusively triable by a court martial but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary criminal court as well as a court martial would have jurisdiction to try the person committing the offence.

Such a situation is visualised and provision is made for resolving the conflict under Sections 125 and 126 of the Army Act.

Under the scheme of these two sections in the first instance it is left to the discretion of the officer mentioned in Section 125 to decide before which court the proceedings shall be instituted and if the officer decides that they should be instituted before a court martial the accused person is to be detained in military custody but if a criminal court is of opinion that the said offence shall be tried before itself it may issue the requisite notice under Section 126 either to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government. (Para 4)

Thus where in a scuffle between arm jawans in a dining hall one of them was injured and later on died and on a intimation by one officer the Police Inspector started investigation sent the dead body for post mortem and the seized articles to Government laboratory for chemical examination but later on the G O C of the area passed an order constituting court martial and the case was tried by them and the accused were convicted under Section 304 and Section 149 I P C.

Held that merely because the police officer conducted the inquest of the dead body or because he seized certain exhibits and sent them to the State Laboratory for chemical examination it could not be reasonably argued that there was a decision of the competent military authority under Section 125 of the Army Act for banding over the inquiry to the Criminal Court. On the other hand the action of the General Officer Commanding indicated that there was a decision taken under Section 125 of the Army Act that the proceedings should be instituted before the Court Martial.

(Para 5)

(B) Criminal P C (1898), Sec. 549 — Rules under (S R O 709 dated 17-4-1952) Rules 3, 5 — Applicability — Rules not attracted merely because police had started investigation in an offence under Army Act — (Army Act (1950), S 125)

The rules framed by the Central Government under Section 549 of the Criminal Procedure Code apply to a case where the proceedings against the accused have already been instituted in an ordinary criminal court having jurisdiction.

tion to try the matter and not at a stage where such proceedings have not been instituted. (Para 7)

It is also manifest that Rule 3 only applies to a case where the police had completed investigation and the accused is brought before the Magistrate after submission of a charge sheet. The provisions of this rule cannot be invoked in a case where the police had merely started investigation against a person subject to military, naval or air force law. (Para 7)

Further, where the accused was not brought before the Magistrate and charged with the offences for which he was liable to be tried by the Court Martial within the meaning of Rule 3, the situation contemplated by Rule 5 does not arise and the requirements of that rule are, therefore, not attracted. (Para 7)

(C) Army Rules (1954), Rule 50 (2) — Applicability — Rule applies only to an alteration of charge before examination of witnesses. (Para 8)

(D) Army Act (1950), Sections 164, 165 — Orders confirming proceedings of Court Martial — No obligation to give reasons — Orders not illegal for not giving any reasons.

There is no express obligation imposed by Section 164 or by Section 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court Martial.

Apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, it cannot be said that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision. Such orders cannot, therefore, be held to be illegal for not giving any reasons for confirming the orders of the Court Martial. (Paras 10, 11)

Cases Referred: Chronological Paras (1952) 1952-1 KB 338 = 1952-1

All ER 122, Rex v. Northumberland Compensation Appeal Tribunal

11

Mr. B. Datta, Advocate (Petitioner was also produced in Court), for Petitioner; Mr. C. K. Daphtary, Attorney-General for India (M/s. B. D. Sharma and R. H. Dhebar, Advocates with him), for Respondents (Nos. 1 and 5).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: In this case the petitioner has obtained a rule from this Court asking the respondents to show cause why a writ in the nature of certiorari should not be issued under Art. 32 of the Constitution for calling up and quashing the proceedings before the General Court Martial No. JAG 26/66-67/AA of 1965 from the Judge Advocate General (Army branch), Army Headquarters whereby the petitioner was found guilty of charges under Sec. 304 and Section 149 of the Indian Penal Code and sentenced to a period of 6 years' rigorous imprisonment and cashiering. Cause has been shown by the Attorney-General on behalf of the Union of India and other respondents to whom notice of the rule was ordered to be given.

2. The petitioner was commissioned in the Indian Army in February, 1964 and was posted as Second Lt. (E. C.-55461) and was attached to 397 Engineering Construction Equipment Company in December, 1964. In August, 1965 the petitioner was posted as a Quarter Master and was transferred to Madras along with the Company. It appears that Wednesday, September 1, 1965 was to be celebrated as the Raising Day of the Unit when Games and Sports entertainment and Bara Khana (evening dinner) were to be arranged. In this celebration, all officers and other ranks of the Unit had to take some part and a number of other Army officers were to be received and entertained on behalf of the Unit. At the variety entertainment Punjabis and Garhwalis took part and each party was given free one bottle of rum. But it is alleged that the Purbias were not given an opportunity to put up their show and were not given free a bottle of rum. They were consequently aggrieved for this reason. The variety entertainment concluded at about 1900 hours at the end of which rum was issued to the jawans. The bara khana was to commence at 2000 hours. As there was a delay in the assembly of the men at the dining hall, Maj. Agarwal sent the petitioner to the lines to find out the cause for the delay and to get the men quickly. The petitioner went to the lines and it is alleged that the accused used filthy language while addressing the men. Some of the Purbias including the deceased Spr. Bishwa-

nath Singh protested against the use of such language. Though the petitioner expressed regret, the men were not satisfied. A few of the Sikh jawans, including some of the accused sided with the petitioner and there was a heated argument between the two groups on their way to the dining hall. The hara khana was served in two sittings. The petitioner did not join the first sitting but joined the second sitting which consisted of about 30 to 40 men. The quarrel which started between the two groups earlier was continued in the dining hall. The lights went off for a few minutes and when the lights came on, it was observed that a scuffle was going on in the middle of the hall between the petitioner and other Sikh jawans and the deceased. As the scuffle progressed, the deceased was surrounded by petitioner No. 1 and the other accused persons and the group moved towards the service counter. The lights went off for a second time. In the dark mess tables, benches and plates were hurled about. Most of the men ran out of the dining hall. It is alleged that accused No. 6 was seen stabbing with a knife Spr Bishwanath Singh and the latter slumped to the ground. Accused No. 3 hit him with a soot rake. When the lights came on after a few minutes, the petitioner and the other accused were found standing near the place where Spr Bishwanath Singh had fallen. Consequently, Maj Agarwal arrived at the scene and took Spr Bishwanath Singh to the MI room where he was found dead by Maj Koley, the Medical Officer. It appears that on September 2, 1965 at about 0400 hours the matter was reported to the Civil Police by Second Lt. F. D. A. Jesudian. A case under S. 302, Indian Penal Code was registered as crime No. 726/1965 at Pallavaram Police Station Madras. Shri Bashyam, Inspector of Police reached the place of occurrence at 0430 hours on the same date. He inspected the dining hall and seized certain exhibits produced by Maj Agarwal. He also held inquest on the dead body of Spr Bishwanath Singh and sent the dead body for post mortem examination to the mortuary, Madras General Hospital through Police Constable No. 1407, Ratnam. He sent the exhibits seized to the State Forensic Science Laboratory, Madras for chemical examination. At 13-30 hours on the same date Sri Bashyam stopped further investigations as Lt. Col.

Bajpai wanted the case to be handled by the Military authorities.

3. On September 3, 1965, a Court of Enquiry under the provisions of Ch. VI of the Army Rules was ordered by the Commander, Mysore and Kerala Sub-Area. After the Court of Inquiry had concluded the proceedings, a Court Martial was constituted by an order dated August 11, 1966 by Major General S. J. Sathe, General Officer Commanding Madras, Mysore and Kerala area to try the petitioner and other accused persons. The Court Martial assembled on August 18, 1966 and conducted its proceedings on several subsequent dates. In support of the case of the prosecution 30 witnesses were examined. At the Court Martial, the petitioner was defended by an Advocate of the Madras High Court Sri Natarajan and he was also assisted by a friend of the accused Major T. B. Narayanan. At the trial the Counsel for the petitioner cross-examined the witnesses for the prosecution and after the prosecution evidence was concluded, the petitioner said that he did not intend to call any defence witnesses. The petitioner, however, submitted a written statement. He was also put various questions by the Court Martial to which he replied. After the Counsel for the defence was heard and after the Judge-Advocate summed up the case the Court Martial came to the finding that the petitioner was guilty of culpable homicide not amounting to murder and that he was a member of an unlawful assembly and the petitioner was sentenced to cashiering and 6 years' rigorous imprisonment. Against the decision of the Court Martial the petitioner filed a petition under Section 164 of the Army Act but the petition was dismissed by the commanding authority and the finding and sentence by the Court Martial was confirmed so far as the petitioner was concerned. The petitioner thereafter filed an appeal under Section 165 of the Army Act to the Central Government but the appeal was dismissed.

4. The first question to be considered in this case is whether the Court Martial had jurisdiction to try and convict the petitioner of the offences under Sections 304 and 149, Indian Penal Code. It was contended by Mr. Dutta on behalf of the petitioner that the Court Martial had no jurisdiction having regard to the mandatory provisions contained in S. 125 of the Army Act and

having also regard to the fact that Maj. Agarwal had, in the first instance, decided to hand over the matter for investigation to the Civil Police. In order to test whether this argument is valid it is necessary to scrutinize the provisions of the Army Act in some detail. Section 2 of the Army Act, 1950 (Act 46 of 1950), hereinafter called the 'Army Act', describes the different categories of army personnel who are subject to the Army Act. Section 3(ii) defines a "civil offence" to mean "an offence which is triable by a criminal court"; S. 3(vii) defines a "court-martial" to mean "a court-martial held under this Act"; S. 3(viii) defines "criminal court" to mean "a court of ordinary criminal justice in any part of India, other than the State of Jammu and Kashmir"; S. 3 (xvii) defines "offence" to mean "any act or omission punishable under this Act and includes a civil offence"; and S. 3 (xxv) declares that "all words and expressions used but not defined in this Act and defined in the Indian Penal Code shall be deemed to have the meanings assigned to them in that Code". Chapter VI is comprised of Ss. 34 to 70. The heading of the Chapter is "Offences". As we have already noticed, the word "offence" is defined to mean not only any act or omission punishable under the Army Act, but also a civil offence. Sections 34 to 68 define the offences against the Act triable by court-martial and also indicate the punishments for the said offences. Section 69 states as follows:

"69. Subject to the provisions of S. 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,—

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven

years, or such less punishment as is in this Act mentioned".

Section 70 provides:

"A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences—

- (a) while on active service, or
- (b) at any place outside India, or
- (c) at a frontier post specified by the Central Government by notification in this behalf.

Explanation.—In this section and in S. 69, "India" does not include the State of Jammu and Kashmir".

Shortly stated, under this Chapter there are three categories of offences, namely, (1) offences committed by a person subject to the Act triable by a court-martial in respect whereof specific punishments have been assigned; (2) civil offences committed by the said person at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under S. 69 of the Act, triable by a court-martial; and (3) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. Subject to a few exceptions, they are not triable by court-martial, but are triable only by ordinary criminal courts. The legal position therefore is that, when an offence is for the first time created by the Army Act, such as those created by Ss. 34, 35, 36, 37, etc., it would be exclusively triable by a court-martial; but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary criminal court as well as a court-martial would have jurisdiction to try the person committing the offence. Such a situation is visualized and provision is made for resolving the conflict under Ss. 125 and 126 of the Army Act, which state:

"125. When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before

which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

126. (1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 125 at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final.

Section 125 presupposes that in respect of an offence both a criminal court as well as a court-martial have each concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the discretion of the officer mentioned in S 125 to decide before which court the proceedings shall be instituted, and, if the officer decides that they should be instituted before a court-martial, the accused person is to be detained in military custody, but if a criminal court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice under S 126 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question of proper court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction having regard to the exigencies of the situation in any particular case.

5 In the present case, we are unable to accept the contention of the petitioner

that merely because Maj Agarwal had directed that the First Information Report should be lodged with the Civil Police through Second Lt. Jesudian, it means that the competent authority under S 125 of the Army Act had exercised its discretion and decided that the proceedings should be instituted before the criminal court. The reason is that Maj Agarwal was not the competent authority under S 125 of the Army Act to exercise the choice under that section. The competent authority was the General Officer Commanding, Madras, Mysore and Kerala Area and that authority had decided on September 2, 1965 that the matter should be tried by a Court Martial and not by the Criminal Court. On the same date, the General Officer Commanding Madras, Mysore and Kerala Area had ordered the constitution of the Court Martial under Ch. VI of the Army Rules to investigate into the case of the petitioner and the other accused persons. There was admittedly no direction by the Commander of that area to hand over the proceedings to the Criminal Court. It is true that Maj. Agarwal had directed a report to be lodged with the Civil Police at 4.00 A. M. on September 2, 1965. It is also true that Sri Bashyam, Inspector of Police had inspected the place of occurrence, seized certain exhibits and held inquest of the dead body of Spr Bishwanath Singh. Sri Bashyam has admitted that he stopped investigation on the same date as directed by the military authorities. Merely because Sri Bashyam conducted the inquest of the dead body of Spr Bishwanath Singh or because he seized certain exhibits and sent them to the State Forensic Science Laboratory, Madras for chemical examination, it cannot be reasonably argued that there was a decision of the competent military authority under S 125 of the Army Act for handing over the inquiry to the Criminal Court. On the other hand, the action of the General Officer Commanding in constituting the Court of Inquiry on September 2, 1965 indicates that there was a decision taken under S 125 of the Army Act that the proceedings should be instituted before the Court-Martial.

6. The second branch of the argument of the petitioner is based upon S 549 of the Criminal Procedure Code which states

"(1) The Central Government may make rules consistent with this Code and the Army Act, the Naval Discipline Act and the Indian Navy (Discipline) Act, 1934,

and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject to military, Naval or Air Force law, shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment, to which he belongs, or to the commanding officer of the nearest military, Naval or Air Force station, as the case may be, for the purpose of being tried by Court-martial.

The Central Government has made rules in exercise of powers conferred on it under this section. The Rules were published at p. 690 in S. 3 of Part II of the Gazette of India dated April 26, 1952, under Ministry of Home Affairs, S.R.O. 709, dated April 17, 1952, Rules 3, 4, 5 and 8 are to the following effect:

"3. Where a person subject to military, naval or Air Force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a court-martial, such Magistrate shall not proceed to try such person or to issue orders for his case to be referred to a Bench, or to inquire with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court, unless

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, Naval or Air Force authority, or

(b) he is moved thereto by such authority."

"4. Before proceeding under clause (a) of Rule 3 the Magistrate shall give written notice to the Commanding Officer of the accused and until the expiry of a period of seven days from the date of the service of such notice he shall not—

(a) convict or acquit the accused under Sections 243, 245, 247, or 248 of the Code of Criminal Procedure, 1898 (V of 1898), or hear him in his defence under Section 244 of the said Code; or

(b) frame in writing a charge against the accused under Section 254 of the said Code; or

(c) make an order committing the accused for trial by the High Court or the Court of Sessions under Section 213 of the said Code."

"5. Where within the period of seven days mentioned in Rule 4, or at any time thereafter before the Magistrate has done any act or issued any order referred to in that rule, the Commanding Officer of the accused or competent military, Naval or Air Force authority, as the case may be, gives notice to the Magistrate that in the opinion of such authority, the accused should be tried by a court-martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section (1) of Section 549 of the said Code to the authority specified in the said sub-section."

"8. Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, Naval or Air Force law has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured unless through military, Naval or Air Force authorities, the Magistrate may by a written notice require the Commanding Officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the court-martial, if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted."

7. It was argued on behalf of the petitioner that there was no notice given by the Commanding Officer to the Magistrate under Rule 5 that the petitioner should be tried by a Court-martial and hence the criminal court alone had jurisdiction under Rule 3 to conduct proceedings against the petitioner for the offences charged. In our opinion, the argument on behalf of the petitioner is misconceived. The rules framed by the Central Government under S. 549 of the Criminal Procedure Code apply to a case where the proceedings against the petitioner have already been instituted in an ordinary criminal court having jurisdiction to try the matter and not at a stage where such proceedings have not been instituted. It is clear from the affidavits filed in the present case that the petitioner was not

brought before the Magistrate and charged with the offences for which he was liable to be tried by the Court Martial within the meaning of Rule 3 and so the situation contemplated by Rule 5 has not arisen and the requirements of that rule are therefore, not attracted. It was pointed out by Mr Dutta that after the First Information Report was lodged at Palavaran police station a copy thereof should have been sent to the Magistrate. But that does not mean that the petitioner "was brought before the Magistrate and charged with the offences" within the meaning of Rule 3. It is manifest that Rule 3 only applies to a case where the police had completed investigation and the accused is brought before the Magistrate after submission of a charge-sheet. The provisions of this rule cannot be invoked in a case where the police had merely started investigation against a person subject to military, naval or air force law. With regard to the holding of the inquest of the dead body of Spr Biswvanath Singh it was pointed out by the Attorney General that Regulation 527 of the Defence Service Regulations has itself provided that in cases unnatural death that is death due to suicide, violence or under suspicious circumstances information should be given under S 174, Criminal Procedure Code to the Civil authorities, and the conduct of Maj Agarwal in sending information to the Civil Police was merely in accordance with the provisions of this particular regulation. For these reasons we hold that Counsel for the petitioner is unable to make good his argument on this aspect of the case.

8 We proceed to consider the next argument presented on behalf of the petitioner, namely, that even if the Military Court Martial had jurisdiction, it could not give a finding of guilt against the petitioner with regard to culpable homicide not amounting to murder unless the charge was altered and amended in accordance with sub rule (2) of Rule 50 of the Army Rules, 1954. It was also contended on behalf of the petitioner that the procedure contemplated by Rule 121 (4) of the Army Rules was not followed by the Court Martial and the finding of the Court Martial must therefore be held to be defective. In our opinion, there is no warrant or justification for this argument since Rules 50 (2) and 121 (4) have no application to the present case. Rules 50 and 121 provide as follows

"50 Amendment of charge—(1) At any time during the trial, if it appears to the court that there is any mistake in the name or description of the accused in the charge sheet, the court may amend the charge sheet so as to correct that mistake

(2) If, on the trial of any charge, it appears to the court at any time before it has begun to examine the witnesses, that in the interests of justice any addition to, omission from, or alteration in, the charge is required, it may report its opinion to the convening authority, and may adjourn, and the convening authority may either direct the new trial to be commenced, or amend the charge, and order the trial to proceed with such amended charge after due notice to the accused."

"121 Form and record of finding—(1) The finding on every charge upon which the accused is arraigned shall be recorded, and except as mentioned in these rules such finding shall be recorded simply as a finding of 'Guilty', or of 'Not guilty'

(2) When the court is of opinion as regards any charge that the facts proved do not disclose the offence charged or any offence of which he might under the Act legally be found guilty on the charge as laid the Court shall acquit the accused of that charge

(3) When the court is of opinion as regards any charge that the facts found to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and that the difference is not so material as to have prejudiced the accused in his defence it may, instead of finding of 'Not guilty' record a special finding

(4) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein

(5) The court shall not find the accused guilty on more than one of two or more charges laid down in the alternative, even if conviction upon one charge necessarily connotes guilt upon the alternative charge or charges"

In the present case there was no necessity for amending the charge by the Court Martial under Rule 50 (2) because that sub rule only relates to an alteration of charge before the examination of witnesses. The Court Martial has also not contravened the provisions of Rule 121 (4)

because that sub-rule is not attracted to the present case. On the contrary, the finding of the Court-Martial is justified in view of the language of S. 139 (6) of the Army Act which states:

"139. (6) A person charged before a court-martial with an offence punishable under Section 69 may be found guilty of any other offence of which he might have been found guilty if the provisions of the Code of Criminal Procedure, 1898, were applicable."

We accordingly reject the argument of learned Counsel for the petitioner on this part of the case.

9. Finally it was contended on behalf of the petitioner that the order of the Chief of the Army Staff confirming the proceedings of the Court-Martial under S. 164 of the Army Act was illegal since no reason has been given in support of the order by the Chief of the Army Staff. It was also pointed out that the Central Government has also not given any reasons while dismissing the appeal of the petitioner under S. 165 of the Army Act and that the order of the Central Government must therefore be held to be illegal and ultra vires and quashed by the grant of a writ in the nature of certiorari. In this context it is necessary to reproduce Ss. 164 and 165 of the Army Act which are to the following effect:

"164. (1) Any person subject to this Act who considers himself aggrieved by any order passed by any court-martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court-martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence, of any court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Chief of the Army Staff or other Officer, as the case may be, may pass such order thereon as it or he thinks fit."

"165. The Central Government, the Chief of the Army Staff or any prescribed officer may annul the proceedings of

any court-martial on the ground that they are illegal or unjust."

In contrast to these sections, S. 162 of the Army Act expressly provides that the Chief of the Army Staff "for reasons based on the merits of the case" set aside the proceedings or reduce the sentence to any other sentence which the court might have passed. Section 162 reads as follows:

"The proceedings of every summary court-martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, or to the prescribed officer, and such officer, or the Chief of the Army Staff, or any officer empowered in this behalf by the Chief of the Army Staff, may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed."

It is necessary in this context to refer to Rules 61 and 62 of the Army Rules which prescribe the standard form of recording the opinion of the Court-Martial on each charge and of announcement of that finding. These rules omit all mention of the evidence or the reasoning by which the finding is reached by the Court-Martial. Rules 61 and 62 are to the following effect:—

"61. Consideration of finding.— (1) The court shall deliberate on its finding in closed court in the presence of the judge-advocate.

(2) The opinion of each member of the court as to the finding shall be given by word of mouth on each charge separately.

"63. Form, record and announcement of finding.— (1) The finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded simply as a finding of 'Guilty' or of 'Not guilty'.

(10) The finding on each charge shall be announced forthwith in open Court as subject to confirmation."

10. In the present case it is manifest that there is no express obligation imposed by Section 164 or by Section 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court-Martial. Mr. Dutta has been unable to point out any other section of the Act or any of the rule made therein from which necessary implication can be drawn that

such a duty is cast upon the Central Government or upon the confirming authority. Apart from any requirement imposed by the statute or statutory rule expressly or by necessary implication, we are unable to accept the contention of Mr Dutta that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.

11. In English law there is no general rule apart from the statutory requirement that the statutory tribunal should give reasons for its decision in every case. In *Rex v Northumberland Compensation Appeal Tribunal* 1952-1 KB 338 it was decided for the first time by the Court of Appeal that if there was a "speaking order" a writ of certiorari could be granted to quash the decision of an inferior Court or a statutory tribunal on the ground of error on the face of record. In that case, Danning, L. J. pointed out that the record must at least contain the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons unless the tribunal chooses to incorporate them in its decision. It was observed that if the tribunal did state its reasons and those reasons were wrong in law, a writ of certiorari might be granted by the High Court for quashing the decision. In that case the statutory tribunal under the National Health Service Act, 1946 had fortunately given a reasoned decision, in other words, made a 'speaking order' and the High Court could hold that there was an error of law on the face of the record and a writ of certiorari may be granted for quashing it. But the decision in this case led to an anomalous result, for it meant that the opportunity for certiorari depended on whether or not the statutory tribunal chose to give reasons for its decision, in other words, to make a 'speaking order'. Not all tribunals, by any means, were prepared to do so, and a superior Court had no power to compel them to give reasons except when the statute required it. This incongruity was remedied by the Tribunals and Inquiries Act, 1953 (S. 12) (6 and 7 Elizabeth 2 C. 66), which provides that on request a subordinate authority must supply to a party genuinely interested the reasons for its decision. Section 12 of the Act states that when a tribunal mentioned in the First Schedule of the Act gives a decision it must give a written

or oral statement of the reasons for the decision, if requested to do so on or before the giving or notification of the decision. The statement may be refused or the specification of reasons restricted on grounds of national security, and the tribunal may refuse to give the statement to a person not principally concerned with the decision if it thinks that to give it would be against the interests of any person primarily concerned. Tribunals may also be exempted by the Lord Chancellor from the duty to give reasons but the Council on Tribunals must be consulted on any proposal to do so. As already stated, there is no express obligation imposed in the present case either by S. 164 or by S. 165 of the Indian Army Act on the confirming authority or on the Central Government to give reasons for its decision. We have also not been shown any other section of the Army Act or any other statutory rule from which the necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. We therefore reject the argument of the petitioner that the order of the Chief of the Army Staff dated May 28, 1967 confirming the finding of the Court Martial under S. 164 of the Army Act or the order of the Central Government dismissing the appeal under S. 165 of the Army Act are in any way defective in law.

12. For the reasons expressed we hold that the petitioner has made out no case for the grant of a writ under Art. 32 of the Constitution. The application accordingly fails and is dismissed.

D R R.

Application dismissed.

AIR 1969 SUPREME COURT 422

(V 56 C 83)

(From Patna)*

M HIDAYATULLAH, C J., J C SHAH,
V. RAMASWAMI, G K. MITTER AND
A. N. CROVER, JJ

Nishi Kant Jha, Appellant v State of
Bihar, Respondent.

Criminal Appeal No 190 of 1968, D/-
2-12-1968.

Evidence Act (1872), Ss 3 and 24 —
Confessional statement — Acceptance of
inculpatory portion alone — Permissibility

* (Govt. Appeal No 14 of 1963, D/-
4-2-1968 — Pat.)

CM/CM/C221/68

— Inculpatory portion can be accepted if the exculpatory portion is found to be inherently improbable — Charge for murder — Confessional statement to Mukhiya of village — Exculpatory portion found to be not only inherently improbable but contradicted by the statement of accused under S. 342 Criminal P. C. — Acceptance of inculpatory portion and conviction based thereon, held, was valid. AIR 1952 SC 354 and AIR 1952 SC 343 and 1964 (1) Cri LJ 730 (SC), Dist.

(Para 23)

Cases Referred: Chronological Paras

(1964) 1964 (1) Cri LJ 730 = 1963-3

SCR 678 (SC), Narain Singh v. State of Punjab 22

(1952) AIR 1952 SC 343 (V 39) = 1952 SCR 1091, Hanumant v. State of Madhya Pradesh 17, 19

(1952) AIR 1952 SC 354 (V 39) = 1953 SCR 94 = 1953 Cri LJ 154, Palvinder Kaur v. State of Punjab (1) 19, 21

(1931) AIR 1931 All 1 (V 18) = ILR 52 All 1011 (FB), Emperor v. Balmakund 19

(1830) 4 Car and P 221, Rex v. Clewes 15

M/s. B. P. Singh and S. N. Prasad, Advocates, for Appellant; Mr. A. S. R. Chari, Senior Advocate, (Mr. U. P. Singh, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

MITTER, J.: The main question involved in this appeal is, whether the statement of the appellant recorded by a village Mukhiya before he was handed over to the police is admissible in evidence; and if so, whether the court could reject a part thereof and rely on the remainder along with other evidence adduced to hold him guilty of an offence he was charged with. The evidence against the appellant was all circumstantial and there can be no doubt that if the statement before the mukhiya is to be left out of consideration, the appellant cannot be held guilty.

2. The appellant who was a student of a school in Jhajha was charged with the murder of a fellow student of the same school and robbing him of the sum of Rs. 84 on October 12, 1961. The additional Sessions Judge, Santhal Parganas acquitted the appellant of both the charges but, in appeal, the High Court found him guilty of the charge of murder and sentenced him to imprisonment for

life. The appellant has come up to this Court by special leave.

3. The case of the prosecution leading to the discovery of the murder and arrest of the appellant is as follows. When the Barauni-Sealdah passenger reached Madhupur station at about 3.52 p. m. on 12th October 1961 the dead body of a person was discovered in the lavatory of a first class compartment of that train. One Anil Kumar Roy who wanted to board the said compartment at Jasidih station (in between Jhajha and Madhupur) could not get the door opened and had to board another compartment. The dead body was found with the neck cut and besmeared with blood. Blood was coming out from the veins of the neck and there was plenty of it on the floor of the lavatory. The clothes of the deceased and his belongings like a comb, handkerchief were also blood-stained and there were finger marks in the lavatory. Photographs of the deceased were taken and later the body was identified as that of Jai Prakash Dubey, a student of class X-B Science of Jhajha High School. The postmortem report showed that there were no less than six incised injuries caused by some sharp cutting weapon. The injuries were homicidal and death was caused by bleeding and shock.

4. The appellant was noticed by one Ram Kishore Pandey (P. W. 17) washing blood-stained clothes with soap in the river Patra about one hour before sunset on 12th October 1961. Pandey noticed that the left hand of the appellant was cut and he questioned the appellant as to how he had got his clothes blood-stained. The appellant's version was that when he was coming from the side of Gangamarni a cow boy had assaulted him and cut his finger with glass and snatched away his money. Reaching his house in village Saptar, Pandey mentioned this to Shiv Shankar Pandey, P. W. 25. Shiv Shankar Pandey learnt from his elder brother, Basdeo that a murder had been committed in the Barauni train and the murderer was missing. They suspected that the appellant might be the murderer and decided to go and search for him. All the three along with Pathal Turi and one Ajodhya Turi, two chowkidars went to the bank of that river but could not find the appellant. There they were told by Jagarnath Mahto and Rameshwar Mahto (P. Ws. 19 and 20) that they had noticed a man with wet clothes asking the way to Deoghar. Proceeding further, this group of persons

found the appellant about a mile from Titthapur going behind a bullock cart. On being accosted the appellant said that he was going to village Roshan to his sister's place and that he had not committed any murder. The appellant was then wearing a pair of trousers and a shirt and had with him some books, an exercise book, a chhura (knife) besides a pair of trousers and a shirt which were both wet. They apprehended the appellant and took him to village Saptar. They called on the Sarpanch of the village who directed them to take the appellant to the Mukhiya not making any enquiry himself. The Mukhiya's place in Lorajore was at a distance of about a mile from Saptar. The party reached there at about 9 o'clock at night and stayed there for 2 or 3 hours. At about midnight on 12th October 1961 the Mukhiya took down the statement (Ex. 6) of the appellant and directed the party to take the appellant to the police station. The party reached Madhupur police station at about 5 a. m. on October 13, 1961. Brij Bihari Pathak, Sub Inspector of Police (P W 39) seized the articles which the appellant had with him in the presence of two witnesses and prepared a seizure list. The articles seized from the accused included a shirt, a pair of trousers, a leather belt, a pair of shoes, 4 blood stained copy books, two books, pages of one being blood stained. He also prepared an injury report of the appellant and sent him to a doctor for examination. The officer in charge of the Railway Police Station Madhupur, Gorakh Prasad Singh (P W 51) proceeded with the investigation, took charge of various articles found in the compartment of the Barauni passenger, received the post-mortem report, examined witnesses and sent all the material exhibits to the Chemical Examiner for examination and report. The report of the Chemical Examiner showed that among the articles found with the appellant Nishi Kant Jha and sent up for examination the following were stained with human blood: (1) leather belt cutting (2) cuttings of under wear, trousers and shirt, (3) pair of chapal (4) portion of a shoe, (5) one big knife and (6) several hooks, papers and an exercise book. The report also showed that sample of blood found on the deceased was of the same group as that of the appellant.

5 The appellant pleaded not guilty. Before taking a note of his statement under S 342 of the Code of Criminal Pro-

cedure, it will be useful to reproduce his statement Ex. 6 recorded by Mukhiya at Lorajore before he was handed over to the police. The statement reads:

"I am Nishi Kant Jha, son of Nilkanth Jha, resident of Baburpur, P S Jasidih, Sub Division Deoghar, District Santhal Parganas. To-day 12-10-61 at about 12 midnight, chowkidars Pathal Turi and Ayodhya Turi of village Saptar and Sheo Shankar Pandey, Ram Kishore Pandey and Basudeo Pandey of the same village arrested me and brought me. My statement is that when I boarded the first class compartment in Barauni passenger at Jha Jha, an unknown person was sitting in it when the train reached near Simultala and when it stopped there, Lal Mohan Sharma resident of Deoghar, P S. Deoghar, district Dumka entered into that compartment. I had been knowing him from before. When the train stopped at the Jasidih station and when I went to get down, Lal Mohan Sharma who had boarded the train at Simultala, did not allow me to get down at the Jasidih station. When the train moved ahead of Jasidih station, in the meanwhile Lal Mohan Sharma took that outsider into the lavatory and began to beat him. At this I caught hold of his hand, as a result of which my left fore-finger got injured with knife. Thereupon he asked me to be careful. Then, on being afraid I sat quietly in that very compartment. He further said that I should not open the door and window of the compartment and if I would do so I would be inviting death. At that very time, he killed him. When the train was reaching near Mathurapur, he jumped down from the running train and fled away. Lal Mohan Sharma fled away. I also jumped down on the other side of Patro river near Madhupur and fled away in order to save my life because I apprehended that I would be the only person who would be arrested. Thereafter, I came to the village Ratu Bahiar lying by the side of Patro river and afterwards I took my clothes to Patro river and washed them with a soap. Meanwhile a bullock cart was going to Deoghar. Therefore I sat on that very bullock cart and started for Deoghar. After I had covered about a mile, Pathal Turi, Shankar Pandey, Ram Kishore Pandey, Ayodhya Turi, the chowkidar and Rameshwar Maito got me down from the bullock cart and brought be-

fore you. I know their names after enquiring the same from them."

6. At the end of the statement there was an endorsement reading:

"On my understanding my statement, I affix my signature."

The signature appearing thereunder was admitted by the appellant to be his bearing date 12th October 1961. From the said statement the following emerge:

(1) The appellant had boarded a first class compartment in Barauni passenger at Jhajha already occupied by a person not known to him.

(2) When the train reached Simutala one Lal Mohan Sharma, resident of Deoghar entered that compartment.

(3) When the train proceeded further and stopped at Jasidih station, the appellant wanted to get down but was prevented from doing so by Lal Mohan.

(4) After the train moved out of Jasidih Lal Mohan caught hold of the first occupant of the compartment and took him into the lavatory and started beating him.

(5) The appellant wanted to prevent this and in trying to catch hold of the assailant's hand he was injured by a knife. Thereafter he took no further steps to prevent the commission of the crime.

(6) Lal Mohan Sharma threatened him with death in case he wanted to open the door or the window of the compartment and killed the stranger.

(7) When the train was reaching Mathurapur Lal Mohan jumped out of it and ran away.

(8) The appellant also jumped out of the train after it had crossed the river Patro near Madhupur and fled away to save his life because he was apprehensive of being arrested as the only person left in the compartment.

(9) He went to the village Ratu Bahiar near the river Patro and washed his clothes in the river with a soap.

(10) Thereafter he took a ride in a bullock cart going to Deoghar but after covering a mile or so he was apprehended by Pathal Turi, Shankar Pandey, Ram Kishore Pandey, Ayodhya Turi, the chowkidar and Rameshwar Mahto.

7. On the face of it the statement goes to show that the appellant was present in the compartment when the murder was committed by Lal Mohan Sharma, that he did not know the victim that the murder was committed after the train had left Jasidih station, that he

himself was prevented from getting out of the train at Jasidih, that he suffered an injury on his left fore-finger from the knife of the assailant and that he jumped out of the train near the river Patro. He did not mention having been accosted by Ram Kishore Pandey while he was washing his clothes in the river nor did he make any statement to the effect that he had received the injury as a result of a scuffle with a cow boy.

8. At the trial evidence was adduced by the Headmaster of the school that Jai Prakash Dubey, the victim, was an old student while the appellant had joined that school in the month of March 1961. They belonged to the same standard but were not in the same section inasmuch as one was in the arts section while the other was in the science section. The Headmaster deposed to the fact that both of them used to play football and that no enmity was known to exist between the two.

9. In his statement under Section 342 Cr. P. C. the appellant said that he could not identify the photographs of the victim as those of Jai Prakash Dubey and that he did not know Jai Prakash Dubey. He did not board a first class compartment of Barauni passenger at Jhajha, that he did not jump off the train when it was nearing Madhupur. He admitted having washed his blood-stained clothes in the river Patro near the village of Ratu Bahiar and that a person had enquired of him the reason for his clothes being stained with blood. He did not admit that he had told anyone that while coming from the side of Gangamarni he had been assaulted by some herdsmen and cut his finger with glass and said that his reply to the query was that he had an altercation with a herdsman on his asking about the way when the latter wanted to assault him with a sharp-edged knife and on his catching hold of it he had cut his hand. He denied having enquired of anybody about the way leading to Deoghar and he also denied that he was arrested while he was a mile ahead of village Titithapur following a bullock cart. He admitted having held in his hand clothes which had been washed in the river and blood-stained books and copy books, pages of some of the books being blood-stained. He did not admit that he had with him a knife when he was arrested. He admitted having been taken to the house of the Mukhiya Sudama Raut but his ver-

sion was that when he reached there they all began to beat him and told him that he must make a statement as suggested by them. With regard to Ex. 6 his version was that it was not his statement but that he had been made to put his signature on a piece of blank paper which was later made use of as his statement. He denied that the writing of the endorsement ascribed to him was his. His account of the activities on that day was as follows. He had boarded a third class compartment in Toofan Express on 12th October 1961 intending to pay a visit to his father's sister's daughter at Roshan and thereafter going to his native place. He had reached Madhupur at about 12-30 p. m. and left for Roshan. He had lost his way after some distance and enquired of some herdsmen about the way to the village. These herdsmen started to abuse him for having lost his way. On his remonstrance, a scuffle took place. At this point of time another herdsman appeared with a lathi which was shining like glass and wanted to assault him with this. On his catching hold of the lathi he got his hand cut which was bleeding. His clothes and books also got stained with blood whereupon the herdsman ran away. He purchased a soap and went to wash his clothes in Patra river and take his bath. People who met him there had asked him about his injury and he had given them the version just now mentioned. Thereafter when he was nearing the village Roshan a number of persons came and apprehended him on a charge of murder. They took him to the Mukhya's bouse at 8-30 p. m. in the night and kept him there assaulting him with lathis and slaps. The Mukhya had asked him to confess his guilt and give a statement and on his refusing to do so, he was again assaulted and threatened with death. Through fear he had affixed his signature on a blank paper

10. On the evidence the High Court found that the train had left Jasidih at 3-23 p. m. its next halt being Madhupur where it reached at 3-52 p. m. The door of a first class compartment was found closed at Jasidih and could not be opened. In the view of the High Court the murder was committed in the lavatory of the first class compartment between Jasidih and Madhupur. On a close scrutiny of the evidence adduced, the High Court found the following in-

criminating circumstances against the appellant:—

(a) Only about two hours after the murder i. e. between 5 to 6 p. m. he was seen washing his blood-stained clothes on the bank of the river Patra.

(b) At the time of his apprehension by Ram Kishore Pandey and others he was holding blood-stained exercise books, and other books some of the pages being blood-stained.

(c) He also had with him at that time a knife the length of the blade and the handle of which was about 9".

(d) According to the medical evidence the injuries of the victim could have been caused by that knife which was in the possession of the appellant. One of the horizontal incised injuries i. e. injury No 6 was 5"X2"X3/4"

(e) The left band of the respondent was noticed with a cut injury at the bank of the said river. The marks of other injuries on the body of the appellant were compatible with a scuffle with the victim in the compartment of the train.

(f) The explanation of the appellant with regard to the possession of blood-stained clothes and articles and the injury on his body was not acceptable.

11. In the light of the above incriminating circumstances culled from the evidence, the acceptance of the statement of the appellant in Ex. 6 that he had travelled together with an unknown person later identified as the victim Jai Prakash Dubey in the same compartment would be conclusive to prove the guilt of the appellant if his further statement in Ex. 6 about the part played by Lal Mohan Sharma be rejected. The appellant had admitted his presence on the scene of the murder, but it was his version that the crime was committed by someone else while he himself was a helpless spectator. When the assailant jumped off the train he followed suit being apprehensive of arrest on the charge of murdering the unknown person. He had done so near the river Patra. Some portions of the statement were not found to be acceptable. It is not possible to believe that if Lal Mohan Sharma wanted to commit the murder he would prevent the appellant from getting off the train at Jasidih so as to have a witness who knew his name and address and testify to his commission of the crime. Lal Mohan Sharma was not in the train at Jhajha and no details were given about any quarrel between him

and the victim which might lead the former to make the attack on Jai Prakash. Apparently there was no motive for Lal Mohan Sharma's commission of the crime. Again it is not possible to believe that Lal Mohan Sharma should not have tried to do away with the appellant also. The version of the appellant receiving the injury on his left hand in the railway compartment was also unbelievable. So was his story of a scuffle with the herdsman and cutting his hand as a result thereof. The cause for the herdsmen abusing the appellant and his remonstrance followed by an attack on his person all appear to be imaginary. The only incised injury which the appellant had suffered was skin deep and it is impossible to accept the story that the bleeding was so profuse as to have necessitated his washing his shirt and trousers in the river. Nor does such an injury account for the other articles like his belt, shoes and books being stained with blood which was sought to be removed by washing.

12. The contention urged on behalf of the appellant that the statement was not voluntarily made and as such could not be admitted in evidence was rightly rejected by the High Court. The High Court noted that no suggestion had been made to any one of the persons who had taken the appellant to the Mukhiya and had been tendered for cross-examination that any of them had assaulted the appellant nor was any suggestion made that the appellant had been coerced or threatened with dire consequences if he did not make the statement. The appellant's own version that he was made to give his signature on a blank piece of paper cuts at the root of his case that he made a statement as a result of a threat or assault, for in that case all that was necessary was to get his signature.

13. A point was sought to be made by counsel for the appellant that the footprints and finger prints in the lavatory of the first class compartment taken at Madhupur station were found to be different from those of the appellant and that this went to show that the appellant could not have been the murderer. The High Court turned down this contention on the ground that before the police took charge of the situation many people had entered the compartment of the train and the above difference there-

fore was not a factor on which any reliance could be placed.

14. The High Court found that the appellant's version that he did not know the victim unacceptable. His version in Ex. 6 as to how he came to sustain his cut injury was entirely different from that given in his statement under Section 342. The High Court also could not accept his version that he had lost his way to his sister's village at Roshan and that he had suffered an injury in the way suggested by him in his statement under Section 342. But however grave the incriminating circumstances against the appellant as summarised by the High Court may be, they were not enough to fasten the guilt on the accused unless a portion of his statement Ex. 6 is pieced together with them. It is only this statement which contains an admission that he was travelling by the Barauni passenger in a compartment where he saw a murder committed and that he had jumped out of the train near the river Patra before getting to Madhupur and the entire evidence minus the unacceptable portion of Ex. 6 lead to the irresistible conclusion of the appellant's guilt.

15. It was contended before us by learned counsel for the appellant that if the statement is to be considered at all, it must be taken as a whole and the court could not act upon one portion of it while rejecting the other. Counsel sought to rely on three judgments of this court in aid of his contention that a statement which contains any admission or confession must be considered as a whole and the court is not free to accept one part while rejecting the rest. In our view, the proposition stated so widely cannot be accepted. As Taylor puts it in his Law of Evidence (11th edition) Article 725 at page 502 that with regard to the general law of admissions, the first important rule is that

"the whole statement containing the admissions must be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained. But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow

that all the parts of the statement should be regarded as equally deserving of credit, but the jury must consider, under the circumstances, how much of the entire statement they deem worthy of belief including as well the facts asserted by the party in his own favour as those making against him."

With regard to criminal cases, Taylor states

"In the proof of confessions—as in the case of admissions in civil causes—the whole of what the prisoner said on the subject at the time of making the confession should be taken together

But if after the entire statement of the prisoner has been given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so, and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another. Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case."

In Roscoe's book on Criminal Evidence (16th Edition, page 52), the statement of law is much to the same effect. Roscoe also cites a decision in *Rex v Clewes*, (1830) 4 Car and P 221 where the confession of the prisoner charged with murder that he was present at the murder but that it was committed by another person and that he took no part in it, was left to be considered by the jury with a direction that the jury might, if they thought proper, believe one part of it and disbelieve another. According to Archbold's Criminal Pleading Evidence and Practice (Thirty sixth Edition, page 423)

"In all cases the whole of the confession should be given in evidence, for it is a general rule that the whole of the account which a party gives of a transaction must be taken together, and his admission of a fact disadvantageous to

himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to him, not merely as evidence that he had made such assertion, but admissible evidence of the matter thus alleged by him in his discharge.

It has been said that if there be no other evidence in the case, or none which is incompatible with the confession, it must be taken as true, but the better opinion seems to be that, as in the case of all other evidence, the whole should be left to the jury, to say whether the facts asserted by the prisoner in his favour be true."

16 In this case the appellant's statement in Ex. 8 on which reliance is placed to show that the appellant could not be guilty of the crime was found wholly unacceptable. His version of Lal Mohan Sharmas commission of the crime, his being prevented from getting down from the train at Jasidih, Lal Mohan apparently committing the crime forcing the appellant to be a witness to it and the latter's version of the manner in which he received the injury were unacceptable to the High Court and we see no reason to come to any different conclusion. The other incriminating circumstances already tabulated, considered along with the appellants statement that he was present in the compartment when the murder was committed, that he jumped from the train near the river, that he gave a different version as to how he had received his injury, his statement that he had lost his way to the village Roshan being unacceptable all point conclusively to his having committed the murder.

17 There is nothing in the judgments of this Court to which reference was made which can help the appellant. In *Hanumanant v State of Madhya Pradesh* 1952 SCR 1091 = (AIR 1952 SC 343) the facts were as follows. On a complaint filed by the Assistant Inspector General of Police, Anti-Corruption Department, two persons by name Nargund kar and Patel, were tried for the offence of conspiracy to secure a contract of Seem Distillery by forging the tender Ex. P-3A and for commission of the offence of forgery of the tender and of another document Ex. P-24. The special Magistrate convicted both the appellants on all the three charges. The Sessions Judge quashed the conviction of both the appellants under the first charge of criminal conspiracy but maintained the

convictions and sentences under S. 465, I. P. C. on the charges of forging Exs. P-3A and P-24. Both the appellants went up in revision to the High Court but without any success. Examining the evidence in the appeal by special leave, this Court held that the peculiar features relied on by the courts below in Ex. P-3A should be eliminated from consideration and it was held that there were really no circumstances inconsistent with Ex. P-3A being a genuine document. In respect of the charge regarding Ex. P-24 the trial Magistrate and the Sessions Judge used the evidence of experts to arrive at the finding that the letter Ex. P-24 was typed on article A which had not reached Nagpur till the end of December 1946 and therefore the letter was antedated. The High Court although of the view that the evidence of the experts was inadmissible proceeded nevertheless to discuss it and place some reliance on it. The lower courts held that the evidence of experts was corroborated by the statements of the accused recorded under Section 342. In rejecting this conclusion it was observed by this Court:

"If the evidence of the experts is eliminated, there is no material for holding that Ex. P-24 was typed on article A. The trial Magistrate and the learned Sessions Judge used part of the statement of the accused for arriving at the conclusion that the letter not having been typed on article B must necessarily have been typed on article A. Such use of the statement of the accused was wholly unwarranted. It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all. If the statement of the accused is used as a whole, it completely demolishes the prosecution case and, if it is not used at all, then there remains no material on the record from which any inference could be drawn that the letter was not written on the date it bears.....we hold that there is no evidence whatsoever on the record to prove that this letter Ex. P-24 was antedated and that being so, the charge in respect of forgery of this letter also fails."

18. Learned counsel for the appellant sought to rely on the above statement of law in aid of his contention that the statement in Ex. 6 should either be taken

as a whole or rejected altogether. In our view that was not the ratio decidendi in Hanuman's case. As was pointed out by this Court with the elimination of the evidence of the experts there was no material for holding that Ex. P-24 was typed on article A and consequently the only evidence on the subject being in the statement of the accused a part of it could not be relied on leaving apart the exculpatory part.

19. This is made more clear in the next case which was cited by learned counsel. In *Palvinder Kaur v. State of Punjab* (1), 1953 SCR 94=(AIR 1952 SC 354) the appellant was tried for offences under Sections 302 and 201, Indian Penal Code in connection with the charge of murder of her husband. She was convicted by the Sessions Judge under Section 302 but no verdict was recorded regarding the charge under Sec. 201. On appeal, the High Court acquitted her of the charge of murder but convicted her under Section 201, I. P. C. With regard to this the High Court held that the most important piece of evidence in support thereof was the confession made by the appellant which though retracted was corroborated on this point by independent evidence so as to establish the charge. This Court held that there was no evidence to establish affirmatively that the death of the appellant's husband was caused by poisoning and that being so the charge under Section 201, I. P. C. also must fail. According to this Court, the High Court in reaching a contrary conclusion not only acted on suspicions and conjectures but on inadmissible evidence. With regard to the alleged confession of the appellant, it was held that the High Court not only was in error in treating the same as evidence in the case but was further in error in accepting a part of it after finding that the rest of it was false. In that case, the evidence showed that the body of the appellant's husband was found in a trunk and discovered in a well and that the accused had taken part in the disposal of the body but there was no evidence to show the cause of his death or the manner and circumstances in which it came about. Referring to the decision of Hanuman's case, 1952 SCR 1091 = (AIR 1952 SC 343) (supra) it was reiterated that the court cannot accept the inculpatory part of a statement and reject the exculpatory part. The Court also referred to the observations of the Full

Bench of the Allahabad High Court in *Emperor v Balmakund* ILR 52 All 1011 = (AIR 1931 All 1) (FB) and fully concurred therein

20 In the Allahabad case the question referred to the Full Bench was, whether the court could accept the inculpatory part of a confession which commended belief and reject the exculpatory part which was inherently incredible on reference to a large number of authorities cited the Full Bench observed that these authorities actually established no more than this that (a) where there is other evidence a portion of the confession may in the light of that evidence be rejected while acting upon the remainder with the other evidence and (b) where there is no other evidence and the exculpatory element is not inherently incredible, the court cannot accept the inculpatory element and reject the exculpatory element. According to the Full Bench of the Allahabad High Court the two rules above stated had been applied during the last one hundred years and the Full Bench answered the reference by holding "where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false the court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible".

21 Relying on the above statement of the law it was said by this Court in *Palvinder Kaur's case*, 1953 SCR 94 = (AIR 1952 SC 354) that no use could be made of her statement contained in the alleged confession to prove that the death of her husband was caused by poisoning or as a result of an offence having been committed and once this confession was excluded altogether, there remained no evidence for holding that her husband had died as a result of the administration of potassium cyanide

22. The last decision of this Court referred to by counsel, viz., *Narain Singh v State of Punjab*, (1963) 3 SCR 678 = (1964) (1) Cr LJ 730 does not add anything which need be taken note of to the propositions of law laid down in the abovementioned case

23. In this case the exculpatory part of the statement in Ex. 6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the injury which the appel-

lant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under S 342 Cr P C to the effect that he had received the injury in a scuffle with a birdsman. The injury found on his body when he was examined by the doctor on 13th October 1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in the river Patra, the amount of bleeding and the washing of the blood stains being so considerable as to attract the attention of Ram Kishore Pandey, P W 17 and asking him about the cause thereof. The bleeding was not a simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have been stained with blood according to the report of the Chemical Examiner. According to the post mortem report this knife could have been the cause of the injuries on the victim. In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Ex. 6 the High Court had acted rightly in accepting the inculpatory part and piecing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime.

24. The appeal therefore fails and the conviction and sentence are upheld.
GGM/D V C Appeal dismissed.

AIR 1969 SUPREME COURT 439
(V 56 C 84)

(From Kerala 1965 Ker LT 1055)

J C SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ

Income Tax Officer, Cannanore, Appellant v M. K. Mohammed Kimhi, Respondent.

Civil Appeal No 1164 of 1966, D/- 11-9-1968

Income-tax Act (1961), Sections 254, 255, 220 (6), 246 — Scope — Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction — Power of stay when to be exercised — (Civil P. C. (1908), Pre. —

CM/CM/E845/68

Interpretation of Statutes — Statute conferring power).

An express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. (Para 4)

Section 255 (5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. But the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220 (6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. When Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory. 1965 Ker LT 1055, Affirmed. Case law Disc. (Para 8)

The power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the tribunal will consider whether to stay the recovery proceedings and on what conditions and the stay will be granted in most deserving and appropriate cases where the tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal. (Para 9)

Cases Referred: Chronological Paras

(1963) AIR 1963 Ker 73 (V 50) =
1962 Ker LJ 1133 (FB), Dharamdas v. State Transport Appellate Tribunal

- (1962) 1962-46 ITR 1168 (Bom),
Commr. of Income Tax, Bombay
City v. Hazarimal Nagji and Co. 6
- (1958) AIR 1958 Bom 143 (V 45) =
1957-31 ITR 844, New India
Assurance Co. Ltd. v. Commr.
of Income Tax, Excess Profits
Bombay 6
- (1957) AIR 1957 Andh Pra 114
(V 44) = 1956-30 ITR 252, Vatcha
Sreeramamurthy v. Income Tax
Officer Vizianagaram 6
- (1957) AIR 1957 Andh Pra 672
(V 44) = 1956-29 ITR 222,
P. Narayana Rao v. Commr. of
Income Tax, Hyderabad 6
- (1957) AIR 1957 Ker 142 (V 44) =
1957 Ker LT 516, Themmalapuram Bus Transport Ltd. v.
Regional Transport Officer, Malabar 5
- (1956) 1956-2 Mad LJ (SN) 12,
Swaranambikar Motor Service v.
Wahita Motor Service 5
- (1955) 1955-6 STC 670 (Nag), Burhanpur Tapti Mills Ltd. v. Board
of Revenue Madhya Pradesh 5
- (1879) 4 QBD 212, Ex parte, Martin 4
- (1879) 12 Ch D 438 = 41 LT 173,
Polini v. Gray 6

Mr. D. Narsaraju, Senior Advocate (M/s. S. A. L. Narayana Rao, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Appellant.

The following Judgment of the Court was delivered by

GROVER, J.: The short but important question which is involved in this appeal by special leave from a judgment of the Kerala High Court is whether the Appellate Income-tax Tribunal has the power, under the relevant provisions of the Income-tax Act, 1961, (hereinafter called - the Act) to stay the recovery of the realization of the penalty imposed by the departmental authorities on an assessee during the pendency of an appeal before it.

2. The assessee, who is the respondent, was imposed penalties in the sum of Rs. 18,000, 1,700 and 14,000 respectively in respect of the assessment years 1954-55, 1960-61 and 1961-62. These penalties were imposed under S. 271(1)(c) read with Section 274 (2) of the Act for concealment of particular income and furnishing inaccurate particulars. The assessee preferred appeals to the Income tax Appellate Tribunal and made an interim prayer for stay of collection of

the penalties imposed. The tribunal declined to order any stay holding that it had no power to grant such a prayer. The assessee then moved the High Court under Article 226 of the Constitution. The High Court held that the Tribunal had the power to stay the proceedings as also the collection of the penalties pending the appeal since that power was incidental and ancillary to its appellate jurisdiction. The Tribunal was consequently directed to dispose of the stay application in accordance with law.

3 The relevant provisions of the Act may be first noticed. Section 156 provides that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under the Act, the Income tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable. Under Section 220 (1) any amount specified in the notice of demand under Section 156 has to be paid within 35 days of the service of the notice or within such lesser period as may be specified under the proviso to sub-section (1). If the amount is not paid within the period limited or extended (the assessee can ask for an extension) the assessee shall be deemed to be in default. Sub-section (6) of Section 220 provides that where an assessee has presented an appeal under Section 246 the Income-tax Officer may, in his discretion and subject to such conditions as he may think fit, treat the assessee as not being in default so long as the appeal remains pending. Section 221 provides for the imposition of penalty when the assessee is in default. Sections 222 to 224 relate to the issuance of a certificate to the Tax Recovery Officer. Under Section 225 the Income tax Officer can order stay of proceedings, even after the certificate has been issued to the Tax Recovery Officer. It may be mentioned that the last four sections in terms relate to recovery of tax, but by virtue of Section 229 any penalty imposed is also recoverable in the same manner. Section 246 to which reference has been made in Section 220 (6) gives the appealable orders against which an assessee may appeal to the Appellate Assistant Commissioner. Appeals to the Tribunal are dealt with by Sections 252 to 253. Section 252 provides merely for constitution of the tribunal. Section 253 says that any assessee aggrieved by the orders set out in Clauses (a), (b) and (c) of sub-

section (1) may appeal to the tribunal. The Commissioner is also entitled to direct the Income Tax Officer to file an appeal against the order of an Appellate Assistant Commissioner made under Section 250. Section 254 specifies the orders which the tribunal can make. Sub-section (1) which is material may be reproduced below —

“254 Orders of Appellate Tribunal.—
(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.”
Section 255 gives the procedure of the Appellate Tribunal. Sub-sections (5) and (6) of this section need alone be noticed

“255(1)
(2)
(3)
(4)

(5) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

(6) The Appellate Tribunal shall for the purpose of discharging its functions have all the powers which are vested in the Income tax authorities referred to in Section 131, and any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code (XLV of 1860) and the Appellate Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1893 (V of 1893).”

Section 131 may at this stage be referred to. It gives to the Income-tax Officer the Appellate Assistant Commissioner and the Commissioner the same powers as are vested in the court under the Code of Civil Procedure when trying a suit in respect of the matters specified in the section. But these powers relate to discovery and inspection, enforcing the attendance of witnesses compelling production of books of account etc. issuing commissions and allied matters.

4 There can be no manner of doubt that by the provisions of the Act or the Income-tax Appellate Tribunal Rules 1963 powers have not been expressly confer

THE
All India Reporter
1969

U. S. Supreme Court

AIR 1969 U. S. S. C. 1 (V 56 G 1)
(1968-20 L Ed. 2d 716)*

BRENNAN J.

Green v. School Board of New Kent County.

†(A) Constitution of India, Article 14 — Constitution of America, 14th Amendment — Racial discrimination in schools — Supreme Court rulings against discrimination — Implementation by schools — Transition to racially non-discriminatory system — Duty of Courts.

Constitutional rights of Negro children require school officials to bear the burden of establishing that additional time to carry out the ruling of the Supreme Court against racial discrimination, in an effective manner is necessary in the public interest and is consistent with good faith compliance at earliest practicable time. The federal district Courts, in their review of particular situations must consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially non-discriminatory school system. Case law Ref. (Para 6)

†(B) Constitution of India, Article 14 — Constitution of America, 14th Amendment

BM/BM/A326/69

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†Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

— Racial discrimination in school — Duty of court to consider adequacy of adoption of system to achieve non-discrimination.

In determining whether the adoption by a school board which was operating an unconstitutional racially segregated school system, of a system known as a "freedom of choice" plan, which allowed a student to choose his own public school, is adequate to be constitutional, the question to be considered is whether the Board has achieved the "racially non-discriminatory school system", which must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system, and not whether the 14th Amendment is to be interpreted as universally requiring compulsory integration so as to require invalidation of the "freedom of choice" plan.

(Para 7)

The obligation of the federal district courts is to assess the effectiveness of a proposed plan in achieving desegregation. There is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date", then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith, and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method.

Moreover, whatever plan is adopted will require evaluation in practice and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed (Para 9)

Without holding that "freedom of choice" can have no place in such a plan or that a "freedom of choice" plan might of itself be unconstitutional, in desegregating a dual system a plan utilizing freedom of choice is not an end in itself. Freedom of choice, is not a sacred talisman. It is only a means to a constitutionally required end — the abolition of the system of segregation and its effects. If the means prove effective it is acceptable but if it fails to undo segregation other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a unitary, non-racial system. Case law Ref (Para 10)

Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. On the other hand, if there are reasonably available other ways such for illustration as zoning, promising speedier and more effective conversion to a unitary non racial school system "freedom of choice" must be held unacceptable (Para 11)

The School Board's "freedom of choice" plan in the instant case could not be accepted as a sufficient step to effectuate a transition to a unitary system. In three years of operation not a single white child has chosen to attend the school although 115 Negro children enrolled in the school. In other words the school system remains a dual system. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a white school and a Negro school but just schools. (Para 12)

{(C) Constitution of India, Art. 14 — Constitution of America, 14th Amendment — Racial discrimination in schools — Direction in Supreme Court rulings — Effect — Duty of school board operating discriminatory systems — Duty of court to give effect to decree of Supreme Court.

In their rulings against racially discriminatory system in schools, the Supreme Court gave a call for the dismantling of well entrenched dual systems tempered an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards then operating state-compelled dual system were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. Case law Ref. (Para 7)

The court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future (Foot Note 4)

{(D) Constitution of India, Art. 14 — Constitution of America, 14th Amendment — Racially discriminatory system in schools — Supreme Court declaring them unconstitutional — Delay of ten years in adoption of non-discriminatory system — Effect.

In determining whether School Board met that command of the Supreme Court to the school boards to switch over to non-discriminatory system, by adopting its "freedom of choice" plan it is relevant to consider that this first step did not come until some 11 years after the Supreme Court had decided that a racially segregated school system violated the 14th Amendment and 10 years after the Supreme Court had directed the making of a prompt and reasonable start towards adoption of a racially non-discriminatory school system. Such deliberate perpetration of the unconstitutional system can only have compounded the harm of such a system. (Para 8)

Such delays are no longer tolerable, for the governing constitutional principles no longer bear the imprint of newly enunciated doctrine. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work now (Para 6)

Cases Referred:	Chronological	Para
(1968) 20 L Ed 2d 732, <i>Raney v Board of Education</i>		0
(1968) 389 US 1003 = 19 L Ed 2d 598 = 88 S Ct 585		4
(1967) 380 F 2d 385 <i>United States v Jefferson County Board of Education</i>		4, 10
(1965) 382 US 183 = 15 L Ed 2d 263 = 86 S Ct 358 <i>Rogers v Paul</i>		8
(1965) 382 US 103 = 15 L Ed 2d 187 = 86 S Ct 224, <i>Bradley v School Board</i>		7, 8
(1964) 377 US 218 = 12 L Ed 2d 258 = 84 S Ct 1228, <i>Griffin v County School Board</i>		8
(1964) 377 US 263 = 12 L Ed 2d 288 = 84 S Ct 1235, <i>Calhoun v. Latimer</i>		8
(1963) 373 US 528 = 10 L Ed 2d 529 = 83 S Ct 1314, <i>Cf. Watson v. City of Memphis</i>		7, 8
(1963) 373 US 683 = 10 L Ed 2d 632 = 83 S Ct 1405, <i>Coss v Board of Education</i>		8
(1959) 170 F Supp 331 (DC ED Va 1959) <i>James v Almond</i>		8
(1958) 358 US 1 = 3 L Ed 2d 5 = 78 S Ct 1401, <i>Cooper v Aaron</i>		8, 9

(1955) 349 US 294 = 99 L Ed 1083 =
 75 S Ct 753, *Brown* (II) v. Board 1, 6
 (1954) 347 US 483 = 98 L Ed 873 =
 74 S Ct 686 = 38 ALR 2d 1180,
Brown (I) v. Board 8
 889 F 2d 178, *Kemp v. Beasley* 10
 882 F 2d 326, *Bowman v. County*
School Board of Charles City
County 4, 10
 872 F 2d 836, *United States v.*
Jefferson County Board of Education 4

Samuel Tucker argued cause, for Petitioners; Frederick T. Gray argued cause for respondents; Louis F. Claiborne argued cause for United States as amicus curiae, by special leave of Court.

OPINION OF THE COURT

Mr. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a non-racial basis" *Brown* (II) v. Board of Education, (1955) 349 US 294, 300-301, = 99 L Ed 1083, 1106 = 75 S Ct 753.

2. Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed (on) May 17, 1966, the District Court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are white. The School Board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each school serves the entire county."

The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

3. The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education, Va Const, Art. IX, S. 140

(1902); Va Code S. 22-221 (1950). These provisions were held to violate the Federal Constitution in *Davis v. County School Board of Prince Edward County*, decided with *Brown* (I) v. Board of Education, (1954) 347 US 483, 487 = 98 L Ed 873, 877 = 74 S Ct 686 = 38 ALR 2d 1180. The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied. (1) One statute, the Pupil Placement Act, Va Code S. 22-232.1 et seq. (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September, 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

4. The School Board initially sought dismissal of this suit on the ground that petitioners had failed to apply to the State Board for assignment to New Kent school. However, on August 2, 1965, five months after the suit was brought, respondent School Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools. (2) Un-

1. E. g., *Griffin v. County School Board of Prince Edward County*, 377 US 218, 12 L Ed 2d 256, 84 S Ct 1226; *Green v. School Board of City of Roanoke*, 304 F 2d 118 (CA 4th Cir 1962); *Adkins v. School Board of City of Newport News*, 148 F Supp 430 (DC ED Va), aff'd, 246 F 2d 325 (CA 4th Cir 1957); *James v. Almond*, 170 F Supp 331 (DC ED Va 1959); *Harrison v. Day*, 200 Va 439, 106 SE 2d 636 (1959).

2. Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal Government. 42 USC Ss. 2000c et seq., 2000d et seq., 2000h-2. In Title VI Congress declared that

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 USC S. 2000d.

The Department of Health, Education, and Welfare issued regulations covering racial discrimination in federally aided school sys-

der that plan, each pupil may annually choose between the New Kent and Watkins schools and, except for the first and eighth grades, pupils not making a choice are assigned to the school previously attended, first and eighth grade pupils must affirmatively choose a school. After the plan was filed the District Court denied petitioner's prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teachers and staff on a racially non-discriminatory basis. The amendment was duly filed and on June 28, 1960, the District Court approved the "freedom-of-choice" plan as so amended. The Court of Appeals for the Fourth Circuit, en banc, 382 F2d 326, 333 (3) affirmed the District Court's approval of the "freedom-of-choice" provisions of the plan but remanded the case to the District Court for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal, objective time table" some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in *United States v. Jefferson County Board of Education* 372 F2d 838 aff'd en banc, (1967) 380 F2d 385. Judges Sobeloff and Winters concurred with the remand on the teacher issue but otherwise disagreed expressing the view "that the District Court should be directed also to set up procedures for periodically evaluating the effectiveness of the [Boards] 'freedom of choice' [plan] in the elimination of other features of a segregated school system" 382 F2d 326 at 330. We granted certiorari, (1968) 389 US 1003 = 19 L Ed 2d 598 = 88 S Ct 565.

tems, as directed by 42 USC S 2000d 1, and in a statement of policies, or "guidelines," the Department's Office of Education established standards according to which school systems in the process of desegregation can remain qualified for federal funds. 45 CFR Ss 80.1-80.13 181.1 181.76 (1967). "Freedom-of-choice" plans are among those considered acceptable, so long as in operation such a plan proves effective. 45 CFR S 181.54. The regulations provide that a school system "subject to a final order of a court of the United States for the desegregation of such school system" with which the system agrees to comply is deemed to be in compliance with the statute and regulations. 45 CFR S 80.4(c). See also 45 CFR S 181.6. See generally Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 Va L Rev 42 (1967). Note, 55 Geo LJ 325 (1966). Comment, 77 Yale LJ 321 (1967).

3 This case was decided per curiam on the basis of the opinion in *Bowman v. County School Board of Charles City County*, 382 F 2d 326, decided the same day. Certiorari has not been sought for the *Bowman* case itself.

5 The pattern of separate "white" and "Negro schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which Brown I and Brown II were particularly addressed, and which Brown I declared unconstitutional. Denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending out just to the composition of student bodies at the two schools but to every facet of school operations — faculty, staff, transportation, extra-curricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro."

6 It was such dual systems that 14 years ago Brown I, held unconstitutional and a year later Brown II held must be abolished, school boards operating such school systems were required by Brown II "to effectuate a transition to a racially non-discriminatory school system" (1955) 349 US 294 at 301 = 99 L Ed 1083 at 1100. It is of course true that for the time immediately after Brown II the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. See, e.g., *Cooper v. Aaron*, (1958) 358 US 1 = 3 L Ed 2d 5 = 78 S Ct 1401. Under Brown II that immediate goal was only the first step, however. The transition to a unitary, non racial system of public education was and is the ultimate end to be brought about, it was because of the "complexities arising from the transition to a system of public education freed of racial discrimination" that we provided for "all deliberate speed" in the implementation of the principles of Brown I. 349 US 294 at 299-301 = 99 L Ed 1083 at 1105, 1106. Thus we recognized the task would necessarily involve solution of "varied local school problems." Id. 349 US 294 at 299 = 99 L Ed 1083 at 1105. In referring to the "personal interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis," we also noted that "[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition." Id., 349 US 294 at 300 = 99 L Ed 1083 at 1106. Yet we emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." Ibid. We charged the district courts in their review of particular situations to "consider problems related to administration, arising from the physical condition of the school plant, the school transportation sys-

tem, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." Id., 349 US 294 at 300-301 = 99 L Ed 1083 at 1106.

7. It is against this background that 13 years after Brown II commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of Brown II. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" Brown II held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to "white" children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See 358 US 1 at 7 = 3 L Ed 2d 5 at 10 (supra), *Bradley v. School Board*, (1965) 382 US 103 = 15 L Ed 2d 187 = 86 S Ct 224; cf. *Watson v. City of Memphis*, (1963) 373 US 526 = 10 L Ed 2d 529 = 83 S Ct 1314. The constitutional rights of Negro school children articulated in Brown I permit no less than this; and it was to this end that Brown II commanded school boards to bend their efforts.(4)

4. "We bear in mind that the court has not merely the power but the duty to render

8. In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after Brown I was decided and 10 years after Brown II directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." 373 US 526 at 529 = 10 L Ed 2d 529 at 533; see 382 US 103 = 15 L Ed 2d 187 supra; *Rogers v. Paul*, (1965) 382 US 198 = 15 L Ed 2d 265 = 86 S Ct 358. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin v. County School Board*, (1964) 377 US 218, 234 = 12 L Ed 2d 256, 267 = 84 S Ct 1226; "the context in which we must interpret and apply this language [of Brown II] to plans for desegregation has been significantly altered," *Goss v. Board of Education*, (1963) 373 US 683, 689 = 10 L Ed 2d 632, 636 = 83 S Ct 1405. See *Calhoun v. Latimer*, (1964) 377 US 263 = 12 L Ed 2d 288 = 84 S Ct 1235. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

9. The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress towards disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds

a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future." *Louisiana v. United States*, 370 US 145, 154, 13 L Ed 2d 709, 715, 85 S Ct 217. Compare the remedies discussed in, e. g., *NLRB v. Newport News Shipbuilding and Dry Dock Co.*, 308 US 241, 84 L Ed 219, 60 S Ct 203; *United States v. Crescent Amusement Co.*, 323 US 173, 89 L Ed 160, 65 S Ct 254; *Standard Oil Co. v. United States*, 221 US 1, 55 L Ed 619, 31 S Ct 502, 34 LRA NS 834. See also *Griffin v. County School Board*, 377 US 218, 232-234, 12 L Ed 2d 256, 265-267, 84 S Ct 1226.

the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date" then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith, and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.

— No 805 Raney v Board of Education,
— US (1968) 20 L Ed 2d 732 = 88 S Ct
—, at p —

10 We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional although that argument has been urged upon us. Rather all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. As Judge Sobeloff has put it,

"Freedom of choice" is not a sacred talisman. It is only a means to a constitutionally required end — The abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a unitary non-racial system. 382 F2d 326 333 (CA 4th Cir 1967) (concurring opinion). Accord, Kemp v Beasley 389 F2d 178 (CA 8th Cir 1968) 380 F2d 385 (supra).

11 Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation, (5) there may well be instances

5 The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows:

"Freedom of choice plans which have tended to perpetuate racially identifiable schools in the Southern and border States require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races.

"(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all white schools,

"(b) During the past school year [1966-1967] as in the previous year, in some areas of the South, Negro families with children attending previously all white schools under free choice plans were targets of violence, threats of violence and economic reprisals by white persons and Negro children were

in which it can serve as an effective device. Where it offers real promise of adding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary non-racial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways such for illustration as zoning, promising speedier and more effective conversion to a unitary non-racial school system, "freedom of choice" must be held unacceptable.

12. The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system the plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board. The Board must be required to formulate a new plan and in light of other courses which appear open to the Board, such as zoning (6) fashion steps which pro-

subjected to harassment by white classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct.

"(c) During the past school year in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all white schools from official functions.

"(d) Poverty deters many Negro families in the South from choosing formerly all white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools.

"(e) Improvements in facilities and equipment have been instituted in all Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools." Southern School Desegregation 1966-1967 at 88 (1967). See *ibid.*, at 45-69. Survey of School Desegregation in the Southern and Border States 1965-1966, at 30-44 51-52 (U S Comm'n on Civil Rights 1966).

6. "In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a unitary non-racial system could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the

mise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

13. The judgment of the Court of Appeals is vacated insofar as it affirmed the

District Court and the case is remanded to the District Court for further proceedings consistent with this opinion.

14. It is so ordered.

RGD

Order accordingly.

eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient." *Bowman v. County School Board*, supra, n 3, at 332 (concurring opinion). Petitioners have also suggested that the Board could consolidate the two schools, one site (e. g., Watkins) serving grades 1-7 and

the other (e. g., New Kent) serving grades 8-12, this being the grade division respondent makes between elementary and secondary levels. Petitioners contend this would result in a more efficient system by eliminating costly duplication in this relatively small district while at the same time achieving immediate dismantling of the dual system.

These are two suggestions the District Court should take into account upon remand along with any other proposed alternatives and in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation remanded to the court by the Court of Appeals.

AIR 1969 U.S.S.C. 7 (V 56 C 2)

(1968-20 L Ed 2d 672)*

WARREN, C. J.; HARLAN, DOUGLAS
AND MARSHALL, JJ.

United States. Petitioner v. David Paul O'Brien (No. 232) David Paul O'Brien, Petitioner v. United States (No. 233)

Nos. 232 and 233, D/- 27-5-1968.

†(A) Constitution of India, Article 19—Case on American Constitution — Every kind of conduct is not speech — 'Speech' and 'non-speech' in same course of conduct — Statute regulating non-speech element, when can justify incidental limitations on freedom of speech — Statute making it criminal offence to knowingly destroy certificate issued by Selective Service System — Defendant publicly burning his draft card to influence others to adopt his anti-war beliefs — Act does not abridge freedom of speech — Conviction of defendant is not illegal — [Constitution of America — 1st Amendment — Freedom of speech.]

An apparently limitless variety of conduct cannot be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. When "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. A government regulation is sufficiently justified if it is within the constitutional power

of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

(Para 14)

A statute (the 1965 amendment of the Universal Military Training and Service Act of 1948 (50 U. S. C. Appx. S. 462 (b) (3)) which makes it a criminal offence knowingly to destroy or mutilate a certificate issued by Selective Service System does not abridge free speech on its face any more than a motor cycle vehicle law which prohibits the destruction of drivers' licenses or a tax law which prohibits the destruction of books and records.

(Para 11)

Constitutional guaranty of freedom of speech (the first Amendment of the American Constitution) is not violated by the conviction for violating the Universal Military Training and Service Act of 1948, of the defendant who burned his draft card publicly to influence others to adopt the anti-war beliefs.

(Para 14)

Both the governmental interest and the operation of the 1965 Amendment are limited to the non-communicative aspect of the conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service System. When a person deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this non-communicative impact of his conduct, and for nothing else, he can be convicted.

(Para 20)

The 1965 Amendment is not unconstitutional as enacted on the ground that the "purpose" of Congress was "to suppress

BM/BM/A325/69

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†Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

freedom of speech", because under settled principles the purpose of Congress is not a basis for declaring this legislation unconstitutional. (Para 23)

†(B) Constitution of India, Articles 19, 83, 245, Sch. VII, List 1, Item 2 — Case on American Constitution — Power of Congress to make all laws in respect of army — Power to classify and conscript manpower for military service — Right to issue Certificate of registration and eligibility classification are administrative aids

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. The power of Congress to classify and conscript manpower for military service is "beyond question". Pursuant to this power Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to co-operate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration. (Para 15)

The registration certificate contains much information of which the registrant needs no notification. This circumstance, however, leads not to the conclusion that the certificate serves no purpose but that, like the classification certificate it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates destruction or mutilation. (Some of the purposes indicated) (Para 16)

Douglas J (Dissenting) — That the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question' is undoubtedly true in times when, by declaration of Congress the Nation is in a state of war. Quære [But whether conscription is permissible in the absence of a declaration of war?] (Para 32)

†(C) Constitution of India, Art. 14 — Case on American Constitution — Provision for alternative statutory avenues of prosecution — Validity — Administrative regulations prescribing a particular avenue, may be changed or revoked from time to time by administrative discretion.

In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. (Para 17)

Where the pre-existing avenue of prosecution prescribed by regulations was not even statutory the regulations may be modified

or revoked from time to time by administrative discretion. Certainly the Congress may change or supplement a federal regulation. (Para 17)

(D) Universal Military Training and Service Act (1948 as amended in 1965 by 79 Stat. 580) (50 U S C. Appx) S 462 (b) (3) — Non-possession of certificate — Mutilation of some one else's certificate is offence — Selective Service Regulations and Federal Act, 50 U S C. Appx. reach different wrongdoers — Constitution of India, Art. 254.

The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their personal possession at all times, as required by the Regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. The essential elements of non possession are not identical with those of mutilation or destruction. Moreover the 1965 Amendment is concerned with abuses involving any issued Selective Service certificates not only with the registrants own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the non possession regulations. (Para 18)

A comparison of Selective Service Regulations requiring personal possession of registration and classification certificates and the federal statute (Universal Military Training and Service Act 1948 as amended in 1965) indicates that they protect overlapping but not identical governmental interests, and that they reach somewhat different classes of wrongdoers. (Para 18)

†(E) Constitution of India, Preamble — Constitutionality of statute — Illicit motive of legislature, enquiry into — Intention of legislature — Speeches in Congress — Relevancy — Bill of attainder — Legislative purpose may be enquired into — Civil P C. (1908). Preamble — Interpretation of Statutes — Motive of legislature.

It is a familiar principle of constitutional law that the Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. (Para 24)

The legislative motive is not a proper basis for declaring a statute unconstitutional, but the inevitable effect of a statute on its face may render it unconstitutional. (Para 26)

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature because the benefit to sound decision making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely

a different matter when Courts are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for the Court to eschew guesswork. Courts would decline to void a statute essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be re-enacted in its exact form if the same or another legislator made a "wiser" speech about it. (Para 25)

The Court may make inquiry into legislative motive in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent — those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements — specificity in identification, punishment and lack of a judicial trial — are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute. (Para 25, Foot-note)

†(F) Constitution of India, Art. 226—Case from America — Writ petition — New plea on constitutional question, can be raised.

Per Douglas, J. — The rule that the Supreme Court will not consider issues not raised by the parties is not inflexible and yields in "exceptional cases". In such a case it is not unusual to ask for reargument, even on a constitutional question not raised by the parties. (Paras 33, 34)

Cases Referred:	Chronological	Paras
(1968) 20 L Ed 2d 856, <i>Holmes v. United States</i>	FN 32, 32	
(1964) 377 US 58=12 L Ed 2d 129=84 S Ct 1063, <i>N.L.R.B. v. Fruit and Vegetables Packers Union</i>		21
(1963) 371 US 415 = 9 L Ed 2d 405 = 83 S Ct 328, <i>NAACP v. Button</i>	FN 22, FN 23	
(1963) 372 US 144=9 L Ed 2d 644 = 83 S Ct 554, <i>Kennedy v. Mendoza Martinez</i>	FN 30	
(1963) 374 US 398 = 10 L Ed 2d 965 = 83 S Ct 1790, <i>Sherbert v. Verner</i>	FN 22, FN 25, FN 27, 20	
(1961) 365 US 551=5 L Ed 2d 773= 81 S Ct 728, <i>Milanovich v. United States</i>	FN 28, FN 29	

(1960) 361 US 516 = 4 L Ed 2d 480 = 80 S Ct 412, <i>Bates v. Little</i>	FN 24, FN 26	
(1960) 362 US 217 = 4 L Ed 2d 668 = 80 S Ct 683, <i>Abel v. United States</i>		34
(1960) 364 US 339 = 5 L Ed 2d 110 = 81 S Ct 125, <i>Gomillion v. Lightfoot</i>		26
(1959) 358 US 415 = 3 L Ed 2d 407 = 79 S Ct 451, <i>Heflin v. United States</i>	FN 28, FN 29	
(1958) 356 US 86 = 2 L Ed 2d 630=78 S Ct 590, <i>Trop v. Dulles</i>	FN 30	
(1958) 356 US 369 = 2 L Ed 2d 848 = 78 S Ct 819, <i>Sherman v. United States</i>		34
(1958) 357 US 386 = 2 L Ed 2d 1405 = 78 S Ct 1280, <i>Gore v. United States</i>		17
(1958) 357 US 449 = 2 L Ed 2d 1488 = 78 S Ct 1163, <i>NAACP v. Alabama Ex rel Patterson</i>	FN 23	
(1957) 352 US 322 = 1 L Ed 2d 370 = 77 S Ct 403 = 59 ALR 2d 940, <i>Prince v. U. S.</i>	FN 28, FN 29	
(1948) 334 US 742 = 92 L Ed 1694 = 68 S Ct 1294, <i>Lichter v. United States</i>	15, FN 32	
(1948) 337 US 1 = 93 L Ed 1131= 69 S Ct 894, <i>Terminiello v. Chicago</i>		33
(1948) 338 US 25 = 93 L Ed 1782 = 69 S Ct 1359, <i>Wolf v. Colorado</i>		34
(1948) 338 US 74 = 93 L Ed 1819 = 69 S Ct 1372, <i>Lustig v. U. S.</i>		34
(1947) 333 US 95 = 92 L Ed 562= 68 S Ct 397, <i>Musser v. Utah</i>		34
(1947) 333 US 178 = 92 L Ed 628= 68 S Ct 591, <i>Donaldson v. Read Magazine</i>		34
(1946) 328 US 303 = 90 L Ed 1252= 66 S Ct 1073, <i>United States v. Lovett</i>	FN 30	
(1945) 323 US 516 = 89 L Ed 430 = 65 S Ct 315, <i>Thomas v. Collins</i>	FN 25	
(1942) 317 US 1 = 87 L Ed 3 = 63 S Ct 2, <i>Ex parte, Quirin</i>		15
(1937) 304 US 64 = 82 L Ed 1188 = 58 S Ct 817 = 114 ALR 1487, <i>Erie R. Co. v. Tompkins</i>		33
(1936) 297 US 233 = 80 L Ed 660 = 56 S Ct 444, <i>Grosjean v. American Press Co.</i>		26
(1931) 283 US 359 = 75 L Ed 1117 = 51 S Ct 532 = 73 ALR 1484, <i>Stromberg v. California</i>	11, 21	
(1931) 283 US 423 = 75 L Ed 1154 = 51 S Ct 522, <i>Arizona v. California</i>		24
(1926) 278 US 28 = 71 L Ed 520 = 47 S Ct 248, <i>Byars v. U. S.</i>		34
(1926) 274 US 195 = 71 L Ed 996 = 47 S Ct 566, <i>Duignan v. U. S.</i>		33
(1918) 245 US 366 = 62 L Ed 352 = 38 S Ct 159 = LRA 1918 C 361, <i>Selective Draft Law Cases</i>	15, FN 32	
(1915) 232 US 383 = 58 L Ed 652 = 34 S Ct 341 = LRA 1915 B 834, <i>Weeks v. United States</i>		34

(1904) 195 US 27 = 40 L Ed 78 =

24 S Ct 769, Mc Cray v. United States 24, 28

667 F 2d 72, United States v. Miller FN 7

868 F 2d 529, Smith v. United States FN 8

676 F 2d 538, O'Brien v. United States FN 4, FN 6

Solicitor General Erwin N. Griswold argued the cause, for the United States, Marvin M. Karpatkin argued the cause, for David Paul O'Brien.

OPINION OF THE COURT

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

On the morning of March 31, 1968, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. (1) Immediately after the burning members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

2. For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. (2) He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs as he put it, "so that other people would re-evaluate their positions with Selective Service, with the armed forces, and re-evaluate their place in the culture of today, to hopefully consider my position."

3. The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2) in violation of Title 50, App., United States Code, Section 462 (b)". Section 462 (b) is

1. At the time of the burning, the agents knew only that O'Brien and his three companions had burned small white cards. They later discovered that the card O'Brien burned was his registration certificate, and the undisputed assumption is that the same is true of his companions.

2. He was sentenced under the Youth Correction Act, 18 USC S 5010 (b), to the custody of the Attorney General for a maximum period of six years for supervision and treatment.

part of the Universal Military Training and Service Act of 1948. Section 462 (b) (3), one of six numbered sub-divisions of S 462 (b) was amended by Congress in 1965 79 Stat 586 (adding the words italicized (here in ") below) so that at the time O'Brien burned his certificate an offense was committed by any person, "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate" (Italics (here in ") supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech and because it served no legitimate legislative purpose. (3) The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights; that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the Amendment was a reasonable exercise of the power of Congress to raise armies.

4. On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech. (4) At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal possession at all times." 32 CFR S 1617.1 (1962) (5) Wilful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute 50 USC App S 462 (b) (6). The Court of Appeals therefore was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the non-possession regulation, and consequently that the Amendment served no valid purpose; further, that in light of the prior regulation, the Amendment must have been "directed at public as distinguished from private destruction." On this basis, the Court concluded that the 1965 Amendment ran afoul of the First Amendment by singling out persons engaged in protests for special treatment. The Court ruled, however, that O'Brien's conviction should be affirmed under

3. The issue of the Constitutionality of the 1965 Amendment was raised by counsel representing O'Brien in a pretrial motion to dismiss the indictment. At trial and upon sentencing, O'Brien chose to represent himself. He was represented by counsel on his appeal to the Court of Appeals.

4. O'Brien v. United States, 376 F 2d 538 (CA 1st Cir 1967).

5. The portion of 32 CFR relevant to the instant case was revised as of January 1, 1967. Citations in this opinion are to the 1962 edition which was in effect when O'Brien committed the crime, and when Congress enacted the 1965 Amendment.

the statutory provision, 50 USC App S. 462 (b) (6), which in its view made violation of the non-possession regulation a crime, because it regarded such violation to be a lesser included offense of the crime defined by the 1965 Amendment.(6)

5. The Government petitioned for certiorari, in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Court of Appeals for the Second(7) and Eighth circuits(8) upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari, in No. 233, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

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6. When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board.(9) He is assigned a Selective Service number, (10) and within five days he is issued a registration certificate (SSS Form No. 2).(11) Subsequently, and based on a questionnaire completed by the registrant, (12) he is assigned a classification denoting his eligibility for induction,(13) and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110).(14) This initial classifica-

tion is not necessarily permanent,(15) and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified.(16) After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.(17)

7. Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.(18)

8. The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It contains the address of his local board and the date the certificate was mailed.

9. Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

10. Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. The 1948 Act, 62 Stat 604, itself prohibited many different abuses involving "any registration certificate, . . . or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder . . ." 62 Stat 622 (1948). Under S. 12 (b) (1)-(5) of the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. 62 Stat 622 (1948). In addition

15. 32 CFR S. 1625.1 (1962).

16. 32 CFR Ss. 1625.1, 1625.2, 1625.3, 1625.4, and 1925.11 (1962).

17. 32 CFR S. 1625.12 (1962).

18. 32 CFR S. 1621.2 (1962).

6. The Court of Appeals nevertheless remanded the case to the District Court to vacate the sentence and resentence O'Brien. In the Court's view, the district judge might have considered the violation of the 1965 Amendment as an aggravating circumstance in imposing sentence. The Court of Appeals subsequently denied O'Brien's petition for a rehearing, in which he argued that he had not been charged, tried, or convicted for non-possession, and that non-possession was not a lesser included offense of mutilation or destruction. O'Brien v. United States, 376 F.2d 538, 542 (CA 1st Cir 1967).

7. United States v. Miller, 367 F.2d 72 (CA 2d Cir 1966) cert denied, 386 US 911 (1967).

8. Smith v. United States, 368 F.2d 529 (CA 8th Cir 1966).

9. See 62 Stat 605 (1948), as amended, 65 Stat 76 (1951), 50 USC App S. 453 (1964); 32 CFR S. 1613.1 (1962)

10. 32 CFR S. 1621.2 (1962).

11. 32 CFR S. 1613.43a (1962).

12. 32 CFR Ss. 1621.9, 1623.1 (1962).

13. 32 CFR Ss. 1623.1, 1623.2 (1962).

14. 32 CFR S. 1623.4 (1962).

as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times 32 CFR S 16171 (1962) (Registration Certificate), (19) 32 CFR S 1623.5 (1962) (Classification Certificates) (20) And S 12 (b) (6) of the Act, 62 Stat 622-623 (1948), made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony

11 By the 1965 Amendment, congress added to S 12 (b) (3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended S 12 (b) (3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. Compare *Stromberg v. California*, (1931) 283 US 359, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484 (21). A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses or a tax law prohibiting the destruction of books and records.

12. O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as

19 32 CFR S 16171 (1962), provides in relevant part:

"Every person required to present himself for and submit to registration must after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No 2) in his personal possession shall be prima facie evidence of his failure to register."

20 32 CFR S 1623.5 (1962), provides, in relevant part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No 2), a valid Notice of Classification (SSS Form No 110) issued to him showing his current classification."

21 See text, *infra*, at para 21.

enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

II.

13 O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct", and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

14. We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms compelling, (22) substantial (23) subordinating (24) paramount (25) cogent (26) strong (27). Whatever imprecision inheres in these terms we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression and if the incidental restriction on alleged First Amend-

22 *NAACP v. Button*, (1963) 371 US 415, 438, 9 L Ed 2d 405, 421, 83 S Ct 328, see also *Sherbert v. Verner*, (1963) 374 US 398 403, 10 L Ed 2d 965, 969, 83 S Ct 1790.

23 *NAACP v. Button*, (1963) 371 US 415 444, 9 L Ed 2d 405, 424, 83 S Ct 323. *NAACP v. Alabama ex rel. Patterson* (1958) 357 US 449 464, 2 L Ed 2d 1488, 1500, 78 S Ct 1163.

24 *Bates v. Little Rock*, (1960) 361 US 516, 524, 4 L Ed 2d 480, 486, 80 S Ct 412.

25 *Thomas v. Collins*, (1945) 323 US 516, 530 89 L Ed 430, 440 65 S Ct 315, see also *Sherbert v. Verner*, (1963) 374 US 398, 406 10 L Ed 2d 965, 971, 83 S Ct 1790.

26 *Bates v. Little Rock*, (1960) 361 US 516 524, 4 L Ed 2d 480, 486 80 S Ct 412.

27 *Sherbert v. Verner*, (1963) 374 US 398, 403, 10 L Ed 2d 965, 973, 83 S Ct 1790.

ment freedom is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to S. 462 (b) (3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

15. The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter v. United States*, (1948) 334 US 742, 755-759, 92 L Ed 1694, 1710, 1711, 68 S. Ct 1294; *Selective Draft Law Cases*, (1918) 245 US 366, 62 L Ed 352, 38 S Ct 159, LRA 1918 C 361. See also *Ex parte, Quirin*, (1942) 317 US 1, 25-26, 87 L Ed 3, 11, 12, 63 S Ct 2. The power of Congress to classify and concept manpower for military service is "beyond question." *Lichter v. United States*, supra, at 756; *Selective Draft Law Cases*, supra. Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service and may require such individuals within reason to co-operate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

16. O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrants. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, leads not to the conclusion that the certificate serves no purpose but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a

young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents. Further, since both certificates are in the nature of "receipts" attesting that the registrant has done what the law requires, it is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring

their continuing availability by punishing people who knowingly and willfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the non-possession regulations in any way negates this interest.

17. In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. Compare the majority and dissenting opinions in *Goro v. United States* (1958) 357 US 380 2 L Ed 2d 1405 78 S Ct 1280(28). Here the pre-existing avenue of prosecution was not even statutory. Regulations may be modified or revoked from time to time by administrative discretion. Certainly, the Congress may change or supplement a regulation.

18. Equally important, a comparison of the regulations with the 1965 Amendment indicates that they protect overlapping but not identical governmental interests and that they reach somewhat different classes of wrongdoers (29). The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their personal possession at all times as required by the regulations is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. Although as we note below we are not concerned here with the non-possession regulations, it is not inappropriate to observe that the essential elements of non-possession are not identical with those of mutilation or destruction. Finally the 1965 Amendment, like S 12 (b) which it amended, is concerned with abuses involving any issued Selective Service certificates, not only with the registrants' own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the non-possession regulations.

19. We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions

28 Cf. *Milanovich v. United States*, (1961) 665 US 551, 5 L Ed 2d 773, 81 S Ct 728, *Heflin v. United States* (1959) 358 US 415, 3 L Ed 2d 407, 79 S Ct 451, *Prince v. United States*, (1957) 352 US 322, 1 L Ed 2d 370, 77 S Ct 403, 59 ALR 2d 940.

29 Cf. *Milanovich v. United States*, (1961) 665 US 551, 5 L Ed 2d 773, 81 S Ct 728, *Heflin v. United States*, (1959) 358 US 415, 3 L Ed 2d 407, 79 S Ct 451, *Prince v. United States* (1957) 352 US 322, 1 L Ed 2d 370, 77 S Ct 403, 59 ALR 2d 940.

with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

20. It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful mutilation or destruction. Compare *Sherbert v. Verner* (1963) 374 US 398, 407-408, 10 L Ed 2d 965, 972, 973, 83 S Ct 1790 and the cases cited therein. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the non-communicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this non-communicative impact of his conduct, and for nothing else, he was convicted.

21. The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California*, (1931) 283 US 359, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484 for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of non-communicative conduct. See also *NLRB v. Fruit and Vegetable Packers Union* (1964) 377 US 58, 79 (concurring opinion) 12 L Ed 2d 129, 142, 84 S Ct 1063.

22. In conclusion we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates because amended S 482 (b) is an appropriately narrow means of protecting this interest and condemns only the independent non-communicative impact of conduct within its reach, and because the non-communicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

III.

23. O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Con-

gress was "to suppress freedom of speech." We reject this argument, because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

24. It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, (1904) 195 US 27, 50, 49 L Ed 78, 95, 24 S Ct 769.

This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona v. California*, (1931) 283 US 423, 455, 75 L Ed 1154, 1165, 51 S Ct 522.

25. Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature,⁽³⁰⁾ because the benefit to

30. The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent — those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements — specificity in identification, punishment and lack of a judicial trial — are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute. See, e. g., *United States v. Lovett*, (1946) 328 US 303, 90 L Ed 1252, 68 S Ct 1073. Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive of the type that O'Brien suggests we engage in in this case. *Kennedy v. Mendoza-Martinez*, (1963) 372 US 144, 169-184, 9 L Ed 2d 644, 661-669, 83 S Ct 554; *Trop v. Dulles*, (1958) 356 US 86, 95-97, 2 L Ed 2d 630, 639, 640, 78 S Ct 590. The inquiry into legislative purpose or motive in *Kennedy* and *Trop*, however, was for the same limited purpose as in the bill of attainder decisions — i. e., to determine whether the statutes under review were punitive in nature. We

sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be re-enacted in its exact form if the same or another legislator made a "wiser" speech about it.

26. O'Brien's position, and to some extent that of the court below rests upon a misunderstanding of *Grosjean v. American Press Co.*, (1936) 297 US 233, 80 L Ed 660, 56 S Ct 444 and *Gomillion v. Lightfoot*, (1960) 364 US 339, 5 L Ed 2d 110, 81 S Ct 125. These cases stand not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose just such a tax. Similarly, in *Gomillion*, the Court sustained a complaint which, if true, established that the "inevitable effect," 364 US at 341, 5 L Ed 2d at 113, of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect — the "necessary scope and operation", *McCray v. United States*, (1904) 195 US 27, 59, 49 L Ed 78, 97, 24 S Ct 769 — abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

27. We think it not amiss, in passing, to comment upon O'Brien's legislative purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong Rec 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, HR 10306, passed the Senate. 111 Cong Rec 20434. In the House debate only two

face no such inquiry in this case. The 1965 Amendment to S. 462 (b) was clearly penal in nature, designed to impose criminal punishment on designated acts.

Congressmen addressed themselves to the Amendment — Congressmen Rivers and Bray 111 Cong Rec 19871, 19872 The bill was passed after their statements without any further debate by a vote of 393 to 1 It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional "purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees The portions of those reports explaining the purpose of the Amendment are reproduced in the Appendix in their entirety While both reports make clear a concern with the "defiant" destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

IV

28 Since the 1965 Amendment to S 12 (b) (3) of the Universal Military Training and Service Act is constitutional as enacted and as applied the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly we vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation (31)

29 It is so ordered.

30 Mr Justice Marshall took no part in the consideration or decision of these cases

APPENDIX TO OPINION OF THE COURT

PORTIONS OF THE REPORTS OF THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND HOUSE EXPLAINING THE 1965 AMENDMENT

The "Explanation of the Bill" in the Senate Report is as follows

"Section 12 (b) (3) of the Universal Military Training and Service Act of 1951 as amended, provides among other things that a person who forges alters or changes a draft registration certificate is subject to a fine of not more than \$ 10 000 or imprisonment of not more than 5 years or both. There is no explicit prohibition in this sec-

tion against the knowing destruction or mutilation of such cards

"The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies

"For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be knowingly done This qualification is intended to protect persons who lose or mutilate draft cards accidentally" S Rep No 589 89th Cong, 1st Sess (1965)

And the House Report explained

"Section 12 (b) (3) of the Universal Military Training and Service Act of 1951 as amended, provides that a person who forges alters or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of \$ 10 000 or imprisonment of not more than 5 years HR 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card

"The House Committee on Armed Services is fully aware of and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards

"While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals the committee feels that in the present critical situation of the country the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

"To this end, HR 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than \$ 10 000 or imprisonment of not more than 5 years" HR Rep No 747 89th Cong, 1st Sess (1965)

SEPARATE OPINIONS

MR. JUSTICE HARLAN concurring

31 The crux of the Court's opinion which I join, is of course its general statement, ante,

31 The other issues briefed by O'Brien were not raised in the petition for certiorari in No 232 or in the cross petition in No 233 Accordingly those issues are not before the Court.

having been transhipped at Varanasi and unloaded at a railway terminus near the Nepal border. As the goods were excisable upon which excise duty had already been paid, they were exported against Form AR-4 in order to enable the assessee company to claim rebate of the excise duty. The copy of the Form AR-4 annexed to the statement of the case contains the following significant entries:—

1. R/R No. 145773 dated 10-2-1960 from Howrah to Varanasi en route to Bhairwa in Nepal.

2. Consignment Messrs. Mohan Lal & Brothers, Bhairwa, Nepal.

3. A declaration by the assessee company to the following effect:—

"We hereby declare that the above-mentioned particulars are true and correctly stated and that the consignment of goods is intended for export to Nepal, Bhairwa via Nautanwa and should not be diverted to any other country."

4. A certificate signed by an officer of the Excise Department in the following words:—

"Certified that the above-mentioned packages have been identified by me and sealed with the Central Excise seal under my supervision."

Finally, it is mentioned in the statement of the case that the Excise authorities at the border certified to the Excise authorities at Calcutta that the goods had passed outside India.

12. From what has been stated above, it is clear that the destination of the goods shown in Form AR-4 was a place in Nepal and the route by which the goods were intended to be exported was also indicated. The name of the buyers mentioned in that form also is that of the dealer of Nepal. These facts show very clearly not only the intention of the parties to export, but also an obligation on their part to do so. As the assessee company was to claim rebate of the excise duty and that rebate was admissible only if the goods were actually exported outside India in accordance with the declaration contained in Form AR-4, an understanding between the assessee company and the buyers to export the goods outside the Indian territory can safely be assumed. This procedure for the rebate of the excise duty is provided in R. 12 read with Rr. 185, 187 and 189 of the Central Excise Rules. These rules have been framed by the Central Govt. in exercise of its rule-making power under Section 37, sub-section (2) (xvi).

In such circumstances it is impossible to hold that the purchasers after taking delivery of the goods at the railway terminus were not under an obligation to take the goods across the Indian border or that they were free to sell them in the Indian territory itself. The contrary inference drawn by the Sales Tax authorities was unwarranted. As has already been observed, the change in the mode of transport from the railway terminus to the Nepal territory was unavoidable due to non-existence of railway

link between Nepal and India and must have been foreseen and agreed upon between the parties. In these circumstances the buyers could not have broken the link between the sale and the export without committing a breach of the contract or the understanding arising from the nature of the transaction.

13. A somewhat similar case came up before the Patna High Court in 1963. The case is that of Dulichand Hardwari Mull v. State of Bihar, AIR 1963 Pat 359. In that case also the assessee had exported certain articles to Nepal which were taken delivery of by the purchasers at the railway terminus in the Indian territory and were then transported by them into Nepal territory. There also the Sales Tax authorities refused the assessee's claim under Art. 286 (1) (b) relying mainly upon the fact that the delivery of the goods had been taken by the purchasers in the Indian territory. The Patna High Court relying upon the finding that the credit memos were prepared in the name of the Nepal parties and the goods were actually exported to Nepal in pursuance of the contract of sale between the parties, upheld the claim of the assessee on the basis of the first Travancore-Cochin case, 1952-3 STC 434 = (AIR 1952 SC 366) (supra). The Patna High Court attached no importance to the fact that the delivery of goods had been taken by the purchasers in the Indian territory, nor to the fact that the delivery of the goods by the assessee was not made to a common carrier for transport out of the country by land or sea as was the case in the first Travancore-Cochin case, 1952-3 STC 434 = (AIR 1952 SC 366) (supra). Dealing with this argument, their Lordships observed at p. 361:

"We do not think that there is any substance in this argument. It is true that in the case reported in 1952-3 STC 434 = (AIR 1952 SC 366), there was delivery of the goods to a common carrier for transport out of the country, but this fact is not part of the ratio decidendi of that case. It appears in the present case that there is no rail connection between Nirmali and Nepal border and the common means of transport is a bullock-cart over a distance of about 25 miles and the goods are despatched by means of bullock-cart over this distance. In our opinion, the delivery of goods to a common carrier is not a material circumstance."

We respectfully agree with this observation of the Patna High Court and hold that the true test is whether the sale and the export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods for transport out of the country by land or sea.

14. There are three Division Bench cases of this Court:

(1) Ram Narain Har Charan Lal v. Commissioner of Sales Tax, U. P., S.T. Ref. No. 617 of 1964, D/-16-11-1966 (All.), by S. C. Manchanda and M. H. Beg, JJ.

(2) Damodar Dass Vishwanath v Commissioner of Sales Tax, U P., Lucknow, STC No 137 of 1964 D/20-1 1967 (All.), by Jagdish Sahal and M H. Beg, JJ

(3) Gohind Sugar Mills Ltd. v The Judge, Sales Tax Spl. Appeal No 105 of 1967 D/26-9-1967 (All.) by S N Dwivedi and Cangeswar JJ

In the first, a view similar to what we have said above was taken. The last two cases are distinguishable as in those cases there was nothing to show either that the goods had crossed the border of India or there was any obligation to export.

15. In the end, it would be useful to reiterate that, where an export sale has all the three essential requisites enumerated above it would qualify for exemption under Article 286 (1) (b) and it would not be necessary to exclude any imaginary possibility of diversion of the goods from the export channel because such a diversion would entail a breach of the obligation to export. In a given case, if there is an interruption in the movement of the goods during the course of export and the goods are not exported, the exemption contemplated by Article 286 (1) (b) would not be available regardless of whether the interruption is by accident or by design for the simple reason that there would in fact be no export.

16. As a result of the above discussion, we would answer the question in the affirmative by saying that the assessee is entitled to claim benefit of Article 286 (1) (b) of the Constitution for sales in the course of export outside India, even though the actual delivery of the goods was taken by the purchaser inside India.

17. The assessee will be entitled to the costs of this reference which we assess at Rs 800. The fee of the learned counsel for the department is also assessed at the same figure.

SSG/D V C. Answered accordingly

AIR 1969 ALLAHABAD 210 (V 56 C 43)
S N SINGH, J

Balmukund Upadhyay, Appellant v Smt. Bhagwati Devi, Respondent.

Second Appeal No 825 of 1967 connected with Civil Revn No 9 of 1967, D/27-2-1968 against judgment and decree of Dist. J., Azamgarh, D/7-10-1966

Limitation Act (1963), S 5 — "Sufficient cause — Meaning of — Mistake or negligence of counsel or his clerk — Wrong and negligent advice as to forum of appeal — Appellant bona fide acting on such advice — Delay in filing appeal in proper Court — Erroneous finding as to sufficiency of cause after accepting facts alleged — Error of law — Interference in second appeal or revision with discretion of lower Court — (Civil P C (1908) Ss. 100 and 115)

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The expression 'sufficient cause' should be so construed as to advance substantial justice. Thus, honest mistake of law committed by an Advocate even though a negligent one should not be allowed to operate to the prejudice of the litigant. The same principle has been applied in the case of clerks of mofussil lawyers AIR 1922 All 490 (FB) and (1897) ILR 19 All 348 (FB), Rel. on. (Para 7)

Even negligence of the district lawyer or of his clerk may be enough to constitute sufficient cause for the failure to initiate proceedings within the prescribed period. In judging as to the sufficiency of cause, the bona fide of the person concerned are to be taken note of and the calibre of the agent giving advice has to be seen. (Para 8)

Where the appellant acting bona fide on the wrong and negligent advice given by his pleaders' clerk that an appeal against the decree in the partition suit should be filed within 90 days in the High Court, went to an advocate of the High Court furnishing himself with the necessary copies for filing the appeal within limitation but when the mistake was discovered by the advocate, he then filed the appeal in the District Court without wasting any time and the same was dismissed as barred by limitation on the view that there was no sufficient cause for condonation of delay.

Held, (i) that there was sufficient cause for condonation of the delay in filing the appeal in the Dist. Court. (1890) ILR 13 Mad 269 and AIR 1956 All 677 and AIR 1962 SC 361 Foll.

(ii) that the District Court having accepted the case put forward by the appellant was not justified in holding that it did not constitute a sufficient cause within S 5 and thus wrong finding about sufficiency of cause constituted an error of law which could be corrected in second appeal. The exercise of discretion by the first Appellate Court could be interfered with in appeal in the circumstances of the case. AIR 1962 Punj 450 and AIR 1928 Nag 503, Rel. on. Case-law Ref.

(Paras 11, 12)

Cases	Referred:	Chronological	Paras
(1964) AIR 1964 Punj 154 (V 51) =	1964 Cur LJ 23, Punjab State v		
	Gopal Singh		6
(1962) AIR 1962 SC 361 (V 49) =	(1962) 2 SCR 762, Ram Lal v Rewa		
	Coalfields Ltd.		6, 9
(1962) AIR 1962 SC 1621 (V 49) =	(1963) 1 SCR 778, Smt. Ujjam Bai		
	v State of U P		6
(1962) AIR 1962 Punj 450 (V 49),	Indar Singh Deshraj v Harman		
	Singh Gian Singh		6, 11
(1960) AIR 1960 SC 260 (V 47) =	(1960) 1 SCR 875 Sitaram Ram-		
	charen v M N Nagrasshona		6
(1956) AIR 1956 All 677 (V 43) =	1956 All LJ 367, Hanuman Dass v		
	Prithvi Nath		5, 7, 9

[1954] AIR 1954 Cal 238 (V 41) =
92 Cal LJ 1, Ashutosh Bhadra v.
Jatindra Mohan

[1953] AIR 1953 SC 23 (V 40) =
1953 SCR 136, Keshardeo v.
Radha Kissen

[1953] AIR 1953 SC 228 (V 40) =
1953 SCR 1009, Namdeo Lokman
v. Narmadabai

[1942] 1942 AC 130 = 1941-2 All
ER 245, Charles Osenton & Co. v.
Johnston

[1926] AIR 1926 Nag 503 (V 13) =
27 Cri LJ 1001, Baban v. Em-
peror

[1922] AIR 1922 All 490 (V 9) =
ILR 44 All 636 (FB), Shib Dayal
v. Jagannath

[1897] ILR 19 All 348 = 1897 All
WN 86 (FB), Brijmohan Das v.
Mannu Bibi

[1890] ILR 13 Mad 269, Krishna v.
Chathappan

[1885] 29 Ch D 50 = 54 LJ Ch
762, Gardner v. Jay

Faujdar Rai, for Appellant.

JUDGMENT: This second appeal and Civil Revision No. 9 of 1967 arise out of a suit for partition filed by the plaintiff-appellant which was partly decreed and partly dismissed by the trial Court by its order dated 30-9-1965. It is not necessary to give in detail the facts of this case, for the lower Appellate Court has not considered the merits of this case but has dismissed the appeal on the preliminary point of limitation. The necessary facts giving rise to the present appeal and the civil revision are as follows:—

2. The plaintiff-appellant instituted a suit for partition at first in the Munsif's Court valuing it at Rs. 2,000. An objection was taken by the defendant about the valuation of the property and a commission was issued. The Commissioner found the valuation to be Rs. 18,220 with the result that the plaintiff having claimed half share in the property, the valuation of his share came to Rs. 9,110. The learned Munsif returned the plaint for presentation to the proper Court. The plaint was presented in the Court of the Civil Judge, Azamgarh, and the plaintiff valued the suit at Rs. 9,110. The suit proceeded and was partly decreed and partly dismissed.

Thereafter, an application for copies of judgment and decree was filed on 7-10-1965. Copies were ready by the 1st of December, 1965. Thereafter the case of the plaintiff is that he was advised by the clerk of his counsel to go to the High Court to file the appeal. The clerk concerned got a letter from his counsel recommending his case to an Advocate of the High Court. The Mukhtarkhas of the appellant actually came to the High Court and got the memo of appeal prepared but when the appeal was going to be filed, the mistake was discovered by the Advocate at Allahabad that the appeal which was valued only at Rs. 9,110

could be filed in the Court of the learned District Judge and not in the High Court as directed by the counsel practising in district Court. Consequently, the advocate at Allahabad made an endorsement on the letter of the counsel of the District Court to the effect that he should file the appeal in the Court of the District Judge. This endorsement was dated 14-1-1966. Thereupon the Mukhtarkhas came back to Azamgarh and presented the appeal on the 17th of January, 1966, with an application under Section 5 of the Limitation Act praying for the condonation of delay. In the application for the condonation of delay the facts, as stated above, were narrated and the same were supported by an affidavit.

3. The learned District Judge accepted the case of the plaintiff that he was advised by the clerk of his counsel to go to the High Court for presenting the appeal within a period of 90 days and acting on his advice the Mukhtarkhas had gone to Allahabad, but he did not consider that this was a sufficient ground for the condonation of delay; as such the learned District Judge dismissed the application under Section 5 of the Limitation Act and also the appeal as time-barred.

4. The plaintiff filed Civil Revision No. 9 of 1967 against the order refusing to condone the delay and also filed Second Appeal No. 825 of 1967 against the dismissal of his appeal as time-barred. In my opinion, if the plaintiff had filed only the second appeal, the purpose would have been served. However, as a precautionary measure, when he has filed the second appeal as well as the revision, it should not prejudice his case.

5. On behalf of the appellant-applicant, it has been argued that the learned District Judge having accepted the case set up by the plaintiff-appellant that the Mukhtarkhas was advised by the clerk that the appeal was to be filed in the High Court and the period for filing such appeal was 90 days and that acting on this advice the Mukhtarkhas had gone to Allahabad and got the memo of appeal prepared and finding there that the appeal could not be filed in the High Court, returned and filed the appeal in the District Court, he erred in holding that the wrong advice by the clerk was not sufficient ground for condoning the delay. Reliance was placed for this submission of his on a Division Bench decision of this Court in the case of Hanuman Dass v. Prithvi Nath, 1956 All LJ 367 = (AIR 1956 All 677).

6. As against this submission of the learned counsel it has been argued for the respondent-opposite party that the discretion exercised by the lower Appellate Court should not be interfered with in second appeal, much less in revision. In support of this contention of his the learned counsel has relied upon the cases of Sitaram Ramcharan v. M. N. Nagrashana, AIR 1960

SC 260, Smt. Ujam Bai v. State of U. P., AIR 1962 SC 1621, Ramlal v. Rewa Coalfields Ltd., AIR 1962 SC 361; Inder Singh Desh Raj v. Harnam Singh Gian Singh, AIR 1962 Punj 450, Punjab State v. Gopal Singh, AIR 1964 Punj 154, Ashutosh v. Jahendra Mohan Seal, AIR 1954 Cal 238, Keshardev v. Radha Kissen, AIR 1953 SC 23 and Nanddeo Lokman v. Narmada Bai, AIR 1953 SC 228.

7. I have considered the respective submissions of the learned counsel and have looked into the various authorities cited by the learned counsel for the parties and have also looked into the various cases referred to in the case of 1956 All LJ 367 = (AIR 1956 All 677). So far as this Court is concerned, the consistent view has been that the expression 'sufficient cause' should be so construed as to advance substantial justice (see the cases of Shih Dayal v. Jagannath, AIR 1922 All 490 (FB), Brij Mohan Das v. Mannu Bibi, (1897) ILR 19 All 346 (FB)). These two Full Benches referred to above clearly establish that an honest mistake of law committed by an advocate, even though a negligent one, should not be allowed to operate to the prejudice of the litigant. The same principle has been applied in the case of clerks of mofussil lawyers.

8. We have to see in the circumstances of the present case and on the finding of fact recorded by the learned District Judge as to whether there was sufficient cause or not for the delay in filing the appeal before the learned District Judge. The learned District Judge has believed that the appellant's case that he bona fide believed in the advice given by the clerk concerned and acting on the bona fide belief he went to Allahabad and thereafter came back to the District Court and filed the appeal. It is not said that the appellant was negligent in filing the appeal even after when he was apprised of the fact that such an appeal could be filed in the District Court. The time taken in filing the appeal after the information given is not such that one would hold that the appellant has not explained each day's delay in the circumstances of this case. The learned District Judge, after having accepted the case of the appellant on facts to be correct, held that the facts found did not constitute sufficient cause. This decision of the learned Judge, in my opinion, is contrary to the established view of this Court that even negligence of the district lawyer or of his clerk may be enough to constitute sufficient cause for the failure to initiate proceedings within the prescribed period. In judging as to the sufficiency of cause, the bona fides of the person concerned are to be taken note of and the calibre of the agent giving advice has to be seen.

In this case it appears that the suit which was valued at Rs 9000 and odd was partly decreed and partly dismissed by the learned Civil Judge. The clerk concerned in the circumstances of this case must have enter-

tained the belief that the appeal would lie to the High Court and not to the District Court and had given that advice. It is true that after having brought to the notice of the mofussil counsel the facts of the case, if the clerk had sought his advice, he might have known that the appeal could only be filed before the learned District Judge, but this was the negligence of the clerk concerned in whom the appellant placed implicit reliance. The advice given by the clerk no doubt may be termed as 'negligent' but the poor litigant who had reposed confidence in the clerk, should not be penalised for it. If the learned District Judge had not believed the case of the appellant, it would have been otherwise and the delay would not have been condoned but having accepted the bona fides of the appellant, it was not proper exercise of discretion in rejecting the appeal as time-barred. The Supreme Court cases referred to above by the learned counsel for the respondent are distinguishable.

9. The Supreme Court in the case of AIR 1962 SC 361 referred to above by the learned counsel for the respondent, has approved of the decision given by the Madras High Court in the case of Krishna v. Chathappan, (1890) ILR 13 Mad 269, and this decision was also relied upon in the case of 1956 All LJ 367 = (AIR 1956 All 677), as such, we can safely take the case of (1890) ILR 13 Mad 269, as laying down the correct law which has the approval of the Supreme Court.

10. This Madras case arose out of the following circumstances. Land was sold in execution of a decree which was passed against the defendant for a sum exceeding Rs 5,000. A suit to set aside the sale was instituted in a Subordinate Judges Court and was dismissed. The plaintiff who desired to appeal against the decree dismissed his suit was advised that the appeal lay to the High Court in which a memorandum of appeal was accordingly filed. On its appearing that the value of the property sold was less than Rs 5,000, the High Court returned the memorandum of appeal for presentation to the District Court. The District Judge rejected it on the ground that it was barred by limitation, holding that the delay caused by the error which the appellant committed in taking proceedings in the wrong Court could not be excused. On appeal the decision of the District Judge was set aside and it was held that the District Judge should have decided whether the appellant under the special circumstances of the case in appealing to the High Court acted on an honest belief formed with due care and attention. In this case the Hon. Judges observed

"We think that Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood, the words 'sufficient cause' receiving

a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant."

These decisions clearly show that the emphasis laid is on the bona fides of the litigant though this bona fide might be based upon the negligent advice of the clerk or the counsel concerned. If the learned Judge had exercised his discretion having taken note of the principle of law laid down in these various cases, the discretion exercised may not have been interfered with. Since on facts the learned District Judge has found in favour of the appellant but at the same time has considered it not to constitute a sufficient cause, in my opinion, this will be a case of an error of law and the decision of the learned District Judge can be interfered with by the Court of appeal. In the case of *Charles Osenton & Co. v. Johnston*, 1942 AC 130 at pp. 138 and 139, the law has been laid down as follows:—

"It is clear that the Court of appeal should not interfere with the discretion of a Judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him, the Court of appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must, if necessary, examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise, in interlocutory matters the Judge might be regarded as independent of supervision. Yet, an interlocutory order of Judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus, in *Gardner v. Jay*, (1835) 29 Ch D 50. *Bowen, L. J.*, in discussing the discretion of the Judge as regards mode of trial, says: "That discretion, like other judicial discretions, must be exercised according to common-sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed."

11. Applying the principle of law as laid down above, I have no difficulty in coming to the conclusion that the learned District Judge erred in not giving the benefit of Section 5 of the Limitation Act to the appellant. The Punjab High Court cases relied upon by the learned counsel for the respondent taking contrary view in respect of the advice of counsel's clerk cannot be relied upon in face of clear decisions of this Court wherein wrong advice of a clerk has been held to be sufficient ground for condoning the delay. The Punjab High Court, in the case of AIR 1962 Punj 450 which has been relied upon by the learned counsel for the respondent, has held as follows:—

"The High Court has power in second appeal to examine the grounds upon which the lower Appellate Court has admitted the appeal beyond time. It has to see that the

duty of exercising discretion in a judicial manner cast upon the lower Appellate Court has been discharged properly or not. If discretion has not been exercised at all, or has been exercised whimsically or arbitrarily, the Court of second appeal will be acting within the ambit of Sec. 100, Civil P. C., while interfering with such an order of lower Appellate Court. The question as to whether the facts and circumstances constitute sufficient cause, is one of law and not of fact and can be raised in second appeal."

12. Thus, on the authorities cited by the learned counsel for the parties, it is clear that when the learned District Judge came to a wrong finding about the sufficiency of cause, he has committed an error of law and the same can be set aside by a second Appellate Court. The argument of the learned counsel that since the first Appellate Court has exercised its discretion, it should not be interfered with in appeal, in the circumstances of the present case cannot be accepted. In the case of *Baban v. Emperor*, AIR 1926 Nag 503, it was held that delay in filing an appeal caused by honest mistake of the party's vakil in calculating the time was sufficient cause for excusing the delay under Section 5 and the High Court in revision interfered with the decision of the subordinate Court which had not excused the delay in filing the appeal. In view of what has been said above, the appeal as well as the revision should be allowed.

13. Accordingly, the appeal as well as the revision is allowed, the orders of the District Judge are hereby set aside and the District Judge is directed to readmit the appeal to its original number and decide it on merits in accordance with law. In the circumstances of this case, I direct the parties to bear their own costs in appeal as well as in revision.

KS B

Appeal and revision allowed.

AIR 1969 ALLAHABAD 213
(V 56 C 44)

R. S. PATHAK, J.

C. K. Avasthi, Petitioner v. Chairman, Board of Governors, Indian Institute of Technology, Kanpur and others, Opposite Party.
Civil Misc. Writ No. 3161 of 1967, D/- 6-3-1968.

(A) Institutes of Technology Act (1961), S. 26 — Statutes 12 and 13 framed under — Promotion — Cannot be claimed as of right — Decision not to promote does not amount to imposing penalty.

The imposition of a penalty assumes the existence of a right and results in the deprivation of that right. It may be a right to property or a right to liberty. A person enjoying that right is punished or penalised

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by being deprived of it. Both elements must concur. There must be a right and the right must be taken away, permanently or temporarily, by way of punishment. There is no right to promote to the higher post and therefore the decision not to promote a person does not amount to imposing penalty. (Para 3)

(B) Institutes of Technology Act (1961), S. 26 — Statute 12, Cl. 3 (f) and Cl. 7 — Cl. 7 is intended to operate where post is filled by promotion for period not exceeding 12 months — Post of Senior Stenographer not filled for temporary period of twelve months — Held that Selection Committee which considered cases of junior stenographers for promotion was one constituted under sub-clause (f) of Cl. (3). (Para 4)

(C) Institutes of Technology Act (1961), S. 30 — Dispute not arising out of contract between Institute and employee — S. 30 (1) is not attracted. (Para 7)

S. N. Kacker and Dhar, for Petitioner; Standing Counsel, for Opposite Party

ORDER. The petitioner is a junior stenographer in the Indian Institute of Technology, Kanpur. The next higher post is that of a senior stenographer. A number of vacancies in the cadre of senior stenographers having arisen, appointments were made by promotion from among the junior stenographers. The appointments were made upon the recommendations of a Selection Committee constituted for the purpose. Two junior stenographers, K. K. Bajpai and H. L. Naithani, were appointed as senior stenographers. The petitioner, C. K. Avasthi, who claims to be senior in service, was not appointed. The petitioner addressed a representation to the Director of the Institute, but his representation was rejected by the Director who pointed out that the Selection Committee had taken into consideration "all relevant material including the seniority and past record of the persons concerned" for the purpose of recommending the promotion of junior stenographers to the higher post and did not find the petitioner suitable for promotion to that post for the present. The petitioner applied to the Director for reconsideration of his case but without success. He then filed an appeal to the Chairman of the Board of Governors of the Institute and that appeal was also rejected. Then he preferred an appeal to the President of India, who under the Institutes of Technology Act, 1961, is the Visitor of the Institute.

The appeal was filed with the Director with the request that it be forwarded to the Visitor. The petitioner was informed that as no appeal lay to the Visitor, the appeal filed by the petitioner would not be forwarded. Finally, the petitioner applied for the appointment of a Tribunal of Arbitration for the decision of the dispute raised by him. He was informed that as the decision not to promote him to the post of senior stenographer had not occasioned any breach of

contract between him and the Institute no dispute could be referred to the Tribunal. The petitioner then filed the instant petition. He prays for mandamus directing the Chairman of the Board of Governors of the Institute, the Director of the Institute and the Assistant Registrar (Administration) of the Institute to promote him to the post of senior stenographer. He also prays for certiorari for quashing the orders rejecting his representation and appeals. He also prays for mandamus requiring the Director of the Institute to forward his appeal to the Visitor. Alternatively, he prays for mandamus requiring the Director to constitute a Tribunal for deciding the dispute raised by the petitioner.

2. The petitioner contends that the decision not to promote him to the post of senior stenographer is in the nature of penalty and as no opportunity was afforded to him to show cause in the matter the principles of natural justice have been contravened. To succeed in that contention it is necessary for the petitioner to establish that the decision not to promote him is by way of penalty. A body of statutes has been framed under the Institutes of Technology Act, 1961, and Statute No. 13 sets out the terms and conditions of service of permanent employees. The petitioner points out that Cl. (9) of Statute 13 provides for disciplinary proceedings and the imposition of penalties against the employees of the Institute and one of the penalties which may be imposed is the withholding of promotion. The petitioner says that the decision not to promote him to the post of senior stenographer amounts to the imposition of a penalty upon him. That the decision was by way of penalty is he urges, supported by the circumstance that his appeal was entertained by the Director. An appeal against an order imposing penalty is provided by Clause (10) of Statute 13.

3. In my opinion, there is no force in the contention that the decision not to promote the petitioner amounts to imposing a penalty upon the petitioner. The petitioner has been unable to show that he had a right to be promoted to the post of senior stenographer. Unless he enjoyed that right, it cannot be said that his promotion has been withheld by way of penalty. The imposition of penalty assumes the existence of a right and results in the deprivation of that right. It may be a right to property or a right to liberty. A person enjoying that right is punished or penalised by being deprived of it. Both elements must concur. There must be a right and the right must be taken away, permanently or temporarily, by way of punishment. In the instant case when the petitioner had no right to promotion to the higher post, the decision not to promote him cannot amount to imposing a penalty. Here, what has happened is that the filling of the posts of senior stenographer was effected upon recommendations made by a Selection Committee entrusted with the task

of examining the cases of all the junior stenographers and determining upon relevant considerations, including their seniority and past record, who among them was most suitable for promotion.

4. The petitioner bases his claim entirely upon the fact of his seniority. But nowhere do I find, neither in the Institutes of Technology Act nor the statutes nor any other material on the record anything to show that seniority alone was the determinative criterion. The posts were filled by selection and the selection was governed by a wide field of considerations, one of which only was the element of seniority. It is said that seniority alone should determine promotion because no procedure has been laid down by the Board of Governors, and I am referred to Clause (7) of Statute No. 12. Statute No. 12 provides for the manner of making appointments to the posts in the Institute. Clause (1) declares that all posts at the Institute shall normally be filled by advertisement but the Board of Governors shall have the power to decide on the recommendations of the Director that a particular post be filled by invitation or by promotion from amongst the members of the staff of the Institute. Clause (3) provides for the constitution of Selection Committees for filling posts under the Institute, other than the posts on contract basis, by advertisement or by promotion from amongst the members of the staff of the Institute.

Each Selection Committee depends for its constitution upon the category of posts which are to be filled up. These posts range from those of Deputy Director and Professor to those not specifically enumerated but carrying a scale of pay the maximum of which exceeds Rs. 600 per mensem. Sub-clause (f) of Clause 3 provides that in the case of all other posts the Director may, at his discretion, constitute such Selection Committees as may be considered appropriate by him. Clause (7) states:

"Where a post is to be filled by promotion from amongst the members of the Institute or temporarily for a period not exceeding twelve months, the Board shall lay down the procedure to be followed."

Apparently, having regard to the context in which Clause (7) occurs, the word "or" has been inadvertently inserted and was not intended in the clause. It seems to me that Clause (7) is intended to operate where a post is to be filled by promotion from amongst the members of the Institute temporarily for a period not exceeding twelve months. That follows necessarily from the circumstance that detailed provision has been made in the preceding clauses for filling posts by promotion on a permanent basis from amongst the members of the Institute. There was no point in repeating the provision in Clause (7). Now, in the instant case, when admittedly the post of senior stenographer claimed by the petitioner is not to be filled temporarily for the period of twelve months or less, Clause (7) cannot be

invoked. On the contrary, the case is one which appears to fall under sub-clause (f) of Clause 3. The scale of pay of senior stenographers is Rs. 210-425. The Selection Committee which considered the cases of junior stenographers for promotion to the post of a senior stenographer was a Selection Committee constituted under sub-clause (f) of Clause 3.

5. It is clear from paragraph 8 of the counter-affidavit filed by the Assistant Registrar (Administration) of the Institute on behalf of the respondents that the Committee considered the case of the petitioner and examined the report received from the Deputy Librarian under whom he is presently working and Superintending Engineer of the Construction Unit to which he was attached previously and in view of the unsatisfactory report in respect of his work in the Construction Unit the Committee decided that his work and conduct should be watched for a further period before his case was considered for promotion. Upon this, it is not possible to say that the decision not to promote the petitioner amounted to imposing a penalty on him. The consideration that his appeal was entertained by the Director does not carry his case any further because the appeal was rejected and there is nothing to show that it was not rejected because it did not lie.

6. In the circumstances, the contention that the petitioner was entitled to an opportunity to show cause against the decision not to promote him is without substance and must be rejected.

7. The next contention of the petitioner is that the respondents were bound to constitute a Tribunal of Arbitration for deciding the dispute raised by him. Reliance is placed upon Section 30 (1) of the Institutes of Technology Act, 1961. That provision reads:

"Any dispute arising out of a contract between an Institute and any of its employees shall, at the request of the employee concerned or at the instance of the Institute, be referred to a Tribunal of Arbitration consisting of one member appointed by the Institute, one member nominated by the employee, and an umpire appointed by the Visitor."

A dispute which can be referred to a Tribunal of Arbitration must be a dispute arising out of a contract between the Institute and the employee. It is not possible to hold that the dispute raised by the petitioner arises out of a contract. Consequently, Section 30 (1) is not attracted and the petitioner is not entitled to a reference of the dispute to a Tribunal of Arbitration. The petitioner complains that the respondents have refused to refer the dispute to a Tribunal after going into the question whether there was any merit in the dispute and, he says, that is a function to be exercised by the Tribunal and not by the respondents. I am not satisfied that the reference has been denied on the ground that the dispute

was devoid of merit. It is clear from the material before me that the reference has been denied because of the view that no dispute arose out of any contract between the petitioner and the Institute.

8 No other point has been pressed before me.

9 The petition fails and is dismissed with costs.

MVJ/DVC

Petition dismissed.

AIR 1969 ALLAHABAD 210 (V 50 C 43)
MAHESH CHANDRA, J

Dalchand, Appellant v State, Respondent.
Criminal Appeal No 2553 of 1964, D/-20-2-1967, against order of Addl S J III, Bareilly, D/-14-9-1964.

(A) Penal Code (1860), S 375 — Laceration of hymen, posterior perineum and vaginal walls of victim — Absence of injury on person of accused, and particularly penis, cannot be sole ground for discarding prosecution evidence. (Paras 10, 11, 12)

(B) Penal Code (1860), Ss 301, 363 and 376 — Accused taking or enticing 5-year old girl out of keeping of lawful guardian without consent of mother in the absence of father and subsequently committing rape on girl — No proof of any intention of rape at the time of kidnapping — Conviction under S 360 is improper — Conviction under Ss 363 and 375 is valid. (Paras 17, 18)

(C) Penal Code (1860), S 361 — "Takes or entices" — Taking when is complete — Consent of child immaterial — Form of enticement not confined to offering sweet meats.

The taking need not be by force and it is immaterial whether the minor girl consents or not. All that is necessary is that there must be taking of a child out of the keeping of the parents. Nor need enticement be confined to any single form of allurements. Offer of sweetmeats is one such form. Even the enticing away of a child playing on a public road is sufficient. The act of taking is not, in the proper sense of the term, a continuous act. But where the minor has been actually taken out of the keeping of her guardian, the act is a completed one.

(Para 17)

P N Misra and V B Gupta, for Appellant, A.G.A., for Respondent.

JUDGMENT. Appellant Dalchand has been convicted under Sec 366 I.P.C., and sentenced to undergo rigorous imprisonment for a period of seven years and also to pay a fine of Rs 100, and in default of payment of fine to undergo rigorous imprisonment for a further period of four months. He has also been convicted under Section 376 I.P.C. and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs 100 and in default

of payment of fine to undergo rigorous imprisonment for a further period of four months. The sentences are to run concurrently.

2. Briefly stated, the prosecution case was this. At about 9 p.m. on 16-3-1964, Kumari Jeet Kaur, aged about five years was playing outside the house of her father Jogendra Singh. Dalchand, appellant, came to the house and knocked at the door and was informed by Jogendra Singh's wife Smt. Harbans Kaur that Jogendra Singh had gone to the bazar. The appellant then remained sitting near the wall of the house and talked to the girl for five or seven minutes and then took her away to the bazar close-by in his lap. Smt. Harbans Kaur had called her to take food. When there was no response Smt. Harbans Kaur came out of the door and saw the appellant going with the girl in his lap. She called the appellant, who replied that he was taking the girl to the Halwais shop and would be back within a few minutes. Smt. Harbans Kaur waited for some time and then went to the house of her neighbour, who was also called Jogendra Singh, and informed him that Dalchand, appellant, had taken away the girl and had not yet brought her back. Jogendra Singh also had seen the appellant taking away the girl. But nobody went to the bazar in search of the girl just then. After about half an hour the girl's father Jogendra Singh returned and was informed by Smt. Harbans Kaur. He then went in search of the girl and came to Amar Singh's shop near Kohrapur where Nand Ram and P W Balwant Singh were sitting.

On hearing about the incident from the father of the girl, Amar Singh, Balwant Singh and Nand Ram went to the appellant's house in search of the girl. The appellant was absent, but the appellant's wife from inside the house informed the party that her husband had brought the girl and had been asked by her to take back the girl to her house. Since they had not met the appellant and the girl on the way, they then went towards the field and the Mandharya of the appellant in Mohalla Surkha about two furlongs away. They heard shrieks and cries of a child from a distance of about 15 or 20 paces from the Mandharya of the appellant. As they reached close to the Mandharya Jogendra Singh flashed his torch and saw the appellant committing rape on the girl. They all then rushed towards the Mandharya. Amar Singh and Balwant Singh caught the appellant. The girl was picked up in an unconscious condition by her father. The appellant and the raped girl were then taken to Kohrapur, from where Balwant Singh and Amar Singh went away, because it had become late. Ranjit Singh and Ujjay Singh (P.W. 4) took charge of the appellant and went with the girl's father Jogendra Singh to Kohrapur Outpost and took police help and then took the appellant and the raped girl to P S Kotwal, where a first information report was

lodged at 12-30 a.m. The girl's frock (Ext. 1) and the accused's dhoti and shirt (Ext. 3) were taken possession of by the police and sealed and later on sent to the Chemical Examiner. At about 2-30 a.m. the same night the girl was examined by Dr. Padma Agarwal at the Dufferin Hospital, Bareilly and the doctor found a tear from the vaginal orifice up to the anal orifice. She was then admitted for examination under general anaesthesia in the daylight.

3. At about 10 a.m. the next morning the examination under general anaesthesia revealed that—

(1) The whole of the hymen was lacerated, bleeding on touch.

(2) There was a tear from 6 O'clock direction of the hymen, 1 inch x 1/3 inch right up to the anal orifice. On opening the tear it was full of faecal matter. On further examination there was a tear 1/3 inch in rectal wall.

4. In the opinion of the lady doctor, the girl had been raped within a period of 24 hours and the estimated age of the girl was five years.

5. The appellant pleaded not guilty and alleged false implication out of enmity. He stated that he was indebted to Jogendra Singh and could not repay the loan. Jogendra Singh then came to the field, abused and beat the appellant and caught him and took him to Koharapir and had made him locked up at the outpost. This was the statement made by him before the Committing Magistrate. In the Sessions Court the appellant stated under Section 342, Criminal P. C., that it was three days after the appellant had been beaten at the field that he went with two baskets of vegetables for selling them in the market. The vegetables of one of the baskets were sold in front of Kararapir Outpost and the empty basket left there. The other basket of vegetables was taken by the appellant to Kutubkhana and the vegetables sold there. At about 7-30 p.m., the appellant came to take the basket from Koharapir. Jogendra Singh then had him arrested with the help of the outpost police. Then Jogendra Singh went to his own house and brought his daughter and wife.

6. Out of the 11 witnesses examined by the prosecution, Balwant Singh (P.W. 3), Jogendra Singh (P.W. 6), the father of the girl, and Amar Singh (P.W. 7) purport to be eye-witnesses of the actual commitment of the rape by the appellant. Smt. Harbans Kaur (P.W. 5), the mother of the girl, stated that the appellant had taken the girl away from her house and had replied on Harbans Kaur's query that he would bring her after giving her some sweets from halwai's shop. Jogendra Singh (P.W. 9) stated that he also saw the appellant taking away the girl. Dr. Padma Agarwal (P.W. 1) examined the raped girl and Dr. H. S. Amwani (P.W. 2) examined the appellant. Trilok Singh (P.W. 10) was the Investigating Officer. There is

no doubt that in view of the statement of Lady Dr. Padma Agarwal the girl Jeet Kaur was five years old at the time of the rape. The doctor's statement also clearly shows that she had been raped.

7. The learned counsel for the appellant contends that it was not the appellant who had kidnapped and raped her and that the prosecution evidence on the point is wholly unreliable.

8. Smt. Harbans Kaur (P.W. 5), the mother of the girl, stated that the appellant came to her house at about 9 p.m. on the date in question and was told by her on enquiry that her husband had gone to the bazar, that thereafter the appellant sat down near the wall and after talking and playing with her daughter Kumari Jeet Kaur for five or six minutes took the girl in his lap without asking Harbans Kaur and that when she called the girl for taking food and there was no response, she went out and saw the appellant taking her away. She further stated that the appellant told her that he was taking her to the halwai's shop and would bring her back soon afterwards. After waiting for 5 or 10 minutes she went, said she, to her neighbour Jogendra Singh and told him that Dalchand, appellant, who had taken the girl had not brought her back till then and that she was informed by Jogendra Singh (P.W. 9) that he had also seen Dalchand taking away the girl. When Smt. Harbans Kaur's husband returned after half an hour, she told him about the incident and the husband went out in search of the girl. Jogendra Singh (P.W. 9) corroborated her on the point that when he was going home at about 9 o'clock after closing his shop, he saw on the way Dalchand, appellant, taking the girl towards Mohalla Surkha and that 15 minutes afterwards Jogendra Singh's wife came to the house of the witness telling his wife that Dalchand, appellant, had taken her daughter. Jogendra Singh (P.W. 9) further stated that he told her that he had also seen Dalchand taking the girl.

9. Jogendra Singh (P.W. 6), the father of the girl, who is a hawker and sells cloth, stated that when he returned at about 9-30 p.m. to his house on the night in question, he was informed that Dalchand, appellant, had taken his daughter away on the pretext of giving her sweetmeats, that thereafter he went in search of the girl and informed Amar Singh at his shop about it and was accompanied by Amar Singh and Balwant Singh and Nand Ram (who were sitting there) to the house of Dalchand, appellant. The witness further stated that at the appellant's house he was informed by the appellant's wife from inside that Dalchand had brought the girl and that she had rebuked him and asked him why he had brought the girl and told Jogendra Singh that her husband had gone to his house to leave the girl there. Getting suspicious because they had not met Dalchand on the way, Jogendra Singh and his three companions went to the Man-

dharya at the appellant's field on the east of his house. According to the witness when they were about 15 or 20 paces from the Mandhaya they heard a shriek of a girl and rushed towards the Mandhaya flashing his torch when the Mandhaya was five or six paces away from them and then saw the appellant actually raping Jeet Kaur

Balwant Singh and Amar Singh caught the appellant and Jogendra Singh took the girl in his lap and brought the girl and the appellant to Koharapur. From there Amar Singh, Nand Ram and Balwant Singh went home and Ujagar Singh and Ranjit Singh and Jogendra Singh brought the girl and the appellant to Koharapur Outpost and went from there with a head constable to the Police Station Kotwali and dictated the report there at 12-30 a.m. He has been corroborated by Balwant Singh (PW 3) and Amar Singh (PW 7) on the point that they went with him to the appellants house and were informed by the appellants wife that the appellant had been rebuked by her and that he had taken the girl to Jogendra Singh's house. They were also corroborated by Jogendra Singh (PW 6) on the point that they went with him to the appellants Mandhaya and heard the shrieks and saw the appellant actually committing rape and then brought the appellant and the girl to Koharapur and thereafter the two witnesses went away to their houses. Ujagar Singh and Ranjit Singh met them and were prepared to go with Jogendra Singh, the girl and the appellant to the police station. Ujagar Singh (PW 4) corroborates Jogendra Singh on the point that the girl and the appellant had been brought to Koharapur by Jogendra Singh, Balwant Singh, Nand Ram and Amar Singh and thereafter Balwant Singh, Nand Ram and Amar Singh went home and he went with Jogendra Singh, the appellant and the girl to the police outpost and thereafter to the police station where the first information report was lodged.

10 The first contention of the learned counsel for the appellant is that the entire prosecution story is false since the medical examination of the appellant goes against the prosecution story that the rape was committed by the appellant. According to the learned counsel for the appellant the rape could not have been committed by the appellant without receiving any injury on his person, particularly the penis

11 It is true that Dr H S Amwani found no injury on the genital region or anywhere in the appellants body and no clotting of the hair. In the opinion of the doctor, there were no signs of struggle, but the absence of smegma round the corona suggested that there could have been sexual intercourse. There could possibly be no injury caused to the appellant at the hands of the raped girl because she was only five years old. As for the absence of injuries on the genital region of the appellant, Dr H S Amwani was of the view that if there was not full penetration there would be no

lacerations on the frenum of the penis. He further explained that if only the corona went inside the private parts of the girl, there would be no lacerations

12 In Modi's Medical Jurisprudence and Toxicology, 14th Edn. at p 339, it is mentioned that—

"Modi had seen cases in which there was no injury to the penis of the accused although there were lacerations of the hymen, posterior perineum and even the vaginal walls of the victim"

In Taylor's Principles and Practice of Medical Jurisprudence, 10th Edn. at p 83 the case of R v Crowley has been quoted in which the prisoner, aged twenty-four, was tried for a criminal assault on his own daughter Catherine aged less than 4 years. The labia majora of the girl was swollen and bruised. The fourchette has been torn across as well as the posterior wall of the vagina, for a depth of over a quarter of an inch extending backwards from this there was a laceration which came up to the anterior wall of the rectum. The anterior part of the external sphincter, i.e., that part between the anal orifice and the central tendon of the perineum had been torn. There was bleeding on her private parts and even on admission to hospital there was slight oozing of blood. The prisoner himself desired to be examined by a doctor. No marks of violence on his person nor any stains of blood or semen, etc., were found. The apron in which the child had been wrapped when she was taken to the hospital contained blood and spermatozoa on one spot and blood only on the other. Nothing was found elsewhere. The prisoner's pudenda was unusually clean for a man of his employment and cleaner than the rest of the body. The jury wished to know why no marks of violence were found on the prisoner, and the medical witness had stated that the male organ, being pressed against the soft parts, would not show marks of violence. The prisoner was on the evidence convicted and sentenced to 10 years penal servitude. This case and the medical evidence produced in that case supports what has been said in Modi's Medical Jurisprudence and Toxicology that there are cases in which in spite of all these injuries on the private parts of the victim, there may be no injury whatsoever on the penis of the accused. It would not be, therefore, correct to discard the prosecution evidence only on the basis that no injuries were found on the person of the appellant.

13 The next contention of the learned counsel for the appellant is that the time factor goes against the prosecution case. His contention is that in the first place, a child aged five would not be given her meals after 9 p.m., that the shops could not be open at the time when Amar Singh's shop is said to have been open and that if we proceed backward from the time at which the report was lodged it is not possible for

Jogendra Singh and the other alleged witnesses to have witnessed the actual rape or even to have found the appellant in the hut. It is true that usually children are often given food earlier than 9 p.m., but it cannot be said to be an invariable rule. There may be occasions when the meals to be given to a child may be delayed. Smt. Harbans Kaur was not cross-examined on the point. After all it was only a hawk's family and there may have been good reasons for delay in giving the food to the girl on that day. No conclusion can, therefore, be drawn from the fact that the girl had not been given her meals till the time she was taken by the appellant from her house. It is true that according to Balwant Singh (P.W. 3) he had reached at Amar Singh's shop at about 9 or 9-30 p.m. with Nand Ram to have cloth given to Nand Ram by Amar Singh on credit. But he says that he knew Amar Singh from before and left for Amar Singh's shop at 8 p.m. It is clear from the statement of Amar Singh that Amar Singh's shop and house adjoin each other and that he sells cloth at the shop and also goes about as a hawk selling cloth. It is therefore, not surprising that Balwant Singh and Nand Ram had reached his shop after 8 p.m. In fact, according to Amar Singh it was at about 10 or 9-45 p.m. that they had reached there. Since the house and the shop adjoin each other, there is nothing strange in the statement of Amar Singh when he says that sometimes he closes his shop even after the closing time of shops. He says that at the latest he closed his shop at 10 p.m. It may be that he had acted against law in keeping his shop open after the closing time, but the mere fact that on that day Balwant Singh and Nand Ram had reached his shop adjoining his house after the closing time would not necessarily demolish the prosecution version that they were with Amar Singh when Jogendra Singh came home and informed him about the disappearance of the girl.

14. As for the time given in the first information report, there is no doubt that the time at which the first information report was dictated would be 12-30 a.m. as mentioned in the first information report. But it would not be correct to arrive at a fixed time by working backward from the time given in the first information report, for so many factors, like the time taken by the complainant in getting a rickshaw to the field at the Mandhaiya and the time taken by the accused while talking to his own wife and having a heated exchange of words with her, the time taken at the Koharapir Outpost and the time taken by the complainant and his party in talking to the appellant's wife at his house, have to be considered. None of the complainant's party is said to have a watch with them, and their idea of the arrival at various places and the time taken there and in doing various acts cannot be said to be accurate or even approximately correct. Nor can it be

said that the time mentioned by Smt. Harbans Kaur as 9 or by Jogendra Singh as 9-30 p.m. are accurate. There can consequently be always a difference of half an hour or an hour or even more in the time given by the various persons when they are not speaking with reference to any watch or clock.

There is thus no reason to disbelieve P.Ws. 3, 6 and 7 when they say that they saw the appellant in the very act of committing rape on the girl when they rushed to the Mandhaiya after hearing her shrieks from a distance of about 20 or 25 paces. But even they did not see the actual rape (although I agree with the Court below that they saw it), there is ample evidence to show that it was the appellant who had taken the girl from her house at 9, that she was recovered in the appellant's Mandhaiya in a raped condition soon afterwards and that the appellant was also found there alone with the girl. It is also in evidence that his dhoti, which was taken possession of by the police and sent to the Chemical Examiner, was found by the Chemical Examiner and the Serologist to be covered with human blood. The frock of the girl was found to have spermatozoa by the Chemical Examiner. There could then be no doubt that Kumari Jeet Kaur was raped by the appellant in the Mandhaiya.

15. It was also contended by the learned counsel for the appellant that the witnesses would not leave the appellant without giving him a severe beating if they had found him committing rape, particularly when, according to him, the complainant and all his witnesses were Sikhs. No doubt there would be a natural reaction to take revenge on the person committing the heinous offence. But there are two courses open to one desirous of taking revenge. One is to beat the person responsible then and there, and the other is to take him to the police after catching him red-handed. The punishment under law for such a heinous offence is very heavy extending up to life imprisonment. There is then nothing strange or incredible if the complainant and his party preferred to take the appellant to the police station instead of taking the law into their hands.

16. The story as given by the appellant has been rightly discarded by the Court below. He says that he owed money to Jogendra Singh and examined D.W. 1 Lila-dhar to prove the loan. But D.W. 1 himself admits that no loan was taken by the appellant from Jogendra Singh in his presence. There is no other evidence of the alleged loan. He says that his Mandhaiya is close to Dalchand's Mandhaiya, but he does not support Dalchand's allegation that there was a marpit between Dalchand and Jogendra Singh two or three days before the appellant was caught. Nor is there any reason to believe that merely for the sake of taking revenge for a loan the complainant would make out a concocted case alleging

rape of his own daughter and implicating the appellant.

17 After a consideration of the entire evidence on record I find that the appellant has been rightly convicted of the offence under S 376 IPC As for the offence under S 366, I.P.C., it is not clear from the evidence on record when he had taken the girl in his lap to his own house, he had done so with the intention of committing rape. According to the prosecution evidence the witnesses were informed at the appellant's house that he had come there with the girl and that it was his wife who had asked him why he had brought the girl and had told him to take the girl back to her house and leave her there. If he had the intention of committing rape from the very beginning, he would not have taken the five-year old girl to his wife. It is not unlikely that the intention to commit rape arose in his mind some time later on while he was taking back the girl from his house. There is, however, no doubt that the appellant had taken or enticed the five-year old girl out of the keeping of the lawful guardian without the consent of the mother in the absence of the father. He had not taken the girl merely to the halwai's shop but had taken her elsewhere including his own house. In fact, we do not know whether he actually took her to halwai's shop also or not. There was no consent, either implied or express, for taking her to any other place.

Section 361, I.P.C., defines 'kidnapping' as follows —

"Whoever takes or entices any minor under sixteen years of age, if a male, or under eighteen years of age, if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception

The taking need not be by force and it is immaterial whether the minor girl consents or not. All that is necessary is that there must be taking of a child out of the keeping of the parents. Nor need enticement be confined to any single form of allurements. Offer of sweetmeats is one such form. Even the enticing away of a child playing on a public road is sufficient. The act of taking is not, in the proper sense of the term, a continuous act. But where the minor has been actually taken out of the keeping of her guardian the act is a completed one. There is consequently not the slightest doubt that the minor girl was kidnapped.

18 Section 363 runs as follows —
"Whoever kidnaps any person from India or from lawful guardianship shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

There is thus not the slightest doubt that an offence of kidnapping under Section 363, I.P.C., was committed by the appellant. But it has not been established as we have already seen that there was any intention of rape at the time of kidnapping. There is no question of any knowledge that it was likely that she would be forced or seduced to illicit intercourse, for it was later on he himself who committed the rape. An offence under Section 366, I.P.C., cannot, therefore, be said to have been made out. The appellant is, therefore, liable to conviction under Section 363, I.P.C., only.

19 The result is that the appeal is partly allowed. His appeal against the conviction under Section 376, I.P.C., is dismissed. The sentence of imprisonment under that section is upheld, but that part of the sentence which relates to fine is set aside. The appeal is allowed in respect of the conviction and sentence under Section 366, I.P.C. and they are set aside. The appellant is convicted instead under Section 363 I.P.C. and is sentenced to undergo five years' rigorous imprisonment under that section. The sentences shall run concurrently.

CWM/DVC

Appeal partly allowed.

AIR 1969 ALLAHABAD 220

(V 56 C 46)

FULL BENCH

S N DWIVEDI, M H BEG AND
RAJESHWARI PRASAD, JJ

Seth Dwarka Prasad, Appellant v Jai Lal Shri Kunj Behari Lal and others, Respondents

First Appeal No 829 of 1953, D/22-2-1963, against decree of Civil Judge, Etawah, D/25-5-1953

Debt Laws — U. P. Encumbered Estates Act (25 of 1934), Ss 47, 19 (2) — Property fraudulently shown as property of one person and sold in auction — Creditor of true owner who is not party to sale proceedings can claim it as his own in collateral proceedings — AIR 1947 All 153, Overruled.

Where some property was fraudulently shown as the property of one person and sold in proceedings under the Encumbered Estates Act, whereas it was actually the property of another who had made a fictitious gift in order to defraud his creditors, the sale itself would be vitiated and will not constitute a "proceeding" within S 47 of the Act even if it has been confirmed by a Court. In such an event, the creditor, who is a third person and a stranger who was not party to proceedings resulting in the sale but whose rights are sought to be defeated by a sale brought about as a consequence of fraud, can expose the fraud in collateral proceedings. (Para 20)

The list of property sent by the Special Judge to the Collector under S 19 (2) will

LL/AM/F760/63

not bar a third person from claiming the property as his own in a collateral proceeding. Section 47 also does not bar him from claiming the property in a collateral proceeding. That section protects from challenge only a 'proceeding'—and nothing more—of the Collector and the Special Judge. Where, on sale of the property shown in the list under Section 19 (2), the true owner who has not already contested before the Special Judge asks for a declaration of his ownership, he does not question any proceedings of the Collector or the Special Judge. He does not question the order for sale, or the act of sale or the delivery of possession to the purchaser. He is only claiming his rights and consequently seeking to expose that the auction sale has passed no interest to the auction-purchaser because the landlord had no right in the property. Section 47 does not prevent him from exposing the real effect of the auction sale. The effect of sale does not form part of any 'proceedings'. (Paras 14, 15)

If the true owner is not barred by S. 47, his creditor is also not barred from showing that he is the true owner of the property. AIR 1948 Oudh 271 and AIR 1953 All 533, Rel. on; AIR 1952 All 227 (FB) and AIR 1952 All 977 (FB) and AIR 1954 All 65 and 1954 All LJ 705, Disting.; AIR 1947 All 188, Overruled. (Para 18)

Cases Referred:	Chronological	Paras
(1956) AIR 1956 Punj 163 (V 43), Narendar Kumar v. Custodian-General of Evacuee Property		16
(1954) AIR 1954 All 65 (V 41) = 1953 All LJ 551, Abdul Ghafoor v. Abdus Salam		9
(1954) 1954 All LJ 705, Syed Ali Miyan v. Syed Taslim Husain		10
(1953) AIR 1953 SC 521 (V 40) = 1954 SCR 506, Deputy Commr., Hardoi v. Rama Krishna Narain		17
(1953) AIR 1953 All 533 (V 40) = 1953 All LJ 239, Bankey Lal v. Narendra Singh		8, 14
(1952) AIR 1952 All 227 (V 39) = 1952 All LJ 156 (FB), Krishna Pal Singh v. Mst. Babban		7
(1952) AIR 1952 All 977 (V 39) = 1952 All LJ 623 (FB), Baladin v. Mt. Ram Piarey		7
(1948) AIR 1948 Oudh 271 (V 35) = 1948 Oudh WN 13, Ram Dal v. Suraj Bux		7
(1947) AIR 1947 All 188 (V 34) = 1946 All LJ 385, Maharaja Bahadur Ram Ran Bijay Prasad v. Sarjoo Singh		7
(1922) AIR 1922 All 294 (V 9) = 66 Ind Cas 559, Jammu v. Mahadeo Prasad		16
2 Smith's LC 7, 13th Edn., p. 641, Duchess of Kingstone's case		20
Gopal Behari, Raja Ram Agarwal, K. M. Sinha and S. S. Choudwaria, for Appellant; Baleshwar Prasad, Badri Swarup Narain, Gopal Goushala, H. P. Sen, K. G. Srivastava,		

K. C. Saxena, Smt. Chandra Kuer, for Respondents.

S. N. DWIVEDI, J. (on his own behalf and for RAJESHWARI PRASAD, J): We are required to answer this question:

"Whether, in the circumstances of this case, Section 47 of the Encumbered Estates Act bars the entertainment of the objection by the creditor relating to ownership of the property in dispute."

2. Let us first give the salient facts. One Jai Narain had a big estate; he had also considerable liabilities. In 1921 he gifted, inter alia, some of his zamindari properties (the property in dispute included) to his wife, Chimma Kunwar. She was made the absolute owner of those properties. In 1936 she made an application under Sec. 4 of the Encumbered Estates Act (hereinafter called 'the Act'). In her written statement under Section 8 of the Act she mentioned the property in dispute in this appeal as her own. No objection was filed. In the list of properties sent to the Collector under Section 19 (2), the Special Judge included this property. The Collector auction-sold it. Sri Gopal Gaushala Society (hereinafter called 'the Society') purchased it.

3. The sons and grandsons of Jai Narain also made an application under Section 4. In their written statement under Section 8, they did not show the properties already gifted by Jai Narain in favour of Chimma Kunwar. So the disputed property also was not shown therein. In his written statement under Section 9, Dwarika Prasad, representing the Trust which held a decree for Rs. 52,000 against Jai Narain, showed the disputed property as liable to attachment, sale and mortgage in satisfaction of the debts of the applicants. The Trust's case was that Jai Narain's gift was fictitious, it was never acted upon and it was intended to defraud his creditors.

4. The Society lodged a claim. It was said that the Society was the owner by virtue of the auction-purchase and the gift was not fictitious nor fraudulent. It was also claimed that Section 47 of the Act barred the Special Judge from going behind its title founded on the auction sale by the Collector under the Act.

5. The Special Judge upheld the claim of the Society. In appeal the learned Judges who have referred the question to us have found that the gift made by Jai Narain in favour of Chimma Kunwar was "wholly fictitious and ineffective" and that he and his sons and grandsons continued to be the owners of the gifted property so that "the sale of the property as belonging to Smt. Chimma Kunwar was not capable of conveying any title to the purchaser Gaushala Society".

6. In view of these findings they have referred the aforesaid question for determination of the Full Bench.

7. We propose to start with survey of the case-law bearing on the interpretation of

Sec. 47 or the other associated provisions In *Maharaja Bahadur v Sarjoo Singh*, 1948 All LJ 385 = (AIR 1947 All 188) a Division Bench held that a person who failed to put forward a claim to the property before the Special Judge could not maintain a suit to establish his title to it in the Civil Court. In *Ram Dal v Suraj Bux*, AIR 1943 Oudh 271 a Division Bench of the Oudh Chief Court disagreed with this view. Section 47 which was not noticed in the earlier case, was interpreted in this case. According to the Bench Section 47 created a bar against the parties to the proceedings before the Special Judge or the Collector. *Krishna Pal Singh v Mst Babban*, 1952 All LJ 156 = (AIR 1952 All 227) (FB) is not material for our purpose. In *Baladin v Mst. Ram Piarey* 1952 All LJ 623 = (AIR 1952 All 977) (FB) a certain property was sold under the Act, although the landlord has claimed only a half share in it in his written statement under Section 8. It was held that a suit for a half share was maintainable by the true owner thereof for the Special Judge had no jurisdiction to show this share in the list under Section 19 (2). The case is distinguishable on facts from the present one.

8 In *Bankey Lal v Narendra Singh*, 1953 All LJ 239 = (AIR 1953 All 533) certain properties of the landlord were shown in the list under Section 19 (2). While the Collector was proceeding with the liquidation of his debts a son born after the list was sent to the Collector instituted a suit for partition of his share in the said properties. It was held that neither Section 11 nor Section 19 (2) stood in his way.

9 In *Abdul Ghafoor v Abdus Salam*, 1953 All LJ 551 = (AIR 1954 All 65) certain property was included in the statement under Section 8. Instead of claiming the property under Section 11 before the Special Judge the true owner instituted a suit for a declaration that the property belonged to him. It was held that the suit was maintainable. This case is also distinguishable on facts from the present case.

10 *Syed Ali Miyan v Syed Taslim Husam*, 1954 All LJ 705 is also distinguishable on facts from the instant case. There the property shown in the list under Section 19 (2) had not been sold.

11. Advertising to the Act, Section 8 requires the landlord to file a written statement, showing, inter alia, the nature and extent of his property which is liable to attachment and sale. Section 10 requires the creditors to file their claims. They may also show the nature and extent of the landlord's property. Under Section 11 (1) the Special Judge shall publish a notice specifying the property mentioned by the landlord in his written statement or by the creditors in their claims. The notice is published in the Gazette. It is also published in a newspaper selected by the Special Judge. A copy of the notice is exhibited at his own office

and at the office of the Collector with whose jurisdiction the property of the landlord is situate. It is also exhibited at a conspicuous place where the landlord is residing. Any person having a claim to the property may file an objection within a certain time.

Under S 11 (3) the Special Judge decides the objection. Section 11 (4) provides that his decision shall be deemed to be a decree of a Civil Court of competent jurisdiction. So his decision will operate as res judicata between the landlord and the objector. Section 19 (2) enjoins upon the Special Judge to inform the Collector "of the nature and extent of the property mentioned in the notice under Section 11 which he has found to be liable to attachment or sale in satisfaction of the debts" of the landlord. Under Chapter V of the Act the Collector shall take steps to liquidate the debt of the landlord. Section 45 provides for appeals from the orders of the Special Judge and Collector. Section 46 provides for revision against their orders. Section 47 is as follows—

"Except as provided in Sections 45 and 46 no proceedings of the Collector or Special Judge under this Act shall be questioned in any Court."

12. If in the contest by the real owner the Special Judge gives a decision he will be bound by it, he cannot reopen the issue collaterally. But what happens if he does not contest before the Special Judge? Is his title extinguished?

13. Section 13 expressly provides that every claim of debt decreed or undecreed against the landlord, shall, if not made within the time prescribed before the Special Judge be deemed for all purposes and for all occasions to have been duly discharged. So the creditor's debt is extinguished by a statutory fiat. The Legislature has not enacted a similar provision in respect of the third person's claim to the property published in the Gazette as belonging to the landlord. It is we believe a fair inference that in this sphere the Legislature did not intend to rob Peter and pay Paul it did not contemplate to extinguish the proprietary rights of third persons.

14. The list of property sent by the Special Judge to the Collector under Sec 19 (2) will not bar a third person from claiming the property as his own in a collateral proceeding. It has been held in *Bankeylal's case*, 1953 All LJ 239 = (AIR 1953 All 533) that the word "found" clearly indicates that, unless there is a judicial determination of his claim by the Special Judge he is not shut out from claiming the property in the Civil Court.

15. Section 47 also does not bar him from claiming the property in a collateral proceeding. This section protects from challenge only a proceeding — and nothing more — of the Collector and the Special Judge. When on sale of the property

shown in the list under Section 19 (2) the true owner who has not already contested before the Special Judge asks for a declaration of his ownership, he does not question any proceedings of the Collector or the Special Judge. He does not question the order for sale, or the act of sale or the delivery of possession to the purchaser. He is only claiming his rights and consequently seeking to expose that the auction sale has passed no interest to the auction-purchaser because the landlord had no right in the property. Section 47 does not prevent him from exposing the real effect of the auction sale. The effect of sale does not form part of any 'proceedings'.

16. In an akin context, Mr. Justice Walsh said: "Certainly a Civil Court has no jurisdiction to set aside the proceedings in a Revenue Court, but I have no doubt that it has jurisdiction to declare that a course of conduct which eventuated in some decree or order in the Revenue Court....., was fraudulently devised or was the result of some wicked conspiracy to injure the plaintiff and to deprive him of his rights behind his back and without his knowledge: AIR 1922 All 294 (295). See to the same effect *Narendar Kumar v. Custodian-General of Evacuee Property*, AIR 1956 Punj 163.

17. The Act is "a code for the administration of the assets of the landlord"; 1954 SCR 506 (513) = (AIR 1953 SC 521 at p. 524). It bears affinity with the law of insolvency. A sale of property by the Insolvency Court or the Receiver appointed by it does not preclude the real owner, if he has already not contested before that Court from, claiming the property as his own in the Civil Court. Why should a sale under the Act have a disparate effect? We can discern nothing in the nature, scheme and language of the Act (including Section 47) to warrant a different result.

18. If the true owner is not barred by Section 47, as we think, his creditor is also not barred from showing that he is the true owner of the property.

19. Our answer to the question referred to us is: No.

20. M. H. BEG, J.: I entirely concur with the view expressed by my learned brother Dwivedi, J. It is only a proceeding taken under the Act which can be questioned under either Section 45 or Section 46 of the U.P. Encumbered Estates Act. The purpose of Section 47 is to make it clear that, apart from the modes prescribed by the statute for questioning the proceedings of the Collector or the Special Judge under the Act, no other channels of relief under the ordinary procedural law are open. It is, however, a well-established proposition: "Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of justice." In *Duchess of Kingston's case*, 2 Smith's L.C. 7, 13th Edn., p. 641 at p. 651, Lord Coke said: "It avoids all judicial acts, ecclesiastical or temporal". Therefore, if some property was fraudulently

shown as the property of one person and sold in proceedings under the Encumbered Estates Act, whereas it was actually the property of another who had made a fictitious gift in order to defraud his creditors, the sale itself would be vitiated and will not constitute a "proceeding" under the Act even if it has been confirmed by a Court. In such an event, the creditor, who is a third person and a stranger who was no party to proceedings resulting in the sale but whose rights are sought to be defeated by a sale brought about as a consequence of fraud, could expose the fraud in collateral proceedings where the true character of what merely appeared to be a proceeding under the Act is determined by showing that it is really no proceeding under the Act in the eye of law. The Act was never meant to operate as an engine of fraud. My answer to the question referred to us is also in the negative.

BY THE COURT

21. Our answer to the question referred to us is: No.

HGP/D.V.C.

Reference answered in negative.

AIR 1969 ALLAHABAD 223 (V 56 C 47)
S. S. DHAVAN, J.

Abdul Salam, Plaintiff-Appellant v. Union of India and another, Defendants-Respondents.

Second Appeal No. 4341 of 1960, D/-10-4-1967, against judgment and decree of Addl. Dist. Civil J., Aligarh, D/-26-9-1960.

(A) Citizenship Act (1955), S. 9 (2) — Citizenship Rules (1956), R. 30 — Scope of — Suit for injunction restraining Government from deporting plaintiff alleging himself to be citizen of India is not barred — What is barred is decision by Court of question whether plaintiff has acquired foreign citizenship — Procedure, when such question arises in suit, to be followed, indicated.

Section 9 (2) merely provides, in effect, that any question as to whether a person has acquired the citizenship of another country shall be determined by the prescribed authority. It confers exclusive jurisdiction on this authority which under Rule 30 of the Citizenship Rules is the Central Government. But the jurisdiction of the Civil Court to try a suit asking the Court to restrain the Government from deporting a plaintiff alleging himself to be a citizen of India is not barred. What is barred is the power of the Court to decide the question whether he has acquired the citizenship of another country, provided this question arises in the suit. If it does arise, the Court cannot try the question itself. The proper course for it would be to refer any question covered by S. 9 (2) to the Central Government and stay further hearing of the suit till the decision of the Central Government

KL/AM/F329/68

is received and then decide the suit in accordance with law AIR 1963 All 482, Foll., AIR 1962 SC 70 Rel. on. (Para 7)

(B) Citizenship Rules (1956), R. 30, Sch. III, Cl. (3) — Person leaving India and staying in Pakistan for five years and coming to India on Pakistani passport — Allegation by him that he had gone to Pakistan temporarily and that he was compelled to obtain Pakistani passport in order to be by the side of his father in India who was very seriously ill and practically on death-bed—Held, that acquisition of passport was voluntary—An act to be involuntary must be the result of legal obligation — Desire to be present at a particular place does not create legal obligation — Word “voluntarily” means that the person obtaining the passport acted of his own volition and knew the nature of his act, and did not act in performance of a legal duty, nor due to coercion, or fraud, or misrepresentation, or mistake 1926-1 Ch 842 and AIR 1965 SC 1623 and AIR 1962 SC 1778, Disting. — (Words and Phrases — “Voluntary”) (Para 14)

(C) Citizenship Act (1955), S 9 (2) — Citizenship Rules (1956), R. 30 — Decision of question whether person has acquired foreign citizenship is judicial — Presumption arising out of voluntarily obtaining foreign passport — Person affected must be given reasonable opportunity to rebut presumption — Ordinarily person must be given personal hearing — Official deciding case must not act upon notes prepared by other officials of the department—Constitution of India, Art. 226 — Natural justice.

The power to decide the question whether a person has acquired the citizenship of a foreign country is quasi-judicial in nature. This means that that authority must act judicially and must give a reasonable opportunity to the person affected by its decision to rebut the presumption which may arise against him under Clause (i) of Sch III of Rule 30 of the Citizenship Rules by virtue of his voluntarily obtaining foreign passport. It is neither possible nor desirable to lay down any rigid test of what is reasonable opportunity. What the scope and the extent of the enquiry to be made by the authority on a plea raised by the citizen concerned should be, depends upon the circumstances of each case AIR 1962 SC 1778, Rel. on. (Para 16)

A person who receives notice under Cl. (i) of Schedule III of Rule 30 to show cause why it should not be held against him that he has voluntarily acquired the citizenship of another country and upon whom is the burden of proving that he has not so acquired such citizenship is ordinarily entitled to a personal hearing. Particularly a person who admits that he obtained a passport of another State but tenders before the competent authority evidence which, if believed, will prove that he did not obtain it voluntarily is entitled to a personal hearing. Where the person had asked for a personal

hearing but his request was rejected, this was a departure from the principles of natural justice ordinarily governing such cases (Para 17)

Moreover, the inquiry being of a quasi-judicial nature, the authority hearing the case must act judicially that is, apply its own mind to the case before it and not rely upon any other official's opinion or notes or comments on the merits of the controversy. The ordinary executive procedure of “processing” cannot be followed in deciding a question under S 9 (2) of the Citizenship Act. The official, before deciding the case can not consult the notes and comments of another official of the department. (Para 18)

It was, however held in this case that inasmuch as it was clear from the person's affidavit that he obtained Pakistani passport in order to see his ailing father in India and that it was not the result of coercion, fraud or misrepresentation, even if the person had been given personal hearing and even if the notes made by the departmental officials had not been consulted, there was no option for the official but to hold under Cl. (3) of Sch. III of R. 30 of Citizenship Rules that the person had voluntarily acquired the citizenship of Pakistan. Any other finding would have been in violation of the conclusive presumption imposed by Cl. (3). Thus, though there had been a violation of the principles of natural justice and irregularities had been committed in the decision, the result could not have been different even if there had been no such violation or irregularities. (Para 19)

Where a person, in response to a notice under Clause (i) of Schedule III of R. 30 of the Citizenship Rules admits that he obtained a Pakistani passport and does not place any material to establish a prima facie case that the obtaining of the passport was not voluntary, the authority concerned is bound to hold that he acquired the citizenship of the country whose passport he obtained, and he cannot plead that the denial of a personal hearing materially prejudiced him. (Para 20)

Cases Referred. Chronological Paras
(1965) AIR 1965 SC 1623 (V 52) =
(1965) 2 SCJ 708 Mohd. Ayub Khan v Commr of Police Madras 15, 16
(1963) AIR 1963 All 482 (V 50) =
1963 All LJ 75, Samiullah v State of U P 7
(1962) AIR 1962 SC 70 (V 49) =
1962-1 SCR 779, Akbar Khan Alam Khan v Union of India 7
(1962) AIR 1962 SC 1778 (V 49) =
(1962) 2 SCA 418 Govt. of Andhra Pradesh v Syed Mohd. Khan 15
(1926) 1926-1 Ch 842 = 95 LJCh 528, In re Willanson, Page v Public Trustee 14
S J Hyder, for Appellant, Standing Counsel, for Respondents

JUDGMENT This is a second appeal by Abdul Salam from the decree of the Addl

tional Civil Judge, Aligarh, affirming that of the Additional Munsif, Aligarh, dismissing his suit for permanent injunction to restrain the Union of India and the State of Uttar Pradesh from deporting him to Pakistan. The plaintiff-appellant alleged in his plaint that he was born in Aligarh and domiciled there at the commencement of the Constitution of India and is a citizen of India as defined in Article 5 of the Constitution; that in March 1950, there was an outbreak of serious communal disturbances at Aligarh and several other places in Uttar Pradesh which for some time completely paralysed the civil administration and during which the members of the minority community were subjected to great misery and trouble and their houses and other property were looted and burnt and there was an extensive loss of life; that these disturbances created a sense of insecurity in the mind of the minority community; that because of the activities of communal elements in India and the State of Indo-Pakistan relations, a situation was created in which law and order were at a discount; that faced with this situation, the plaintiff decided to take temporary asylum till the situation in India became normal, and he went to Pakistan in May 1950 without the least intention of migrating to that country on a permanent basis; that with the return of normal conditions in India, the plaintiff along with other Muslims who had sought asylum in Pakistan under similar circumstances expressed their desire to return to India; that the circumstances which compelled the plaintiff to leave his native home and the justice of his claim to return to India were recognised in the agreement between the Prime Minister of India and Pakistan, popularly known as the Nehru Liaquat Pact wherein it was mutually agreed that Indian Muslims who had left Uttar Pradesh for Pakistan because of the disturbances between February and May 1950 should be repatriated, that availing of this opportunity the plaintiff tried to return to India, but although several thousands of persons were repatriated and allowed to settle in India in pursuance of the aforesaid inter-Dominion agreement, the plaintiff continued to languish in Pakistan; that ultimately, having despaired of all hopes of obtaining permission to return to India, he came to this country on a passport issued by the Government of Pakistan because there was no other way left for him to return to his home; that his family and his parents are living in India as Indian citizens; that in these circumstances the obtaining of a Pakistani passport by the plaintiff did not in any way affect his status as a citizen of India; that the defendant Governments had issued orders directing the plaintiff to leave India; that these orders are in infringement of his fundamental rights as a citizen of India to reside and settle in any part of the country; that he cannot be compelled to leave India for Pakistan. The plaintiff appel-

lant asked for an injunction to restrain the two Governments from deporting him.

2. The suit was resisted by both the Governments, and a joint written statement was filed. The defendants alleged that the plaintiff had not left India because of fear of disturbances but with the intention of settling down in Pakistan. It was denied that he is a citizen of India. It was further alleged that the plaintiff had come to India after obtaining a Pakistani passport but had stayed beyond the permitted period which he had no right to do. It was also pleaded that the Court had no jurisdiction to hear the suit.

3. It may be noted that the suit was filed on 5-7-1957. The importance of this date will be explained presently.

4. The trial Court framed the following four issues:—

1. Whether the plaintiff is a citizen of India?

2. Whether the Court had jurisdiction to try the suit?

3. Whether a valid notice under S. 80, Civil P. C., was served on the defendants?

4. Was the plaintiff entitled to the relief claimed?

5. The trial Court held that the plaintiff, at the time of applying for his visa, made a definite statement before the Government of India that he was a citizen of Pakistan and wanted to enter India to meet his relatives, and that the possession of a Pakistani passport was conclusive proof of the possessor being a citizen of Pakistan. Accordingly it held that the plaintiff had not proved that he was a citizen of India.

On the question of jurisdiction it held that S. 9 (2) of the Citizenship Act provided that when a question arises as to whether a person has acquired the citizenship of another country, it shall be decided by the Central Government and therefore the jurisdiction of the Civil Court was barred in every case in which the question of the acquisition of the citizenship of another country arises; the Court held that this question had arisen in the present suit and the Court had no jurisdiction to try it, and dismissed the suit.

On appeal the learned Civil Judge affirmed the view of the trial Court that the jurisdiction of the Civil Court was barred under Section 9 (2) of the Act. He dismissed the appeal without considering the merits of the case. The appellant Abdul Salam has come here in second appeal.

6. During the pendency of this appeal, the respondent Governments filed an application alleging that the question whether the appellant had acquired the citizenship of Pakistan had been decided by the Central Government by its order dated 8-7-1963, and asking this Court to take this document into consideration in the decision of this appeal. Therefore, the position today is that the appellant's suit was dismissed on the ground that it raised a question whether he had acquired the citizenship of Pakistan which could only be determined by the Cen-

tral Government under S 9 (2) read with R. 30 of the Citizenship Rules and the Civil Court had no jurisdiction to hear the suit, but during the pendency of this appeal the Central Government itself had decided the aforesaid question and held that the appellant had acquired the citizenship of Pakistan.

7. It may be stated at the outset that the view of the Courts below that the jurisdiction of the Civil Court to try this suit is barred under S 9 (2) of the Act is manifestly erroneous. That sub-section merely provides, in effect, that any question as to whether a person has acquired the citizenship of another country shall be deemed by the prescribed authority. It confers exclusive jurisdiction on this authority which, under Rule 30 of the Citizenship Rules, is the Central Government. But the jurisdiction of the Civil Court to try a suit asking the Court to restrain the Government from deporting a plaintiff alleging himself to be a citizen of India is not barred. What is barred is the power of the Court to decide the question whether he has acquired the citizenship of another country, provided this question arises in the suit. If it does arise, the Civil Court cannot try the question itself. The proper course for it would be to refer any question covered by S 9 (2) to the Central Government and stay further hearing of the suit till the decision of the Central Government is received and then decide the suit in accordance with law. *Samullah v State of U P.*, AIR 1963 All 482, following *Akbar Khan Alam Khan v Union of India*, AIR 1962 SC 70. In *Samullah's* case, AIR 1963 All 482, it was held by this Court that though neither S 9 nor Rule 30 expressly provides for a reference by the Court to the Central Government of the questions specified in S 9 (2), such a power to refer can be inferred. For these reasons it is obvious that the view of the Courts below that the jurisdiction of the Civil Court to try the suit itself was barred is erroneous. The proper course for the trial Court was to refer the question whether the appellant had acquired the citizenship of Pakistan for a decision by the Central Government and then decide the suit in accordance with that decision.

8. If these were the only facts, I would have allowed this appeal and remanded the case to the Court below with a direction that it should remit to the Central Government for its decision, the question whether the appellant had obtained the citizenship of Pakistan. But during the pendency of this appeal the Government of Uttar Pradesh remitted this very question for the decision of the Central Government. The latter decided it by its order dated 8th July 1963 in which it was held that the appellant had left India for Pakistan with an intention to settle down in that country permanently, that he stayed there for 5 years which showed that he wanted to make Pakistan his permanent home, that

he returned to India apparently because the conditions there did not suit him, and he had obtained a Pakistani passport, and that the inescapable conclusion was that he had voluntarily acquired the citizenship of Pakistan. These findings were arrived at by Shri Fateh Singh, Joint Secretary to the Government of India, Ministry of Home Affairs. On the basis of these findings a formal order dated 8th July 1963 was drawn up. It runs as follows—

"No 13/417/62-I.C.
Government of India,
Ministry of Home Affairs,
New Delhi-11,
the 8th July, 1963.

ORDER

Whereas it has come to the notice of the Central Govt that Shri Abdul Salam, son of Abdul Hakim, by caste Musalman, resident of Mohalla Sarai Bibi, Aligarh, had claimed Indian citizenship notwithstanding his having obtained a Pakistan passport and short term visa for entry into India from Pakistan, and whereas a question has arisen as to whether the said Shri Abdul Salam has acquired the citizenship of Pakistan, now, therefore, the Central Government acting under Section 9 (2) of the Citizenship Act, 1955, and Rule 30 of the Citizenship Rules, 1958, and giving due regard to the principles of evidence contained in Schedule III to the aforesaid Rules and after considering the cause shown by the said Shri Abdul Salam against the proposed action under the said section and rule, hereby determines that the said Shri Abdul Salam has voluntarily acquired the citizenship of Pakistan, after 26th January, 1950, and before 9th January, 1953

(Sd.) R. P. SHARMA,

Under-Secretary to the Govt. of India."

9. It may be noted that this formal order is signed not by Sri Fateh Singh but by R. P. Sharma, Under-Secretary to the Government of India.

10. On August 8, 1964, learned counsel for the State filed an affidavit to which an attested copy of the aforesaid order was attached, together with an application praying that this order should be taken into consideration in deciding this appeal.

11. The appellant opposed this application and filed a counter-affidavit. He denied that the aforesaid order was an order of the Central Government. In the alternative he contended that it was illegal and invalid. He alleged that he sent to the Central Government a representation through the Government of Uttar Pradesh demanding an opportunity to be heard in person and produce evidence at the inquiry, but this demand was refused by the Central Government which asked him to put forward any material which he wanted in the form of an affidavit. He further alleged that accord-

ingly he submitted an affidavit through the local Intelligence Unit, Aligarh, but had no knowledge whether it was forwarded for the consideration of the Central Government. He contended that as the burden of proving that he had not acquired the citizenship of Pakistan was on him, the Central Government should have given him an opportunity to discharge it. He contended that he was entitled to what he called a "maximum hearing", and that the question of citizenship could not be made on a mere consideration of the contents of his representation.

He also contended that Mr. R. P. Sharma, Under-Secretary to the Government of India, Ministry of Home Affairs, who had signed the formal order of 8-7-1963 had no jurisdiction to pass an order under S. 9 (2) of the Citizenship Act, because the power to make a decision under this sub-section had not been assigned to an officer of the rank of Under-Secretary.

He also contended that Rule 30 of the Citizenship Rules which nominates the Central Government as the prescribed authority for deciding the question of citizenship under Section 9 of the Citizenship Act is ultra vires because that Government could not appoint itself as the prescribed authority.

During arguments, all the pleas raised in the appellant's counter-affidavit were not pressed, and Mr. S. J. Hyder, learned counsel for the appellant, advanced only one argument, namely, that the order of the Central Government was invalid because that Government had not given the appellant a reasonable opportunity of proving his case. Mr. Hyder contended that reasonable opportunity in the present case included the right to a personal hearing, and as this was admittedly denied to the appellant, the order was passed in violation of the principles of natural justice. Learned counsel relied on a number of decisions of the Supreme Court in support of this argument.

In the interests of justice I asked the counsel for the State whether the Government of Uttar Pradesh and the Central Government were prepared to produce the files relating to the case of the appellant for the perusal of the Court. Counsel accepted the suggestion without any hesitation and the hearing was adjourned to enable the learned counsel to produce the files. I have examined them and they were also shown to counsel for the appellant. From the record the following facts are established and were admitted by counsel for the States. (1) The Central Government rejected the appellant's demand for an opportunity to be heard in person and produce evidence in support of his case at a personal hearing. (2) that Government permitted the appellant to produce whatever evidence or other material he desired to be considered by the Central Government in the form of affidavits. (3) The Central Government asked the State Government to forward such material together with

its (the State Government's) views thereon. (4) The appellant, in pursuance of this decision filed an affidavit in which he protested that the denial of a personal hearing was bound to cause him an immense prejudice, but he had no alternative but to file an affidavit instead. (5) In his affidavit dated 13-3-1963 the appellant merely repeated his statements in his earlier representation, but produced no fresh material. (6) In paragraph 12 of his affidavit the appellant admitted that he had obtained a Pakistani passport but explained that he obtained it when he received the news that his father was seriously ill and almost on his death bed and therefore he "felt compelled to obtain a Pakistani passport and returned to his home in or about 1955".

12. As the perusal of the file had revealed that the Central Government had asked the State Government to attach its own comments while forwarding any evidence or other material furnished by the appellant in support of his case, I considered it necessary to make a further probe for the purpose of ascertaining whether the comments of the State Government had influenced the decision of the Central Government. Accordingly I directed that the Central Government should file an affidavit sworn by Mr. Fateh Singh, Joint Secretary, Government of India, Ministry of Home Affairs, who had considered the appellant's case and held that the petitioner had acquired the citizenship of Pakistan. The Government filed an affidavit duly sworn by Mr. Fateh Singh. In it this official admitted that the appellant had asked for an opportunity of being heard in person and to produce evidence in his case, but the Central Government decided that it was not necessary or feasible to give him a personal hearing, but he was given a further opportunity to produce any evidence in his defence in the form of an affidavit. It was also admitted by Mr. Fateh Singh that the Central Government had asked the State Government to forward any material submitted by the appellant together with their own views. It was further stated by him that in their reply the State Government had merely forwarded an affidavit sworn by the appellant without any comments and had written that the State Government had no further comments to make beyond what they have made while forwarding the appellant's case earlier. It was further stated by Mr. Fateh Singh, that the appellant's matter was "processed" in the Ministry of Home Affairs according to the formal procedure, and examined by the Under Secretary in the Ministry who put up a note on the basis of the material which had been furnished by the appellant. It was further stated that this Under Secretary had expressed a view that the explanations given by the appellant were not fit to be accepted and had recommended that it might be held that the appellant had voluntarily acquired the citizenship of Pakistan. It was admitted by Mr. Fateh Singh that the Under Secretary had prepared two drafts for the considera-

tion of Mr Fateh Singh, the first being a formal order informing the appellant that the Central Government had determined that he had voluntarily acquired the citizenship of Pakistan, and the second a draft of a letter to be issued to the Government of Uttar Pradesh informing them of the decision by the Central Government. It was further admitted by Mr Fateh Singh that he had looked into the notings and the representation and the affidavit filed by the appellant and came to the conclusion that it was quite clear that the appellant had left for Pakistan with an intention of settling down in that country permanently, and that the appellants own representation showed that he had stayed in that country for about 5 years and returned to India after obtaining a Pakistani passport because the conditions did not suit him and as the appellant had admitted that he had obtained such a passport, there was no escape from the conclusion that he had voluntarily acquired the citizenship of Pakistan.

13 A copy of Mr Fateh Singh's affidavit was supplied to the counsel for the appellant. At the final hearing of this appeal, Mr Hyder did not challenge the statement of the Central Government that Mr Fateh Singh had been duly appointed by it to consider the question whether a particular individual had voluntarily acquired the citizenship of another country under Section 9 (2) of the Citizenship Act. He did not challenge very properly in my opinion, the veracity or correctness of the statements made by Mr Fateh Singh in his affidavit which in my opinion contains a truthful, honest and frank statement of facts. But Mr Hyder advanced two arguments in support of his attack on the validity of the findings arrived at by this officer. First, he contended that the order was vitiated by the denial of a personal hearing; secondly, he argued that the order was invalid as there was no finding that the appellant had voluntarily acquired a Pakistani passport.

14. I shall consider the last argument first. Mr Hyder contended that the appellant had clearly stated in his affidavit before the Central Government that he was compelled to obtain a Pakistani passport only when he received news that his father was seriously ill and was almost on his death bed, and as there was no maternal before the Central Government to rebut this statement it must be accepted as correct. Therefore, (Mr Hyder argued) it had been established that the appellant had not voluntarily obtained a Pakistani passport but had been compelled by force of circumstance to do so. Learned counsel relied on an English decision in support of his argument. In *In re Wilkinson*, Page v Public Trustee, 1926 Ch. 842 it was held that the word "voluntarily" means the doing of something as the result of the free exercise of the will, but not something done under a legal duty. In that case a woman by the name of Edith Carter was left a legacy by her aunt, but the will contained a proviso that "in the event of my

said niece voluntarily ceasing to make the said dwelling house her permanent home as aforesaid, I direct that the said sum of £ 7000 and the investments representing the same shall fall into residue. Subsequently Edith Carter married and at first her husband also came to live with her in her ancestral house but later on he pressed her to change her residence and live with him in his (husbands) house. Edith Carter asked for a direction from the Court as to whether she would be deemed to have voluntarily ceased to reside in her aunt's house if she complied with her husband's wishes. The court held that the word "voluntarily" did not include an act done in the performance of a legal duty or obligation requiring a wife to reside and co-habit with her husband. It was pointed out that the duty of a wife to reside with her husband, though of imperfect obligation, was capable of enforcement by means of an action or suit for restitution of conjugal rights and therefore if the wife in compliance with her legal duty joined the husband in the new matrimonial home as a result of his direction, she could not be said to have voluntarily ceased to reside in her aunt's house. In my opinion, the principle enunciated in this decision does not apply to the appellant. There was no legal duty compelling him to obtain a Pakistani passport. Mr Hyder argued that the news of his father's serious illness provided the necessary compulsive force which rendered his obtaining a Pakistani passport not a voluntary act. I do not agree. The desire to be present at a particular place does not create any legal obligation to be present. Hundreds of persons are unable to be present at the illness of a parent. The compulsive force must be something more than an inner urge however strong. If learned counsels argument is accepted, a person who steals bread because his children are hungry will be able to plead that his act was not voluntary. The act of theft is voluntary though there are mitigating circumstances. Learned counsels argument means that any act done under a strong temptation is not voluntary in law. It also implies that any person has a legal right to make a false declaration and thus obtain a false passport and a visa by fraud for the purpose of satisfying his strong urge to see a parent who is seriously ill. In my opinion the word "voluntarily" means that the person obtaining the passport acted of his own volition and knew the nature of his act, and did not act in performance of a legal duty, nor due to coercion, or fraud, or misrepresentation, or mistake. The reasons and temptations which induced him to obtain the passport do not render his act other than voluntary.

15 Mr Hyder cited two decisions of the Supreme Court *Mohd Ayub Khan v Commissioner of Police, Madras*, AIR 1965 SC 1623 and *Government of Andhra Pradesh v Syd. Mohd. Khan*, AIR 1962 SC 1778. In *Mohd Ayub Khans case* AIR 1965 SC 1623 the Supreme Court held that for the purpose of clause (3) of Schedule III of Rule 30 of

the Citizenship Rules, the obtaining of a passport of a foreign country cannot in all cases be regarded as conclusive proof of acquisition of voluntary acquisition of foreign citizenship, and that if he raises a plea that he had not voluntarily obtained the passport, he must be afforded an opportunity to prove that fact. This case is not of any help to the appellant. The Supreme Court had in mind those cases where a person may be compelled to obtain a passport due to fraud or misrepresentation or any other similar reason which will render his act not voluntary. The court observed: "Cases may be visualized in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced without any intention of renunciation of his Indian citizenship, to obtain a passport from a foreign country. It would be difficult to say that such a passport is one which has been 'obtained' within the meaning of paragraph 3 of Sch. III and that a conclusive presumption must arise that he has acquired voluntarily citizenship of that country". This observation has no application here. It is not the appellant's case that he was compelled to obtain a Pakistani passport because of fraud, misrepresentation, coercion or any other similar reason. His was a deliberate and voluntary act committed to satisfy his desire to see his father who was seriously ill. (I assume that his allegation concerning his father's illness and his desire to see him may be true). The decision in AIR 1962 SC 1778 is also of no help to the appellant. In that case the State Government had ordered the deportation of several persons without referring the question of their having acquired the citizenship of Pakistan to the Central Government at all. It was argued before the Supreme Court that as these persons had admittedly obtained passports of a foreign country, this raised a conclusive presumption that they had acquired the citizenship of that country and it was not necessary to refer the question for the decision of the Central Government. Rejecting this argument the Supreme Court held that a finding by the Central Government is the basis on which any further action can be taken against such a person. This decision is really an authority for the principle that whatever be the merits of the case and however conclusive the evidence of acquisition of foreign citizenship may appear to the State Government, it has no jurisdiction to decide the question which must be referred for the decision of the Central Government. But in the case before me, there has been a decision of the Central Government, and the only question is whether that decision is vitiated by any error which goes to its root.

16. I now come to the other argument of Mr. Hyder. He contended that the Central Government's finding is illegal because the appellant was denied the opportunity of being heard in person. He also argued that the finding of Mr. Fateh Singh is illegal because he relied upon the opinion and

remarks and notes of his brother officers while deciding the question of the appellant's citizenship. Now it is manifest that the power to decide the question whether a person has acquired the citizenship of a foreign country is quasi-judicial in nature. This means that the authority must act judicially and must give a reasonable opportunity to the person affected by its decision to rebut the presumption which may arise against him under Clause (i) of Schedule III of Rule 30 of the Citizenship Rules. What is a reasonable opportunity? It is neither possible nor desirable to lay down any rigid test. As observed by the Supreme Court in Mohd. Ayub Khan's case, AIR 1965 SC 1623: "What the scope and the extent of the enquiry to be made by the authority on a plea raised by the citizen concerned should be, depends upon the circumstances of each case."

17. In my opinion, a person who receives notice under Cl. (i) of Schedule III to show cause why it should not be held against him that he has voluntarily acquired the citizenship of another country and upon whom is the burden of proving that he has not so acquired such citizenship is ordinarily entitled to a personal hearing. Particularly, a person who admits that he obtained a passport of another State but tenders before the competent authority evidence which, if believed, will prove that he did not obtain it voluntarily, is entitled to a personal hearing. In this case the appellant asked for a personal hearing but his request was rejected. In my opinion this was a departure from the principles of natural justice ordinarily governing such cases.

18. Moreover, the inquiry being of a quasi-judicial nature, the authority hearing the case must act judicially that is, apply its own mind to the case before it and not rely upon any other official's opinion or notes or comments on the merits of the controversy. The ordinary executive procedure of "processing", if I may borrow a phrase from Mr. Fateh Singh's affidavit, cannot be followed in deciding a question under S. 9 (2) of the Citizenship Act. In this case Mr. Fateh Singh has frankly admitted that before deciding this case he consulted the notes and comments of other officials of the Department. This he could not do as he was acting judicially.

19. If these were the only considerations I would have allowed the appeal and decreed the petitioner's suit for an injunction. But whatever be the irregularities committed by the Central Government or the authorities hearing his case, the finding against him that he voluntarily acquired the citizenship of Pakistan is based on the appellant's own statement in his affidavit that he obtained a Pakistani passport with the object of coming to India to see his ailing father in other words, on his virtual admission that he voluntarily obtained such a passport. It was not the appellant's case that he was compell-

ed to obtain a Pakistani passport due to fraud, mis-representation, coercion, or any other similar reason. Therefore, even if the petitioner had been given a personal hearing and Mr. Fateh Singh had decided this case without consulting any notes or comments made by any other officer, there was no option for him but to hold under Clause (3) of Sch. III of the Citizenship Rules that the appellant had voluntarily acquired the citizenship of Pakistan. On these facts, any other findings would have been in violation of the conclusive presumption imposed by law under Clause (3). The comments of other officials were superfluous and unnecessary, and the failure of the Central Government's refusal to give the appellant a personal hearing could not, and did not, prejudice him. Therefore, I am compelled to hold that though there has been a violation of the principles of natural justice and irregularities have been committed in the decision of this case, the result could not have been different even if there had been no such violation or irregularities.

20. If the petitioner's case in his affidavit filed before the Central Government had been that he had been compelled to obtain a Pakistani passport, not voluntarily, but due to fraud or mis-representation or coercion or the like, and he had been denied a personal hearing to prove his case by evidence, I would have held that he had been materially prejudiced. But the petitioner's own case is that he obtained a Pakistani passport because he desired to see his ailing father. But, as explained above, a strong desire to see an ailing parent does not make the obtaining of a foreign passport less than voluntary. Where a person, in response to a notice under Clause 1 of Schedule III of the Citizenship Rules admits that he obtained a Pakistani passport and does not place any material to establish a prima facie case that the obtaining of the passport was not voluntary, the authority concerned is bound to hold that he acquired the citizenship of the country whose passport he obtained, and he cannot plead that the denial of a personal hearing materially prejudiced him.

21. The appeal is dismissed, but in the circumstances I direct that the parties shall bear their own costs throughout.

RGD Appeal dismissed.

AIR 1969 ALLAHABAD 230 (V 58 C 43)

SATISH CHANDRA, J.

Chandra Mohan, Petitioner v. State of U. P. and others, Opposite Parties.

Civil Misc. Writ No. 397 of 1967, D/- 24-11-1967.

(A) Constitution of India, Art. 233—Eligibility of appointment as District Judge — Person not in judicial service is also eligible provided he has been a lawyer of seven

years' standing and has been recommended by High Court — Words "has been" in the expression "if he has been for not less than seven years an advocate" — Meaning—Person need not be continuing as an advocate at the time of his appointment.

According to Art. 233, a person who is not already in the service is eligible only if he has been an advocate or a pleader of at least seven years' standing and is recommended by the High Court. The expression "has been" in the phrase "if he has been for not less than seven years an advocate or a pleader" indicates that the state of being has existed and may be (but not necessarily is) continuing. Clause (2) of Art. 233 does not restrict the field of eligibility to only such advocates or pleaders who were actively practising at the date of their appointment. Consequently, the person to be appointed as District Judge need not be continuing to be an advocate at the time of his appointment. AIR 1961 SC 518 and AIR 1958 All 823 and AIR 1967 SC 442, Rel. on. (Paras 7, 8 and 9)

(B) Words and Phrases — "Has been" — Meaning — "Has been" when not followed by a participle is the present perfect tense of "to be" and indicates that the state of being existed and may be (but not necessarily is) continuing. AIR 1958 All 823, Rel. on. (Para 8)

(C) Constitution of India, Art. 309, Proviso, Arts. 233 and 233-A — U. P. Higher Judicial Service Rules, 1953 — Effect of decision in AIR 1960 SC 1987 — Conditions of service mean and include various aspects like appointment, scale of pay, confirmation, seniority promotion, payment of pension, etc. — Art. 233 deals with only one condition of service, namely, appointment — Rules are severable — Only the rules relating to appointment alone are invalid due to non-compliance with Art. 233 (1) — Rest of the rules are valid.

Proviso to Art. 309 confers powers to make rules to govern the conditions of service. The conditions of service mean and include various aspects like appointment, scale of pay, confirmation, seniority promotion, payment of pension, etc. Art. 233 (1) deals with only one aspect of the conditions of service, namely, the appointment to the post of District Judge. That has to be done in consultation with High Court. The effect of the decision of Supreme Court in AIR 1963 SC 1987 is that the rules relating to appointment alone would be bad on the ground that they did not comply with the condition, namely, of the appointments being made in consultation with High Court. The rules relating to recruitment are severable. The rules relating to other aspects of conditions of service having been validly framed under Article 309, would remain unaffected by non-compliance with Art. 233 (1) of the Constitution and would continue to be in force. This position would be in consonance with Art. 233-A. Under it no existing appointment would be deemed ever to have

become illegal or void even though it may have been made otherwise than in accordance with Art. 233. Thus, all such appointments would be deemed to have been made validly. The employment of the Higher Judicial Service Rules for making such appointments would also, as a necessary consequence, be deemed to be valid. In relation to such appointments, the rules would be deemed to have remained in operation because the unconstitutionality arising by reason of non-compliance with Art. 233 has been taken away. Article 233-A operates retrospectively. So, the rules would be deemed never to have become unconstitutional. They will continue to govern all officers appointed thereunder, including the parties in the present case between 1st April, 1953 and 21st December, 1966. AIR 1962 SC 505 and AIR 1962 SC 36 and AIR 1966 SC 1987, Rel. on.

(Paras 11, 12, 15 and 16)

(D) Constitution of India, Art. 233-A (as inserted by 20th Amendment), Arts. 142 and 144 — Validity — Amendment is invalid in so far as it validates appointment of parties to AIR 1966 SC 1987.

Article 233-A necessitates a change in Art. 142. Article 142 would be deemed to have been modified so as to make it in-applicable to the decree of the Supreme Court in Chandra Mohan's case, AIR 1966 SC 1987. Article 142 being an entrenched provision, such a change could be brought about only under the proviso to Art. 368 by obtaining the requisite ratification. The Twentieth Amendment was silent as to this necessary consequential amendment in Article 142. It would not be valid without ratification. The Twentieth Amendment not having obtained the requisite ratification, was ultra vires the amending power of Parliament, in so far as it affected the appointments of the parties to Chandra Mohan's case, AIR 1966 SC 1987. It being severable, the rest of it remains valid. AIR 1966 SC 1987 and AIR 1967 SC 1643, Ref.

(Paras 36 and 38)

Article 142 of the Constitution approximates the legal position in this country still more with the American rule that the Legislature could not reverse decisions of Courts or reopen adjudicated controversies. The second part of Art. 142 (1) by guaranteeing the enforceability of the decree or order of the Supreme Court read with Art. 144, is a restriction on the legislative power to undo the effect of that decree or order in respect of the cause of matter in which it was rendered. If a legislative enactment seeks to make unenforceable, the decree or order of the Supreme Court in relation to the cause and the parties between whom it was made, such law would be void for contravening Art. 142, AIR 1963 SC 687 and AIR 1958 SC 300 and AIR 1965 SC 845 and AIR 1951 SC 458 and AIR 1961 SC 112 and AIR 1957 Bom 266 (FB), Ref. (Para 39)

(E) Constitution of India, Art. 141 — Scope — Article remains unaffected by amendments to Constitution.

Article 141 provides that the law declared by the Supreme Court shall be binding on all Courts in India. This Article provides a binding efficacy to the decisions of the Supreme Court as precedent. The efficacy of a declaration of law by a Court lasts only so long as the particular law interpreted is in existence. If by an amendment, the law is changed, the amendment would not affect Art. 141, because the declaration itself would come to an end with the change of the law. AIR 1967 SC 1643 and AIR 1921 PC 59 and AIR 1966 All 412 and AIR 1944 FC 1, Rel. on. (Para 28)

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N Lal and H S Goshi, for Petitioner;
 K. C Agarwal, S N Misra and S K. Tewari,
 for Opposite Parties

ORDER. This is a petition under Art. 226 of the Constitution for a writ of quo warranto calling upon the respondents 2 to 16 to show cause by what authority they are holding the office of the District Judges and to oust them from the offices

2. The present petition is a concomitant of the Supreme Court decision in an earlier writ petition filed by the petitioner in this Court, Chandra Mohan v State of U P, AIR 1966 SC 1937. On 8th August, 1966, the Supreme Court reversed the decision of this Court. It declared that the U P Higher Judicial Service Rules (which I shall hereinafter call "the rules") providing for the recruitment of District Judges are constitutionally void, because they infringe Art. 233 of the Constitution and therefore the appointments made thereunder were illegal. This decision invalidated practically all appointments made by promotion or direct recruitment. Thereupon, the judgments rendered by the Judges so appointed were challenged as being without jurisdiction. The majority opinion of a Full Bench of this Court in Jai Kumar v State, 1966 All WH (HC) 705, decided on 17.10.1966, held that the judgments of such Judges could not be collaterally challenged in appeals till the de facto colour under which they functioned in office had been exposed. In view of this decision all judgments rendered by practically the entire strength of the District Judges after the date of decision of the Supreme Court would have been illegal. To remedy this serious situation, Parliament intervened, and, by the 20th Constitution Amendment Act, 1966 (passed on 22nd December, 1966) added the following as Art. 233-A to the Constitution—

"233-A. Notwithstanding any judgment, decree or order of any Court—

(a) (i) no appointment of any person already in the Judicial Service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a District Judge, in that State, and

(u) no posting promotion or transfer of any such person as a District Judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966 otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, post-

ing, promotion or transfer was not made in accordance with the said provisions,

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966, by, or before, any person appointed, posted, promoted or transferred as a District Judge in any State otherwise than in accordance with the provisions of Art. 233 or Art. 235 shall be deemed to be illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions."

It validated all past appointments (except of Judicial Officers) notwithstanding non-compliance of Article 233 and notwithstanding any judgment or decree of any Court. Judgments rendered by such Judges were also declared immune

3. Thereupon the present petition was filed on 1st February, 1967, primarily to challenge the validity of the Twentieth Amendment to the Constitution. The two out of the five questions urged before the Supreme Court, but not answered by it, have also been reiterated in the present petition. Before the Supreme Court the following five points were canvassed

"(1) While under Article 233 (1) of the Constitution the Governor has to make appointments of persons to be, and the posting and promotions of, District Judges in consultation with the High Court concerned, under the Rules made by the Governor under Article 309 of the Constitution he has to consult, before making such appointments, a selection committee constituted thereunder and therefore, the appointments made in consultation of two authorities instead of one as provided by the Constitution, were illegal.

(2) On a fair reading of the provisions of the Rules, it is manifest that the High Court is a transmitting authority while the selection committee is made the real consultative body, that is to say, the Governor has to make the appointments not in consultation with the High Court as it should be under the Constitution, but in consultation with the committee constituted under the Rules.

(3) The Governor has no power to appoint District Judges from judicial officers as they are not members of the judicial service.

(4) The exclusion of the members of the judicial service in the matter of direct recruitment offends Articles 14 and 16 of the Constitution, or, alternatively, the exclusion of the members of the judicial service in the matter of direct recruitment to the post of District Judges while permitting judicial officers to be so recruited offends the said Articles

(5) The recruitment is to the post of "Civil and Sessions Judges" and they are not "District Judges" as defined by Article 226 of the Constitution and therefore, the re-

cruitment to those posts in terms of Art. 233 is bad."

4. The Supreme Court upheld the first three points and on these grounds held the U. P. Higher Judicial Services Rules unconstitutional. It did not express any opinion on the last two questions. The fourth point urged before the Supreme Court about discrimination had been negated by the Division Bench of this Court. The view of the Division Bench not having been set aside by the Supreme Court, still prevails, and is binding on me sitting singly. This point, therefore, has to be negated. The fifth point, namely, that the "Civil and Sessions Judges" are not "District Judges" as defined by Article 236 of the Constitution was repelled by the Supreme Court in *Prem Nath v. State of Rajasthan*, AIR 1967 SC 1599.

5. Apart from the validity of the Twentieth Amendment to the Constitution, two other points were urged. It was submitted that Sri Prayag Narain, respondent No. 12, being a Judicial Officer was not qualified to be appointed to the post of District Judge. Further, Rule 8 and the proviso to Rule 19 of the Rules violate Article 16 of the Constitution.

6. Acting under Article 309 of the Constitution, the Governor framed the U. P. Civil Services (Judicial Branch) Rules, 1951. These rules dealt with the posts of Munsifs and Civil Judges. Similarly, under Art. 309, the Governor made the U. P. Higher Judicial Service Rules, 1953, for the posts of Civil and Sessions Judges and District and Sessions Judges. These rules contemplated recruitment and appointment by promotion of Civil Judges and also by direct recruitment. At the first selection by direct recruitment which was held in 1953, respondents 2, 3 and 4 were appointed as Civil and Sessions Judges. Eight persons, namely, respondents Nos. 5 to 12, were appointed as a result of the second selection held in 1957. The third selection was held in 1963-64. Six persons including respondents Nos. 13 to 16 were approved for appointment. As a result of the impending appointments of these six persons, Chandra Mohan, who was officiating as Civil and Sessions Judge became liable to be reverted. He was informed of this contingency. At that stage he filed a writ petition No. 526 of 1965 under Art. 226 of the Constitution in which he prayed that the State Government be directed not to make any appointment by direct recruitment. Subsequently, proceedings to hold the fourth selection were initiated in 1965. Chandra Mohan amended the writ petition so as to challenge its validity.

The six persons approved for appointment in the third selection applied for being impleaded as parties to the writ petition filed by Chandra Mohan and by an order dated 24-8-1965, they were impleaded as respondents. Respondent No. 13 Raksheshwar Prasad was respondent No. 3 in the previous

petition. The present respondent No. 14 Sri R. C. Baijpal was respondent No. 2. Respondent No. 15 Sri Behari Ji Das was respondent No. 4. These three were from the Bar. Respondent No. 16 Om Prakash Sharma was respondent No. 6 in the previous petition. The other remaining two were Judicial Officers. Chandra Mohan's writ petition was partly allowed on 21-2-1966. The judgment is reported in 1966 All LJ 599. It was held that Sri Om Prakash Jauhari was not eligible. It was also held that the fourth selection held in 1965 was illegal and the State was directed not to make any appointments on its basis. The selection of the other five was upheld as valid. As seen earlier, the Supreme Court reversed the decision and held the Higher Judicial Service Rules relating to recruitment as void as also the appointments made thereunder illegal. In view of that decision, respondent No. 16, Om Prakash Sharma, was not appointed. Respondents Nos. 13 to 15 appear to have been appointed before the decision of the Supreme Court. During this period respondents Nos. 2 to 12, who were initially appointed as Civil and Sessions Judge, were promoted to the grade of the District and Sessions Judge, under the rules.

The petitioner was, as a result of the competitive examination held in 1950, recruited to the U. P. Civil Services (Judicial Branch) and was appointed as Munsif. In 1963 the petitioner was appointed to officiate as Civil and Sessions Judge. He is still continuing in the officiating capacity. There is no allegation that he has been promoted through the Selection Committee.

7. Mr. Jagdish Swarup urged that Mr. Prayag Narain, respondent No. 12, was a Judicial Officer when he was recruited to the post of District Judge in 1957. The Supreme Court had declared that the Judicial Officers were not qualified to be recruited to the post of District Judge. The Twentieth Constitution Amendment did not validate the appointments of Judicial Officers. Mr. Prayag Narain hence was illegally occupying the post. Mr. Prayag Narain's case is that he had completed seven years' practice at the Bar and was hence eligible. The answer to this controversy depends upon the interpretation of Article 233 of the Constitution which reads:

"233 (1) Appointment of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than 7 years an advocate or a pleader and is recommended by the High Court for appointment."

Sub-article (1) confers the power of appointment and provides for the conditions under which the power is to be exercised. Sub-article (2) deals with the field of eligi-

bility to which the selection is to be confined. Under sub-article (2) a person already in the service of the Union or of the State is eligible. According to the decision of the Supreme Court in Chandra Mohan's case, "service" means the "judicial service". A person who is not already in the judicial service is eligible only if he has been an advocate or a pleader of at least seven years' standing and is recommended by the High Court. The submission of Mr Jagdish Swarup, that a person who is in the service of the Union or of the State other than judicial service is not at all eligible, seems to do violence to the language of sub-article (2). The construction of the sentence in sub-article (2) seems to emphasise that a person not in the judicial service is also eligible, but only if the other two conditions are present, namely, that he has been a lawyer of seven years' standing and is recommended by the High Court.

8 It was urged that the words "has been" in the phrase "if he has been for not less than 7 years an advocate or a pleader" signify that the eligibility is that the individual is an advocate or a pleader at the time when he is recommended by the High Court, or, on the date of his appointment. In substance, the argument is that a person must be a practising lawyer when he is appointed. In Rameshwar Dayal v State of Punjab AIR 1981 SC 818, the Supreme Court held that Clause (2) of Article 233 provides a qualification for persons not already in service. The required qualification is that he should be an advocate or pleader of seven years' standing but that clause does not say how that seven years' standing has to be reckoned. The other authorities are also against Mr Jagdish Swarup's contention.

In the second proviso to Section 86 (3) of the Representation of the People Act, 1951, a person who "has been" a Judge could be appointed as a member of the Election Tribunal. A Division Bench of this Court in Mubarak Mazdoor v K. K. Banerji, AIR 1958 All 823, held that this phrase meant a person who has, at some time, held office as a Judge, but it does not necessarily mean that the person must be holding office as a Judge at the time of the appointment as a member of the Tribunal. A retired Judge was eligible. The Bench observed that the argument that the words "has been" in the phrase "a person who has been a Judge" is a present perfect continuous tense, was incorrect. "Has been" when not followed by a participle is the present perfect tense of "to be" and accordingly indicates that the state of being has existed and may be (but not necessarily is) continuing. For example, the statement "A has been to Ceylon" indicates that A has visited Ceylon but is not there now; whereas the sentence "the baby has been ill all day" implies not only that the baby has been ill but is still ill. On the other hand, "Y has been a soldier" excludes neither the possibility that

Y is still a soldier nor that he has ceased to be one. The line of reasoning of this authority is applicable. The qualification of seven years' standing need not necessarily be a continuing one till the appointment.

9 Similarly, in State of Assam v Horizon Union, 1987 Fac LR 1 = (AIR 1967 SC 442), the Supreme Court had occasion to consider a similar provision. Clause (aa) added to Section 7-A (3) of the Industrial Disputes Act by the Industrial Disputes (Amendment) Act No 86 of 1964, provided that a person shall not be qualified for appointment as a Presiding Officer of a Tribunal unless he has for a period of not less than three years been a District Judge or an Additional District Judge. The Supreme Court held that the requirement of this provision was satisfied in a case where a person held the post for the requisite period even though he had not actually worked in that post for that period.

In that case Sri Dutta was appointed as Presiding Officer on 7th December, 1965. Sri Dutta was appointed as a temporary Additional District Judge on 16th August, 1954. He worked as such till March 8, 1957, when he was appointed Registrar of the High Court of Assam in an officiating capacity. On 30th June, 1959, he retired from the office of the Registrar. It was held that Sri Dutta continued to hold the office of the Additional District Judge while he was working on the post of the Registrar and that period will be counted for the purpose of the required qualification. The period between 16th August, 1954 and 24th April, 1958, when Sri Dutta was confirmed, was held to be countable. Sri Dutta had been prior to his appointment on 7th December, 1965, the Presiding Officer of a Labour Court for about two years. He was hence not continuing to hold the post of the District Judge on the date of his appointment. This was not held to be a disqualification. This decision is in line with the Division Bench of our Court. Clause (2) of Article 233 does not, in my opinion, restrict the field of eligibility to only such advocates or pleaders who were actively practising till the date of their appointment.

10 Sri Prayag Narain has in his counter-affidavit mentioned the periods during which he was practising at the Bar. That period totals to more than seven years. He was thus qualified for appointment. It has not been alleged in the petition that Sri Prayag Narain was not recommended by the High Court. His appointment satisfied the requirements of Article 233 of the Constitution.

11. Mr Jagdish Swarup initially argued that Rule 8 (number of appointments to be made) and the proviso of Rule 19 (appointment) of the U P Higher Judicial Service Rules, 1953, infringed the guarantee of equality mentioned in Article 18 of the Constitution. During the course of arguments,

learned counsel, however, shifted his stand. He urged that the U. P. Higher Judicial Service Rules in their entirety became void as a result of the Supreme Court decision in Chandra Mohan's case, AIR 1966 SC 1987. The U. P. Higher Judicial Service Rules have been framed under the proviso to Rule 809 of the Constitution. They relate to the conditions of service of the cadre of District Judge. They deal with the strength of the service, recruitment including the procedure for it, qualifications, appointment, probation and confirmation, seniority and the scales of pay admissible to the members of the service. Rules 25 to 32 deal with other ancillary and subsidiary matters like canvassing, loyalty, knowledge of Hindi, regulation of allowances, pension, etc.

Part V of the rules consisting of Rule 13 dealt with the procedure for recruitment by promotion. Part VI (Rules 14, 15 and 16) provided for the procedure for direct recruitment. Appointment by promotion as well as by direct recruitment was to be made at the recommendation of the Selection Committee consisting of two Judges of the High Court and the Judicial Secretary to the Government. The Supreme Court held that the rules providing for recruitment were void because they contravened Articles 233 (1) and 233 (2). Under the rules the Governor consults the Selection Committee and acts on its recommendations. He does not consult the High Court. The Supreme Court further declared that the rules empowering recruitment from Judicial Officers were also unconstitutional. This would nullify Cl. (b) of sub-rule (2) of Rule 5 which provided for eligibility for direct recruitment and included judicial officers also. The direct effect of the Supreme Court's decision was to nullify Parts V and VI of the rules which postulated recruitment through the Selection Committee. The other rules like Rule 5 dealing with the source of recruitment, Rule 7 providing for reservation of seats for scheduled caste, Rule 8 indicating that the Governor shall decide the number of recruits to be taken at each selection from each of the two sources of recruitment specified in Rule 5 and also providing for the quota from the two sources, would not be hit by the principle enunciated by the Supreme Court. Similarly, Part VII dealing with the appointment, probation and confirmation was not dealt with by the Supreme Court nor declared to be unconstitutional.

12. The proviso to Article 309 confers powers to make rules to govern the conditions of service. The conditions of service mean and include various aspects like appointment, scale of pay, confirmation, seniority, promotion, payment of pension, etc. (See Accountant-General, Bihar v. Bakshi, AIR 1962 SC 505 and General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36). Article 233 deals with only one aspect of the conditions of service, namely, appointment to the post of the District Judge. That has to be made in consultation

with the High Court. The rules did not comply with this condition. The rules relating to appointment alone would be bad on that ground. Rules relating to other aspects of conditions of service having been validly framed under Article 309, would remain unaffected by the non-compliance with Article 233 (1) of the Constitution.

13. The learned counsel suggested that the rules relating to recruitment and appointment having been declared void, the rest of the rules would not be severable and will consequently be bad. Prior to the coming into force of the rules with effect from 1st April, 1953, the post of District Judge was governed by the U. P. Civil Service (Judicial Branch) Conditions of Service Rules, 1942. Officers recruited under the previous rules but holding office of the District Judge when the 1953 Rules came into operation, were also generally governed by the latter. The exceptions were mentioned in Rules 29 and 30. In so far as these rules were applicable to persons appointed otherwise than through the Selection Committee prescribed thereunder, they would continue to remain in force.

14. The Supreme Court directed the State not to make any appointment under these rules. That direction would obviously operate in futuro. The Supreme Court also declared that the rules relating to recruitment were unconstitutional and the appointments made thereunder were illegal. Since no relief for ousting the illegally appointed respondents was prayed for in the petition, no such order was made. The declaration would render all appointments made under the rules through the agency of the Selection Committee illegal and unconstitutional, but all such officers, who were not parties to the case before the Supreme Court, would not be deemed to have vacated their offices automatically. The result of accepting the submission for the petitioner would be that all those officers would be deprived of the benefits of the rules relating to the various aspects of their conditions of service. Even the payment of salary in the pay-scale given in the rules would be illegal. That will not be desirable or feasible.

15. For all these reasons the rules relating to recruitment would be severable. The rest of the rules being valid, would continue to remain in force.

16. This position would be in consonance with Article 233-A. Under it no existing appointment would be deemed ever to have become illegal or void even though it may have been made otherwise than in accordance with Article 233. Thus, all such appointments would be deemed to have been made validly. The employment of the Higher Judicial Service Rules for making such appointments would also, as a necessary consequence, be deemed to be valid. In relation to such appointments, the rules would be deemed to have remained in operation because the unconstitutionality arising

by reason of non-compliance with Art. 233 has been taken away Article 233-A operates retrospectively. So, the rules would be deemed never to have become unconstitutional. They will continue to govern all officers appointed thereunder, including the present parties, between 1st April, 1953 and 21st December, 1968. The point that R. 8 and the proviso to Rule 19 violated Art. 16 need not be discussed because it was not argued at the hearing.

17 Having thus cleared the ground, I will now come to the principal point. Mr Jagdish Swarup attacked the Twentieth Amendment on two grounds. He urged that an administrative action was not part of the Constitution. Cunnig of any illegality in an executive action would not in law be an amendment of the Constitution within the meaning of Article 368 of the Constitution. In the next place, he urged that Art. 233 A affects the operation of Arts 142 and 144 of the Constitution. These Articles are included in the proviso to Article 368. Even an indirect change in them would require the ratification by the State Legislatures. No such ratification having been obtained, the Twentieth Amendment was unconstitutional.

18 Mr Jagdish Swarup submitted that keeping in view the correct connotation of the term "Constitution" and the implicit and implied limitations on the power of amendment thereof, an attempt to validate an executive action would not be an "amendment" of the Constitution. In the recent case of *L. C. Golak Nath v. State of Punjab* AIR 1967 SC 1643, the Supreme Court adverted to the question whether there are any implied limitations on the power possessed by Parliament to amend the Constitution. Subba Rao, C J, speaking for himself and four other Judges (Sikri, Shah, Shelat and Vaidialingam, JJ), held that Article 368 only provides the procedure for making amendments to the Constitution but does not confer the power of amendment either expressly or impliedly. The power vests in Parliament by reason of Articles 245, 246 and 248 read with Schedule VII, List 1, Item 97. The residuary power of Parliament takes in power to amend the Constitution. He held that there is nothing in the nature of the amending power which enables Parliament to override all the express or implied limitations imposed on that power. He did not elaborate or specify the extent or nature of the implied limitations.

It was argued before the Supreme Court that the expression "amendment" in Article 368 has a negative content and in exercise of the power of amendment, Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument, for its better effectuation. The fundamentals of the Constitution could not be obliterated. The learned Chief Justice observed that there is considerable force in this argument but he did not express a final

opinion on the point (para 40). It is thus clear that it was not even argued that an individual provision of the Constitution cannot be modified in order to offset judicial declaration of an executive action as invalid.

Hidayatullah, J., who concurred with the conclusions reached by Subba Rao, C J, and thus constituted the majority with him, observed that the question of implied limitations has evoked a spate of writings (paragraph 156), many authors and authorities holding that there are no implied limitations. He also mentioned that the opposite view has been strenuously stressed by reputable authors. His Lordship analysed the position to be that the principle that there are no implied limitations, flows from the doctrine that the process of amendment of a Constitution is not the ordinary legislative process but the exercise of a peculiar power. He rejected the premise. He seems to be of the opinion that there are limitations on the power of amendment, but there is nothing in his judgment to suggest that one of the limitations is that a provision of the Constitution could not be changed or altered with the intention to validate an executive action. His Lordship noted that many of the amendments to the Constitution have been made with the intention to nullify the decisions of Courts including the Supreme Court. His Lordship held that the intention behind Section 3 of the Seventeenth Amendment Act of 1964 (which added 44 State Acts to the Ninth Schedule) was to silence the courts and not to amend the Constitution. This was *ultra vires* the amending process (paragraph 191).

So this was one implied limitation. But, provisions of the Constitution could be altered or changed. Herman Finer (*The Theory and Practice of Modern Government*, Revised Edition, p 127), states that an amendment could deconstitute and reconstitute the provisions. Doing that would not be *ultra vires*. Is validation of an executive action within such an implied limitation? In my opinion not. The 20th Amendment added Art. 233A to the Constitution. In substance it modified the provisions of Article 233 (1) with retrospective effect. Thus, the *path* and *substance* of the amendment was to deconstitute and reconstitute the scope of Article 233 (1) with the intention to achieve a synthesis between necessities of the administration and the declaration of law made by the Supreme Court. This would be far beyond the purview of the implied limitation contemplated by Hidayatullah J. His Lordship noticed that the First and the Fourth amendments were brought about to nullify decisions of courts which had held Legislative and executive action invalid. That result was brought about by *inter alia* amending Article 31 and introducing Article 31A to the Constitution. This was not held to be beyond the amending process. On a parity of reasoning, the 20th amendment of the Constitution would equally be within the amending power.

19. The minority opinion of Wanchoo J. held that Article 368 conferred the substantive power to amend. The amending process is the constituent power, distinct from the legislative power of Parliament. Such constituent power knows no implied limitations. On this view the argument of Mr. Jagdish Swarup would not be valid. Bachawat J. also rejected the submission that there are implied limitations on the amending power. Ramaswami J. also agreed with Wanchoo J.

20. Mr. Jagdish Swarup invited my attention to the definition of the concept of Constitution as given by various writers. Herman Finer (The Theory and Practice of Modern Government, Revised Edition, p. 116) calls a "Constitution" as "an autobiography of a power relationship". Garner (Political Science and Government, 1955 Edition, p. 456) enumerates definitions given by various authors. He has referred to Cooley (Constitutional Limitations, 7th Edition, p. 4) as defining a Constitution as "the fundamental law of the State, containing the principles upon which government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided and the manner in which it is to be exercised". Cooley added that "perhaps an equally complete and accurate definition would be the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised". The modifications of such rules with a view to save administrative action would be an amendment of a Constitution as so defined.

21. W. Ivor Jennings (in the Law and the Constitution, 3rd Edition, p. 61) says that a written constitution is the fundamental law of a country, the express embodiment of the doctrine of the rule of law in one of its senses. All public authorities — Legislative, administrative, and judicial — take their powers directly or indirectly from it. Constitution determines these authorities and the general powers which they exercise. At p. 62 the learned author clarified that a written constitution deals with the selection of legal rules set out in the document and with their meaning and application. A modification of the meaning and application of the rules set out in the document of the Constitution would clearly be an amendment thereof. So, a provision like Article 238 conferring power on administrative head i.e. the Governor would be within the concept of a Constitution. Its alteration will be nothing else than its amendment. None of these authorities have anywhere indicated that a measure to validate an administrative action would be beyond the amending process.

22. In respect of the second ground the scope of Article 368 and of Articles 142 and 144 will have to be examined and then the impact of Art. 238-A thereon will have to be seen. According to the majority opinion in Golak Nath's case, AIR 1967 SC 1643 (Supra) Article 368 lays down the procedure

for amendment of the Constitution. Its proviso requires that if an amendment of the Constitution seeks to make any change in the articles mentioned in clauses (a) to (e) thereof the amendment shall also require to be ratified by the Legislatures of not less than one half of the States. Articles 142 and 144 are included in Clause (b) of the proviso. Mr. Jagdish Swarup submitted that the term "change" in the phrase "seeks to make any change" occurring in the proviso, signifies not only a verbal alteration in the language of the entrenched articles, but also takes in the concept of the effect, scope or the operation of those articles being adversely affected. To emphasise this he placed reliance upon "Words and Phrases", Permanent Ed. Vol. 6, p. 512, where the shades of differences in the meanings of the words "amend", "modify", "alter" and "change" have been mentioned. It is unnecessary to refer to them because in Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845 the Supreme Court held that for construing the word 'amend' in the context of Article 368 reliance on the dictionary meaning would be singularly inappropriate.

23. The Supreme Court has had occasion to consider the connotation of the word "change" in the proviso to Article 368 more than once. In Shankari Prasad Singh v. Union of India, AIR 1951 SC 458 it was argued that Articles 31A and 31B sought to change Articles 132, 136 and 226 of the Constitution because they affected the powers conferred by them. The Court negatived this submission. It held that the amendment introducing these Articles only excluded certain classes of cases from the purview of the Courts. The powers of the Courts were not curtailed. After the amendment there would be no occasion for the exercise of those powers in the class of cases covered by the amending provision. The amendment did not introduce a change either in terms or in effect in Articles 132, 136 and 226 of the Constitution. So, an effect of the entrenched Articles, even though no verbal alteration is made, would be relevant.

24. In Sajjan Singh's case, AIR 1965 SC 845 (Supra) the Constitution 17th Amendment Act, 1964, came up for consideration. It amended Art. 31-A of the Constitution. It was argued that the effect of the amending provision was to curtail the powers of the High Court conferred by Art. 226 of the Constitution. Gajendragadkar, C. J. speaking for the majority held that the answer to the question whether an amendment seeks to make a change in the Articles mentioned in the proviso, would depend upon the effect of the amendment on them. If the effect of the amendment is indirect, incidental, or is otherwise of an insignificant order, the proviso will not apply. The effect ought to be judged in the light of the pith and substance test i.e. to say the true nature and character of the amending provision ought to be seen. The amendment must be scrutinised in its entirety. To determine the pith and sub-

stances test, it would be relevant to recall the legislative history of the amendment and to see its scope object and genesis

It will be relevant to ask: Does the amendment purport to affect any Article directly or in any appreciable manner? So if Article 233A affects Article 142 or 144 directly or in any appreciable manner the 20th amendment would require ratification.

25 The significance of the phrase "seeks to make any change" in the proviso to Article 368 was canvassed before the Supreme Court in Golak Nath's case, AIR 1967 SC 1643 (Supra). The majority opinion, however did not deal with it. Wanchoo J (for himself Bhargava and Mitter JJ) held (in paragraphs 104 to 107) that primarily the change must actually be in the terms of the provision concerned. An indirect effect on the entrenched provisions would not be enough but, referring to Sajjan Singh's decision, he observed that if an amendment directly affects the entrenched Article and necessitates a change thereunder then recourse must be had to ratification under the proviso. His Lordship illustrated the principle Article 226 confers power to issue writs for the enforcement of any of the rights conferred by Part III and for any other purpose. If Part III is completely deleted by an amendment, it will necessitate an amendment of Article 226 also and deletion therefrom of the words for the enforcement of any of the rights conferred by Part III.

If the amendment is silent as to the necessary consequential amendment in Article 226, it can then be said that deletion of Part III necessitates change in Article 226 also and, therefore, ratification was in fact provided for amendment of Article 226. He took another example. Article 52 provides that there shall be a President. This Article is not mentioned in the proviso Article 54 provides for the election of President. Article 55 lays down the manner of election. Arts 54 and 55 are entrenched Articles. His Lordship held that if Article 52 was amended so as to abolish the office of the President, it will necessitate a change in Articles 54 and 55. Even if the amendment does not make the necessary consequential changes, it would require ratification. The test, therefore, was whether the amendment directly necessitates a change in an entrenched article.

26 The legislative history and genesis of the 20th Amendment is a matter of general knowledge. As a result of the decision in Chandra Mohan's case, AIR 1966 SC 1987 (Supra) the administration of justice in this State was virtually paralysed. The 20th amendment respected the interpretation of the Supreme Court on the content of the requirement of Article 233 as to consultation with the High Court. It by implication accepted that interpretation but, for reasons of administrative necessity it modified the effect of Article 233 in respect of past appointments. The object of this amendment does not appear to have been to affect

the powers of the Supreme Court, but this does not conclude the matter. The question whether it directly or in any appreciable manner affects Article 142 or 144 remains to be considered.

27 Article 142 (1) confers power on the Supreme Court to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Then it provides that any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made in such manner as the President may by order prescribe. In *K. M. Nanavati v State of Bombay* AIR 1961 SC 112 at p 122 paragraph 18 it was observed that Article 142 contains no words of limitation and in the fields covered by it, it is unfettered. Article 144 provides that all authorities civil and judicial in the territory of India shall act in aid of the Supreme Court.

28 The question is what is the place and scope of Article 142 (1) in the scheme of the Constitution. Article 141 provides that the law declared by the Supreme Court shall be binding on all Courts in India. This Article provides a binding efficacy to the decisions of the Supreme Court as a precedent. The efficacy of a declaration of law by a Court lasts only so long as the particular law interpreted is in existence. See *Balwant Rao v Bajirao* AIR 1921 PC 59 and *Deen Chand Jam v Board of Revenue U.P., Allahabad*, 1966 All LJ 118=(AIR 1966 All 412). If by an amendment, the law is changed, the amendment would not affect Article 141 because the declaration itself would come to an end with the change of the law.

29 Article 142 is not an application of the doctrine of *res judicata* either. On its terms this Article does not make the decree binding on the parties in any subsequent litigation.

30 In *Sajjan Singh's case*, AIR 1965 SC 845 (Supra) it was observed (paragraph 16) that the Legislature can validate laws which have been declared invalid by Courts retrospectively. It can also provide for the intended validation to take effect notwithstanding any judgment, decree or order of a Court to the contrary. This would amount to review of a Court's decision and in a sense would be exercise of the judicial function, in a case where the Court's decree in the particular cause, in which it was made, is sought to be nullified. The second part of Article 142 (1) by conferring a constitutional status of enforceability prohibits such usurpation. This aspect may be examined in its historical perspective. The validity of such an exercise of judicial function arose while the Government of India Act 1935 was in force. Under it, there was no provision like Article 142 (1).

31 In *Piero Dusadh v Emperor*, AIR 1944 FC 1 it was held that as a general proposition it may be true enough

to say that the legislative function belongs to the legislature and the judicial function to the judiciary. Such differentiation of functions and distribution of powers are in a sense part of the Indian law as of the American law. Spens, C. J. observed that an examination of the American authorities will show that there the rule was that the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Courts in the exercise of their undoubted authority have made.

His Lordship pointed out that this development was influenced not merely by the simple fact of distribution of powers, but by the pre-existing constitutional provisions in certain State Constitutions positively forbidding the Legislature from exercising judicial powers. The learned Chief Justice noted that in India the legislature has more than once enacted laws providing that suits which had been dismissed on a particular view of the law must be restored and retried. Section 31 (2) of the Limitation Act, 1908, and the Public Suits Validation Act (11 of 1932) are such instances. Debt relief legislation in the various provinces provided even for the reopening of decrees passed inter partes. His Lordship felt that in view of the history of the rule in America, it would be questionable whether it would be right to apply the same rule in this country.

32. Spens, C. J. further observed that the limitation was derived by the American Courts from the 5th and 14th Amendments whereunder no person could be deprived of life, liberty or property without due process of law. Due process of law was interpreted to mean the judicial process and not the legislative process. Under the then prevailing Constitutional law of India there was no corresponding provision to the 5th and the 14th amendments. The principles of British Jurisprudence applicable in this country as to the sacredness of personal freedom, was not part of the Constitutional law. It was only principle of private law. He observed:—

“While its enactment as an article of the Constitution would have placed it beyond the power of the Indian Legislature to alter it, the position must be different so long as it remains a rule of private law, however cardinal and fundamental.”

Referring to this decision, Chagla, C. J., speaking for the Full Bench in Gulabrao Keshavrao Dhole v. Pandurang Bhanji Dhomne, AIR 1957 Bom 266 (FB), observed:

“It is true that this decision was given in 1944 before our Constitution was enacted and it may be that after the enactment of our Constitution the position under our law and the American law has to a certain extent approximated; but this would only be in this sense that if the Courts declared that a particular Act or a particular law contravened the fundamental rights of a citizen, it may be that the Legislature could not undo the decision of the Court because the Courts are constituted the custo-

dian of fundamental rights of the citizen and it is for the Courts to uphold those fundamental rights.”

33. Article 142 of the Constitution, in my opinion, approximates the legal position in this country still more with the American rule that the Legislature could not reverse decisions of Courts or reopen adjudicated controversies. The second part of Art. 142 (1) by guaranteeing the enforceability of the decree or order of the Supreme Court read with Article 144, is a restriction on the legislative power to undo the effect of that decree or order in respect of the cause or matter in which it was rendered. If a legislative enactment seeks to make unenforceable the decree or order of the Supreme Court in relation to the cause and the parties between whom it was made, such law would be void for contravening Article 142. According to the majority in Golak Nath's case, AIR 1967 SC 1643 (supra), the power to amend the Constitution is legislative in its nature. An amendment having that effect would directly and substantially affect Article 142 (1). It would necessitate a change in Article 142 (1).

34. In Khem Chand v. Union of India, AIR 1963 SC 687, while dealing with the argument that Rule 12 (4) introduced by the President of India in the Central Civil Services (Classification, Control and Appeal) Rules, 1957, went against the directions of the Supreme Court as contained in its decree passed in Khem Chand v. Union of India, AIR 1958 SC 800 and thereby contravened Articles 142 and 144. Dasgupta J. observed (paragraph 15):

“If the decree of this Court had directed payment of arrears of appellant's salary and allowances and the effect of the rule made by the President was to deprive him of that right, there might perhaps have been scope for an argument that the rule contravened the provisions of Article 144.”

35. Thus, if the effect of a law was to nullify the declaration or the directions contained in a decree of the Supreme Court, Article 142 would be contravened. In Chandra Mohan's case, AIR 1966 SC 1987 (supra), the Supreme Court made the following order:—

“In the result, we hold that the U. P. Higher Judicial Service Rules providing for the recruitment of District Judges are constitutionally void and, therefore, the appointments made thereunder were illegal. We set aside the order of the High Court and issue a writ of mandamus to the first respondent not to make any appointment by direct recruitment to the U. P. Higher Judicial Service in pursuance of the selections made under the said Rules.....”

This contained a specific declaration or direction that the appointments made under the Higher Judicial Service Rules were illegal. That order was in virtue of Art. 142 (1) enforceable between the parties to that case. If the Twentieth Amendment has the effect of rendering unenforceable the declaration or

directions contained in the order in relation to the persons who were parties to Chandra Mohan's case AIR 1966 SC 1937 (that is to say respondents 13 14 and 15) it would directly and substantially affect Art. 142 of the Constitution, because the second part of Article 142 (1) would become completely nugatory in respect of that order.

36 If the effect of Article 233-A had been to create a fiction that Chandra Mohan's case was never pending before the Supreme Court, there may have been scope for the argument that the consequential effect on Article 142 (1) was incidental or insignificant. But that is not the case. Art. 233-A recognises the existence of the decree or order of the Supreme Court. It respects it in relation to Judicial Officers and for the future. It validates only past appointments made by promotion or by direct recruitment from members of the Bar. It does so notwithstanding any judgment, decree or order of any Court. On its terms it applies to the appointments of officers who were parties to Chandra Mohan's case AIR 1966 SC 1937 namely the present respondents Nos 13 14 and 15. Under Article 233-A their appointments also are to be deemed never to have become illegal or void. If Article 233-A were to prevail, the decree of the Supreme Court would not be enforceable. Article 142 is thus contravened and nullified in relation to the decree in Chandra Mohan's case. AIR 1966 SC 1937.

To have the full play of its amplitude Article 233-A necessitates a change in Article 142. Article 142 would be deemed to have been modified so as to make it inapplicable to the decree of the Supreme Court in Chandra Mohan's case, AIR 1966 SC 1937. Article 142 being an entrenched provision such a change could be brought about only under the proviso to Article 368 by obtaining the requisite ratification. The Twentieth Amendment was silent as to this necessary consequential amendment in Article 142. It would not be valid without ratification, even according to the opinion of Wanchoo J in Colak Nath's case (supra). The Twentieth Amendment not having obtained the requisite ratification was ultra vires the amending power of Parliament, in so far as it affected the appointments of the officers to Chandra Mohan's case. AIR 1966 SC 1937. It could not validate the appointments of the respondents Nos 13 14 and 15.

37 Either the legislative history or the language of Article 233-A does not indicate that it was intended to work as a whole or not at all. If for any reason it is held inapplicable in respect of a few officers only its organic scheme would not be destroyed. In my opinion, Article 233-A is severable. The Twentieth Amendment introducing it would be valid in respect of the other officers.

so far as it makes valid the appointments of the parties to the Supreme Court decision in Chandra Mohan's case, AIR 1966 SC 1937. It is severable. The rest of it remains valid.

39 The petitioner wants a quo warranto to oust respondents Nos 13 14 and 15 from the post of District Judge. The learned Standing Counsel invited my attention to the decision in *The King v William Cowell*, (1825) 6 Dow & Ry KB 336 for the submission that since the petitioner's appointment suffered from the same illegality as was imputed to respondents Nos 13 14 and 15 he was incapacitated from applying for this relief. In that case, relying on *Rex v Cuddihy*, it was held that the Court will not file a quo warranto information against one corporator for defect of title at the instance of another corporator whose title is equally deficient. There the only defect in title was the swearing in at a wrong place. It may not be applicable where the appointment is unconstitutional. When quo warranto lies on constitutional grounds it should go. Moreover the principle of this case does not appear to be applicable. There is no material on the record before me to establish that the petitioner was appointed as officiating Civil and Sessions Judge through the agency of the Selection Committee contemplated by the Higher Judicial Service Rules. Learned Standing Counsel urged that Clause (2) of Article 19 of the Rules authorised the Governor to make appointments in temporary and officiating vacancies as far as may be from the waiting list, in force at the time of appointment, as prepared under Rule 13. The waiting list under Rule 13 is prepared in accordance with the recommendations of the Selection Committee but Clause (2) applies "as far as may be". So the Governor may make an officiating appointment from persons not mentioned in the waiting list. There is no assertion in any of the affidavits that the petitioner was on the waiting list. It cannot, therefore be said that his officiating appointment was illegal because it was made through the Selection Committee. I cannot say that the petitioner's appointment was illegal, much less that the illegality was of the kind attaching to respondents Nos 13 14 and 15.

40 In the result, the petition is allowed in part. Respondent No 13 Riksheshwar Prasad, respondent No 14 R. C. Bajpai and respondent No 15 Behanji Das are declared to be holding the post of District Judge (which includes the post of Civil and Sessions Judge) illegally and without the authority of the Constitution. A writ in the nature of quo warranto is issued ousting all of them from their offices. No order is made as to costs.

GGM/D.V.C.

Petition partly allowed.

38. The conclusion is—The Twentieth Amendment is unconstitutional and void in

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RAJESHWARI PRASAD, J.

Jauhari Mal and another, Applicants v. The State of U. P., Opposite Party.

Criminal Revn. No. 2057 of 1965 connected with Criminal Misc. No. 3130 of 1965, D/-8-8-1967, against judgment of Second Addl. S. J., Muzaffarnagar, D/-16-10-1965.

(A) Criminal P. C. (1898), Ss. 190 (1) (c) and 173 — Submission of final report by Police — Magistrate not agreeing with it — Ordering submission of fresh chargesheet after re-investigation — Prosecution on fresh charge-sheet is illegal.

The Magistrate has no jurisdiction to require the police to submit fresh charge-sheet after re-investigation, where the police has already submitted final report that the alleged crime cannot be worked out, though the Magistrate certainly has the power to require further investigation to be made.

(Para 7)

Where the Superintendent of Police, duly authorised under S. 7 of the Telegraph Wires (Unlawful Possession) Act (1950), files a complaint of an offence committed within the meaning of that Act (1950), not on his own initiative but on direction of the Magistrate to submit fresh charge-sheet after disagreeing with the final report made by the police, the prosecution started on such complaint is illegal.

(Para 7)

(B) Criminal P. C. (1898), Ss. 190 (1) (c), 192 — Transfer of case from one Magistrate to another — Previous Magistrate found to have committed illegality in prosecuting case — Dismissal of case on that ground by second Magistrate is valid.

Where a case is transferred from the file of one Magistrate to another, the Magistrate seized of the case has power to dismiss the same on the consideration that the complaint is not maintainable inasmuch as it had emerged out of an illegal order passed by the Magistrate from whom the case is transferred and this does not amount to sitting in appeal over the order of the previous Magistrate.

(Para 7)

D. N. Wali and G. P. Tandon, for Applicants.

ORDER: This petition under Sec. 561-A, Cr.P.C., and the Revision Petition No. 2057 of 1965 connected with that case can be disposed of by a common order because the subject-matter of both is the same. The applicants of this petition are Sri Johri Mal and Kumari Arun Bala, minor daughter of Sri Johri Mal. They have prayed that this Court may quash the proceedings pending against the applicants in Criminal Case No. 614 of 1964 under Section 7 of the Telegraph Wires (Unlawful Possession) Act. The prayer in the revision petition is also to the same effect by asking for the setting aside of the order passed by the revisional Court and to discharge the applicants.

2. It appears that the police got information that the petitioners were in possession of some telegraph wire as well as stolen utensils kept in their shops. Search of the shop was made and some telegraph wire was recovered. The police, however, found that crime could not be worked out and, therefore, they made a final report. When the final report came up for consideration before Sri Jai Dayal, a Magistrate, First Class, of the District, he directed the police to make fresh investigation and to submit a charge-sheet. Such a charge-sheet was subsequently submitted and on the basis of that charge-sheet a complaint under Sec. 7 of the Telegraph Wires (Unlawful Possession) Act was made by the Superintendent of Police against the petitioners. That complaint was first filed in the Court of Sri Jai Dayal, learned Magistrate mentioned above. An application for the transfer of the case appears to have been moved whereupon the learned Magistrate made the following order:—

"D.M.—In this case under S. 5 of Telegraph Wires Act, the police submitted a final report. But I declined to agree with the report and directed the police to submit charge-sheet after reinvestigation. Now the charge-sheet has been received. The accused desires that the case be transferred to some other Court under Section 190 (1) (c), Cr.P.C. I have no objection. It may kindly be sent to some other Magistrate."

3. When the case was transferred to the Court of Mr. A. N. Khare, Sub-Divisional Magistrate (S.D.M., Jansath), he ordered that the complaint submitted by the Superintendent of Police against Jauhari Mal and Kumari Arun Bala be dismissed as not maintainable on account of the reasons recorded by him in his order. He proceeded to discharge the petitioners. The view taken by Mr. Khare, learned Sub-Divisional Magistrate, was that the order of the learned Magistrate Mr. Jai Dayal requiring the police which had made a final report in the matter, to submit a charge-sheet after reinvestigation was illegal, and that a complaint filed on the basis of such a charge-sheet was not maintainable in law. Mr. Khare noticed the various decisions relating to the point and came to the conclusion that the Magistrate did not have the jurisdiction to require the police to submit a charge-sheet in case where the police had made a final report. The Magistrate certainly would have the power to require further investigation to be made but to make a direction for submitting a charge-sheet there was no sanction in law. It is on such consideration that the complaint was dismissed by Mr. Khare and the petitioners were discharged.

4. The State filed a petition in revision before the Sessions Judge, Muzaffarnagar, which was disposed of by Mr. Vikram Singh, Second Additional Sessions Judge, Muzaffarnagar, by his order dated 16th October, 1965. The learned Sessions Judge allowed the revision petition and set aside the order

of the learned Magistrate by which the learned Magistrate had discharged the petitioners.

5. It is this order of the learned Sessions Judge which is sought to be set aside and quashed by both, the petition under Section 561-A, Cr.P.C., as well as the connected revision petition.

6. The view taken by the learned Sessions Judge is that whatever may have happened earlier to the filing of the complaint, the complaint itself had been filed by the Superintendent of Police, who was an officer authorised to make such a complaint under Section 7 of the Telegraph Wires (Unlawful Possession) Act, 1950. This being so, according to the learned Sessions Judge, the complaint could not be said to be tainted with any infirmity and consequently could not be dismissed. The learned Sessions Judge had also observed that there was no charge-sheet on the record, nor was there any final report, nor the alleged order of Sri Jai Dayal, Magistrate directing the police to make further investigation and to submit a charge-sheet against the petitioners. On these two considerations, the learned Sessions Judge proceeded to set aside the order of discharge passed by the learned Magistrate.

7. I am unable to agree with the view taken by the learned Sessions Judge. So far as the absence of the charge-sheet or the order of the learned Magistrate Sri Jai Dayal from the record is concerned, it is sufficient to mention that all these facts were assumed on all hands to be correct before the learned Magistrate Mr. Khare. The learned Magistrate has referred to these papers and it is on the basis of these papers that he proceeded to pass the order of discharge. The facts mentioned by the learned Magistrate in his order, therefore, were not in controversy between the parties at all. There was no justification for the learned Sessions Judge to make an observation with regard to the absence of the papers from the record in support of those undisputed facts. The view of the learned Sessions Judge with regard to the maintainability of the complaint filed by the Superintendent of Police, is not quite correct. The Superintendent of Police undoubtedly had the authority to make a complaint of an offence committed within the meaning of the Telegraph Wires (Unlawful Possession Act), but then he had to file the complaint on his own initiative. It may be that before filing the complaint, the Superintendent of Police could validly require an investigation to be made by the police and to act upon that investigation and to proceed to file the complaint on the basis thereof. But in the instant case, it is obvious that the Superintendent of Police did not take any initiative in the matter, nor did he require any investigation to be made by the Police. It was Sri Jai Dayal, the learned Magistrate, who commanded the Police to submit the charge-sheet against the petitioner after dis-

agreeing with the final report, which had been made by the police. The initiative, therefore, must be attributed to that learned Magistrate and not to the Superintendent of Police which finally culminated into the filing of the complaint. Kumari Arun Bala has also been prosecuted as it was held out that when recovery of the telegraph wires was made from the shop of Shri Johri Mal, Shri Johri Mal was absent and Kumari Arun Bala his minor daughter aged about ten years, was present in the shop.

The learned Sessions Judge has also taken the view that Shri Khare, the learned Magistrate, who passed the order assumed the role of an appellate authority against the order of the learned Magistrate Shri Dayal, while passing the order which is the subject-matter of the present revision petition. To my mind, a Magistrate seized of a case had power to dismiss the same on the consideration that the complaint was not maintainable inasmuch as it had emerged out of an illegal order passed by another learned Magistrate. This, therefore, did not amount to sitting in appeal over the order of Shri Jai Dayal, the learned Magistrate, as observed by the learned Sessions Judge. The learned Magistrate seized of the case, was well within his powers to come to the conclusion that the complaint was not maintainable in view of the fact that its origin could be traced to an order of another learned Magistrate which was wholly illegal.

8. I am, therefore, of the opinion that both the petition under S. 561-A, Cr. P. C. and the petition in revision must be allowed.

9. I allow the petition under Sec. 561-A of the Code of Criminal Procedure so also the petition in revision set aside and quash the order passed by the learned Sessions Judge dated 16th October 1965 and all subsequent proceedings thereafter and confirm the order passed by Shri A. N. Khare, Sub-Divisional Magistrate, Jansath, dated 30th March 1965.

DVT/D.V.C.

Petitions allowed.

AIR 1969 ALLAHABAD 242 (V 56 C 501)

R. L. GULATI, J.

Imperial Electric Trading Co., Aligarh, Petitioner v. Industrial Tribunal (II), U.P., Allahabad and others, Opposite Parties.

Civil Misc. Writ No. 5195 of 1963, D/- 24-5-1968.

U. P. Industrial Disputes Act (23 of 1947), S. 6 (1) (3) — When individual dispute becomes Industrial Dispute — Dispute must be sponsored by a union of workers of the company concerned or by a union of workers employed in similar or allied trade — Dispute as to claim for bonus in a company manufacturing electrical goods sponsored by union of workers of metal industry — Workers of metal industry cannot be said to be employ-

LL/AM/G426/68

ed in similar or allied trade as the company manufacturing electrical goods is engaged—Reference by State Government is not competent. AIR 1957 SC 532 and AIR 1960 All 734, Rel. on. (Paras 4, 5 and 6)

Cases Referred: Chronological Paras

(1960) AIR 1960 All 734 (V 47) = J. K. Cotton Manufacturers Ltd., Kanpur v. U. P. Government 4

(1957) AIR 1957 SC 532 (V 44) = 1957 SCJ 566, Newspapers Ltd. v. State Industrial Tribunal, U. P. 4

S. N. Kacker and V. K. Mehrotra, for Petitioner; Standing Counsel, for Opposite Parties.

ORDER: This writ petition under Art. 226 of the Constitution has been filed by Messrs. Imperial Electric Trading Co. of Aligarh, to challenge an order dated 6th November, 1963, passed by the Industrial Tribunal (II), Allahabad.

2. The petitioner is a partnership concern carrying on the business of manufacture and sale of electrical goods in the name and style of Messrs. Imperial Electric Trading Co. (hereinafter called 'the company'). The company has alleged and the same has not been denied that it produces electric table lamps, wall and ceiling fittings, out of brass circles, pipes, electric wires, switches, glass and plastic shades purchased and imported from outside and that it does not carry on any moulding or casting of any metal goods in the factory. The total number of workers employed by the company at the material time was 25, who had formed themselves into a union known as Imperial Electric Trading Company Workers Union, sometimes in 1956; and the said union was registered with the Registrar of Trade Unions, U. P., Kanpur. Sometimes in 1961 this union made radical amendments to its constitution and changed its name to Dhatu Udyog Mazdoor Sangh, Aligarh (hereinafter referred to as 'D.U.M.S.').

In this union all workers employed in the metal industries of Aligarh were entitled to join. According to the allegation of the petitioner company, one Chandra Bhan, the Secretary of D.U.M.S., filed an application before the Additional Regional Conciliation Officer, Aligarh, on 7th March, 1963, claiming two months' bonus for each workman of the company for the year 1961-62. The company filed objections contending, inter alia, that the D.U.M.S. or its secretary were incompetent to raise any dispute with regard to the petitioner's workmen, inasmuch as the D.U.M.S. represented the workmen of the metal industries only. As no settlement could be arrived between the petitioner and the D.U.M.S., the State of Uttar Pradesh by a notification No. 613 (LC)/XVIII-LA-33 (ARG)/1963, dated 9th August, 1963, referred the following matter for adjudication to the Industrial Tribunal (II), U. P., Allahabad.

"Should the employers be required to pay bonus to their workmen for the year 1961-62

(ending on October 28, 1962)? If so, at what rate and with what other details?"

When the Tribunal took cognizance of the dispute, the petitioner raised a preliminary objection to the effect that the D.U.M.S. was not entitled to sponsor the dispute on behalf of the workmen of the petitioner company and as such the reference itself was incompetent. The company challenged the jurisdiction of the Tribunal to adjudicate upon the reference made by the State of Uttar Pradesh. The D.U.M.S. filed its written statement through one Chander Singh, its Joint Secretary. At the request of the company the Tribunal proceeded to decide the preliminary objection before embarking on the adjudication of the dispute which related to the payment of bonus. The Tribunal framed the following two issues on the preliminary objections of the company:

"(1) Is the Dhatu Union Mazdoor Sangh, Aligarh, competent to sponsor the case of the workmen concerned? If not, what is its effect?"

(2) Have the workmen espoused their own cause properly?"

After the parties had filed their written statement and led other evidence, the Tribunal by its order dated 6th November, 1963, rejected the preliminary objection. It is against this order of the Tribunal that the present writ petition is directed.

3. The Tribunal has accepted the fact that the members of the D.U.M.S. are the workers employed in Metal Industries of Aligarh, but it has expressed the opinion that the petitioner company can also be said to be engaged in metal industry inasmuch as it employs metal as its raw material. According to the Tribunal, it is the raw material employed which would determine the nature of the trade rather than the finished goods produced by the company. The D.U.M.S. was, therefore, competent to take up the cause of the workers of the petitioner company. The Tribunal has further held that the workmen of the petitioner company had espoused their own cause and that D.U.M.S. was merely representing them which it was competent to do under S. 6-I(3) of the U. P. Industrial Disputes Act.

4. The view taken by the Tribunal on both the issues is manifestly erroneous. In order that a dispute between an employer and its workmen may assume the nature of an industrial dispute, it is necessary that the dispute must be sponsored by the union of the workers of the company concerned or by a union of the workers employed in a similar or allied trade. If these conditions do not exist, any dispute between any employer and its workmen would be only an individual dispute which cannot be referred by the State Government for adjudication under the Industrial Disputes Act (See *Newspapers Ltd. v. State Industrial Tribunal, U. P.*, AIR 1957 SC 532.) In that case also the matter

had been taken up by the U P Working Journalists' Union, Lucknow with which the workers concerned had no concern whatsoever and the matter was not taken up by any union of the workers of the company concerned or by any of the employees of similar or allied trades. The Supreme Court in that case quashed the award which had been affirmed by the Labour Tribunal and had been upheld by a Division Bench of this Court on appeal from the decision of a learned Single Judge.

The decision of this Court in *J. K. Cotton Manufacturers Ltd. v U P Government, AIR 1960 All 734*, is also to the same effect. There also a dispute between an employee of the *J. K. Cotton Mills Kanpur* concern engaged in the manufacture of textile, (sic) was taken up by a trade union called the *Kanpur Mechanical and Technical Workers' Union*. It was held that the *Kanpur Mechanical and Technical Workers Union* was not competent to take up the dispute on behalf of a worker of a textile mill.

5 That the nature of the trade of a company engaged in the manufacture and sale of electrical goods is entirely different from the trade of a company engaged in metal industries admits of no doubt whatsoever. It is not the raw material used in the manufacturing process which determines the nature of the trade, but the finished goods produced by the company that are determinative of the nature of the trade carried on by the company. To quote an instance, it is well known that sand is the raw material used in the manufacture of glass and glass-ware. But a concern engaged in quarrying sand, cannot be said to be carrying on the same trade as a concern engaged in the manufacture of glass and glassware. Aluminium is a metal which is used for the manufacture of utensils and is also used in the manufacture of aeroplanes and other aeronautical parts. It would be absurd to say that the manufacture and sale of aluminium-ware is the same as the manufacture of aeroplanes and aeronautical parts.

6 Under Section 2 of the *Industrial (Development and Regulation) Act, 1961*, the Union Government is authorised to take under its control the industries specified in the First Schedule of the said Act. A clear distinction is made in the First Schedule between metallurgical industries noted at Serial No 1 and the electrical equipments noted at Serial No 5 of the First Schedule. Under the heading "Metallurgical Industry" there are two groups. Group A is of ferrous industries and Group B is of non ferrous industries. Group A itself has seven different industries employing iron as raw material and under Group B there are three industries employing non ferrous metal as raw material. The industries enumerated in Groups A and B may be called allied industries but they certainly cannot be called allied industries to the industries mentioned at Serial No 5 under the heading "Electrical Equipment Industries." Under the heading of the Elec-

trical Equipment, there are as many as eleven different industries according to the nature of the electrical goods manufactured. The view of the Tribunal, therefore that the trade carried on by the petitioner company was similar or allied to the trade carried on by the metal industries is obviously and palpably wrong. That being so the DUMS, which has as for its members the workers of metal industries was not competent to take up the dispute on behalf of the workers of the petitioner company.

7 Now turning to the second question, a reference to sub-section (3) of Section 6-I of the U P Industrial Disputes Act show very clearly that no officer of the union shall be entitled to represent any party unless the union has been registered for one trade only. The manufacture of electrical goods and a metal industry being two separate trades, the DUMS could not be said to have been registered for one trade only for it has as its members the workers of the metal industries as well as the workers of the petitioner company. Moreover this union which was formed in 1961 is admittedly not registered. For that reason also it could not represent the workers of the petitioner company.

8 Mr K. B. Garg, learned counsel for the State then tried to place reliance upon G O No. 646(LL)/XXXVI B-257(LL) 1954, dated 14-7-1964, which is quoted in the case of *J. K. Manufacturers Ltd. (supra)* at p 736. It provides for reference of disputes to Conciliation Boards. It further provides that if reference is to be made on behalf of the workmen, it can be made by a registered trade union of workmen or by a Federation of such trade unions or where no such union or federation exists in relation to any particular concern or industry by representatives not more than five in number of the workmen employed in that concern or industry by election in that behalf by majority of the workmen employed in the concern or industry as the case may be at a meeting held for the purpose.

9 Learned counsel stated that the DUMS was competent to have as its members the workers of the petitioner company as the company had no separate union or federation of its own and in such a case the G O would operate. That may be so but, according to the G O, where a particular concern of industry has no union of its own, the workers of the concern can be represented by their own representatives chosen from amongst themselves and not by a union of a different trade.

10 There is a peculiar feature of this case which may be noticed at this stage. The DUMS which has been impleaded as the Opp Party No 3 in the writ petition has not filed any counter-affidavit nor has it engaged any counsel to represent it before this Court. The petitioner company has alleged that the dispute was not sponsored by any of its workmen, but by the Secretary

of the D.U.M.S., who was not an employee of the petitioner company. The Tribunal has, of course, stated relying on the statement of one Inder Prakash that a resolution was passed by the union in a meeting in which the majority of the workmen were of the petitioner company and they had authorised the D.U.M.S. to represent their case. However, no copy of any such resolution has been filed and the petitioner company has stated in paragraph 16 of the writ petition that no documentary evidence was filed before the Tribunal either on behalf of the D.U.M.S. or on behalf of the petitioner disclosing that the workmen of the petitioner concerned had at any stage sponsored the dispute relating to the bonus for the year in question either before the Additional Regional Conciliation Officer or before the State of Uttar Pradesh. This allegation of the petitioner has not been properly controverted. In paragraph 11 of the counter-affidavit of Shri K. N. Srivastava, there is a denial which is of a very vague nature. No worker of the petitioner company has filed any affidavit to show that the dispute had in fact been raised or sponsored by the workmen of the petitioner company. Obviously, the workmen of the petitioner company do not seem to be interested in prosecuting this dispute. In these circumstances it is rather strange that the petition is being contested by the State of Uttar Pradesh.

11. As a result of this discussion, it must be held that there was no industrial dispute nor had the same been properly sponsored and the D.U.M.S. was not competent either to sponsor the dispute or to prosecute it as a representative of the workers of the petitioner company. The order of Tribunal dated 6th November, 1963, is, therefore, patently erroneous and has to be quashed.

12. The writ petition is accordingly allowed. A writ of certiorari shall issue quashing the order of the Industrial Tribunal, Allahabad, dated 6th November 1963, as also the notification No. 613(LC)/XVIII-LA-33(ARG)/1963 dated 9th August, 1963. The petitioner will be entitled to his costs from the Opposite Party No. 2.
GGM/D.V.C. Petition allowed.

AIR 1969 ALLAHABAD 245 (V 56 C 51)
FULL BENCH

B. D. GUPTA, RAJESHWARI PRASAD
AND A. K. KIRTY, JJ.

State of U. P. and another, Appellants v.
Sure and others, Respondents.

Special Appeal No. 39 of 1967, D/-30-7-1968, from judgment of Single Judge of this Court in C.M.W. No. 3372 of 1963, D/-30-1-1967.

Land Acquisition Act (1894) (as amended by U. P. Act 22 of 1954), S. 17 (1), (2), (1-A) and (4), Ss. 5-A and 6 — Notification

under S. 17 (4) can only be made in cases falling under S. 17 (1) and (2) and not in cases falling under S. 17 (1-A)—Acquisition of land for public purpose of establishing Irrigation Demonstration-cum-Research Farm falling under S. 17 (1-A) — Notification under S. 17 (4) held illegal.

A notification under Section 4 (1) of the Land Acquisition Act declared that the land mentioned in the schedule was needed for a public purpose, viz., for establishing Irrigation Demonstration-cum-Research Farm. This was followed up by another notification dated February 25, 1963, under S. 17 (4) directing that the provisions of Section 5-A of the said Act shall not apply in the case of the land mentioned in the Schedule. Thereafter, notification under Section 6 together with a notification under S. 17 (1) and (1-A) was issued on April 10, 1963. This notification gave direction to the Collector to take possession of land though no award under S. 11 had been made.

Held, that the notification issued under S. 17 (4) of the Act dated February 25, 1963, and the notification issued under Ss. 6 and 17 (1) and (1-A) of the Act were illegal, inasmuch as no such notification could be issued in respect of land to which the provisions of sub-section (1-A) of S. 17 applied — Civil Misc. Writ No. 3872 of 1963, D/-30-1-1967 (All.), Affirmed.

(Paras 6, 11)

The language of S. 17 (4) indicates that a notification under that sub-section can be made only in those cases to which sub-ss. (1) and (2) of S. 17 of the Act are applicable. The power exercisable in case of urgency to take possession of land only for a public purpose before an award is made has been extended by U. P. Legislature by S. 17 (1-A) to cases where the land is acquired for or in connection with the sanitary improvement of any kind or planned development; the Legislature has, however, not authorised the Government to direct that the provisions of S. 5-A shall not apply to acquisition of land other than waste or arable land. Sub-section (1-A) has been added as an independent sub-section and no amendment has been made either in sub-sec. (1) or sub-sec. (4) nor has any separate provision been made for applying sub-section (4) to a case falling under sub-section (1-A) and so sub-sec. (4) cannot be applied to sub-sec. (1-A). AIR 1965 SC 1763 (Reversing AIR 1962 All 221) and AIR 1964 SC 1217, Foll.; AIR 1964 All 353, Ref. (Paras 12, 15)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1763 (V 52) =
1965-2 SCJ 411, Sarju Prasad
Sahu v. State of Uttar Pradesh 6, 15
(1964) AIR 1964 SC 1217 (V 51) =
ILR (1964) 1 All 1, Nandeshwar Prasad v. U. P. Government 15
(1964) AIR 1964 All 353 (V 51) =
ILR (1964) 2 All 622, Shcikh Ghulam Maula v. State of Uttar Pradesh 9, 14

(1962) AIR 1962 All 221 (V 49) =

1962 All LJ 98, Sarju Prasad Sahu
v State of Uttar Pradesh, 13, 14, 15

S N Upadhaya, for Appellants, Standing
Council, for Respondents

RAJESHWARI PRASAD, J. As a result
of the direction given by Division Bench,
this special appeal has been referred for
decision to a Full Bench.

2. The material facts leading up to the
special appeal are these

3. A notification dated February 11,
1963, was published in the U P Gazette
dated February 16 1963 under Section 4 (1)
of the Land Acquisition Act, notifying that
the land mentioned in the schedule was
needed for a public purpose. A number of
plots were mentioned in the schedule which
are situate in village Gursari, Pergana
Garoth, district Jhansi. Some of these plots
belonged to the respondent Shri Suroy and
the other respondents. The purpose for
which acquisition was made as disclosed in
the notification was for establishing Irriga-
tion Demonstration-cum-Research Farm. This
was followed up by another notification
dated February 25, 1963, under Sec. 17 (4)
of the Land Acquisition Act (hereinafter
called 'the Act'). The last notification runs
as hereunder—

"In continuation of notification No H8100/
XXII B dated February 11, 1963, the Gov-
ernor of Uttar Pradesh, being of opinion
that the provisions of sub-sections (1) and
(1-A) of Section 17 of the Land Acquisition
Act, 1894 (No 1 of 1894), are applicable
to the land, is pleased, under sub-section (4)
of the said section, to direct that the provi-
sions of Section 5-A of the said Act shall
not apply in the case of the land mentioned
in the Schedule."

Thereafter, notification under Section 6 to-
gether with a notification under Section 17
(1) and (1-A) was issued on April 10 1963.
This notification gave direction to the Col-
lector, Jhansi, to take possession of land
though no award under Section 11 had been
made.

4. The respondents filed a petition under
Article 226 of the Constitution challenging
the notification made under Section 17 (4)
and the notification made under Section 6
read with Section 17 (1) and (1-A) of the
Act.

5. The main ground on which the peti-
tioner-respondents relied was that the noti-
fication made under Section 17(4) was illegal
inasmuch as no such notification could be
issued in respect of land to which the pro-
visions of sub-section (1-A) of Section 17
applied.

6. The learned Single Judge who heard
the writ petition referred to the decision of
the Supreme Court in Sarju Prasad Sahu v
State of Uttar Pradesh, AIR 1965 SC 1763
and came to the conclusion that the notifi-
cation issued under Section 17 (4) of the Act
dated February 25, 1963, and the notifi-
cation issued under Sections 6 and 17 (1) and

(1-A) of the Act were illegal. The writ
petition was allowed and the aforesaid noti-
fications were quashed.

7. Against the order of the learned Sin-
gle Judge, State of Uttar Pradesh along with
the Land Acquisition Officer, Jhansi, filed
the instant special appeal.

8. When the special appeal came up for
hearing before a Division Bench of this
Court, Mr S S Verma, learned counsel ap-
pearing for the petitioner-respondents, urged
that he wanted to support the order of the
learned Single Judge on a fresh ground.
According to him, unless a notification had
been previously issued under Section 17 (1)
of the Act, no notification under Sec 17 (4)
of the Act could be issued and for that
reason also, the notification made under
Section 17 (4) was illegal.

9. While giving consideration to the
fresh ground urged by Mr Verma, the Divi-
sion Bench observed that it found some diffi-
culty in following the reasoning given by
another Division Bench of this Court in the
case of Sheikh Ghulam Maula v State of
Uttar Pradesh, AIR 1964 All 353. In this
view of the matter, the Division Bench pro-
ceeded to refer the special appeal for deci-
sion to a Full Bench. On account of the
above circumstance, the ground on which
the learned Single Judge had quashed the
notifications could not come up for consid-
eration, on merits, before the Division Bench.

10. Before us, Mr Verma urged—that
apart from the fresh ground that he had
proposed to urge with a view to support the
order of the learned Single Judge, the order
of the learned Single Judge was perfectly
correct even on the ground which found
favour with the learned Single Judge. We,
therefore, considered it appropriate to decide
whether the view taken by the learned Sin-
gle Judge was correct or not before pro-
ceeding to hear the counsel for the respon-
dents on the proposed fresh ground in sup-
port of the order of the learned Single
Judge. In case the view taken by the learn-
ed Single Judge was found by us to be cor-
rect, we would not be called upon to con-
sider the correctness of the new ground pro-
posed by the learned counsel for the res-
pondents for the purpose of maintaining
the order of the learned Single Judge.

11. After hearing the learned counsel
for the parties, we have arrived at the con-
clusion that the view taken by the learned
Single Judge is perfectly correct and the
order of the learned Single Judge, therefore,
must be maintained.

12. It may be recalled that Clause (1-A)
was added to Section 17 by the U.P. Amend-
ing Act, 1954, and it reads as follows.—

"The power to take possession under sub-
section (1) may also be exercised in the case
of other than waste or arable land, where
the land is acquired for or in connection
with sanitary improvements of any kind or
planned development."

Though such a provision was added in Sec-
tion 17, no amendment was made in Sec-

tion 17 (4) and the words "or sub-section (1-A)" were not inserted between the words "sub-section (1)" and "or sub-section (2)". This being so, the language of Section 17 (4) indicates that a notification under that sub-section could be made only in those cases to which sub-sections (1) and (2) of Section 17 of the Act were applicable.

13. In the case of Sarju Prasad Sahu v. State of Uttar Pradesh, AIR 1962 All 221, a Division Bench of this Court took the view that as the purpose behind the addition of sub-section (1-A) could have been achieved by suitably amending sub-section (1) itself, the effect of the addition was that the power to be added by it is to be included in the power conferred by sub-section (1). It was observed that though the form of the amendment was to add a new section, the real effect of the amendment was only to add a few words in the old sub-section (1), i.e., to increase its scope in one respect, and that, consequently, it was not necessary to add anything in sub-section (4). On that reasoning, it was held that the power under sub-section (4) of Section 17 of the Act could also be exercised in respect of a case governed by sub-section (1-A) of Section 17 of the Act.

14. Later on another Division Bench of this Court in the case of AIR 1964 All 353 found it difficult to agree with the view taken by the Division Bench in the case of AIR 1962 All 221 (supra). The case of AIR 1964 All 353 (supra), however, was ultimately decided on other grounds.

15. The case of AIR 1962 All 221 (supra) was, however, taken in appeal to the Supreme Court and the decision of the Supreme Court is reported in AIR 1965 SC 1763. It is that decision on which the learned Single Judge placed reliance in this case and took the view that he did. The decision of the Division Bench of this Court in that case was set aside and the appeal was allowed by the Supreme Court and the notification issued under Section 17 (4) as well as notification issued under Section 6 in that case were set aside. The view taken by the Supreme Court was that the power exercisable in case of urgency to take possession of land only for a public purpose before an award is made has been extended by U. P. Legislature to cases where the land is acquired for or in connection with the sanitary improvement of any kind or planned development; the Legislature has, however, not authorised the Government to direct that the provisions of Section 5-A shall not apply to acquisition of land other than waste or arable land. Reference was made to an earlier decision of the Supreme Court in the case of Nandeshwar Prasad v. U. P. Government, AIR 1964 SC 1217. In the case of AIR 1964 SC 1217 (supra), it was held that Section 17 (1) and Section 17 (4) are independent of each other in the sense that an order under the former one does not necessarily require an order under

the latter. Similarly, Section 17 (1-A) must be independent of Section 17 (4) and an order under Section 17 (1-A) would not necessarily mean that an order under Section 17 (4) must be passed. In that case, it was further observed that if the Legislature intended that provision of sub-section (4) should also apply to a case falling under sub-section (1-A) it has failed to carry out that intention. Sub-section (1-A) has been added as an independent sub-section and no amendment has been made either in sub-section (1) or sub-section (4) nor has any separate provision been made for applying sub-section (4) to a case falling under sub-section (1-A) and so sub-section (4) cannot be applied to sub-section (1-A).

16. In view of the above decision of the Supreme Court, it must be held that the order passed by the learned Single Judge is perfectly correct.

17. The learned Standing Counsel urged that it has been conceded by the petitioner-respondents that the entire area with regard to which petition under Article 226 of the Constitution has been filed was arable land inasmuch as it was under cultivation at the time of the notification. That being so, it has been further urged that the mention of sub-section (1-A) in the notification was the result of inadvertence and mistake and that it should be ignored for the purpose of holding the validity of the notification made under Section 17 (4) of the Act. It has, however, not been disputed by the learned Standing Counsel that the impugned notifications were made not only in respect of the area which is owned by the petitioners but also in respect of land which was held by persons other than petitioners. The learned Standing Counsel, however, conceded that there was no material on the record to indicate the nature of the land held by persons other than petitioners which was the subject-matter of the impugned notifications on the date of the notification, though, at present, the entire area notified has been put under cultivation. It is, however, clear from the notifications themselves that the Governor after applying his mind was of the opinion that some part of the area with regard to which the notifications were proposed to be issued, was land other than waste or arable land it was for that reason that mention of sub-section (1-A) was made in the notification. In view of the contents of the notifications, we must assume that, at least a portion of the land covered by the notification was land other than waste or arable land to which sub-sec. (1-A) applied. The case that mention of sub-section (1-A) was made by inadvertence or mistake had never been taken on behalf of the State in the counter-affidavit filed in this case.

18. The learned Standing Counsel then requested us to grant him a fresh opportunity to adduce evidence and materials to show that the entire area covered by the notifications was waste and arable land. As we find that no such case was put forth on

behalf of the State, we do not consider it appropriate to afford a fresh opportunity to the appellants in this case.

19 In the view we have taken, there is no occasion for entering into the merits of the fresh ground which had been proposed by the learned counsel for the respondents.

20 The special appeal is dismissed but under the circumstances of the case, we direct that the parties will bear their own costs of the appeal. The stay order is vacated.

KSB

Appeal dismissed.

AIR 1969 ALLAHABAD 248 (V 56 C 52)

S D KHARE AND YASHODA

NANDAN JJ

Shanti Sarup Appellant v Radhaswami Satsang Sabha, Dayalbagh Agra and others, Respondents

First Appeal No 340 of 1957 D/22-3-1968 against judgment of 1st Addl. Civil J Agra, D/30-5-1957

(A) High Court Rules and Orders — Allahabad High Court Rules, Chapter XI, R. 9 — Registrar cannot admit appeal — Order for admission is done by the Court — Limitation for filing cross-objection runs from the date of admission by the Court — Civil P C. (1908), O 41, R. 22.

(Para 13)

(B) Civil P C. (1908) O 15, R. 1, 4 — No evidence need be led by any party on a point which is not in issue AIR 1930 PC 57 (1) and AIR 1937 SC 133 and AIR 1939 SC 31 Rel on.

(Para 19)

(C) Societies Registration Act (1860) Ss 1, 2, 3 19 — Certified copy of registration of society under Act produced — Presumption as to signature of persons on memorandum of association — Burden to prove contrary — Evidence Act (1872) S 114, Illus (e)

A Registrar is not expected to register a society unless the provisions of Sections 1 and 2 of Societies Registration Act, have prima facie been complied with.

(Para 21)

Before registering a society he has to satisfy himself that the memorandum, as required by law has been filed in other words, the memorandum must purport to have been signed by at least seven persons and the copy of the rules and regulations of the Society must on the face of it bear the signatures of not less than three of the members of the governing body.

(Para 22)

Once the registration of a society has been proved it can safely be assumed, relying on the presumption which can be raised under Section 114 Illus (e) of the Evidence Act, that the necessary formalities which were required to be observed before a society could be registered by the Registrar had prima facie been observed and at least on the face

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of it the memorandum of association purport ed to have been signed by seven different persons (Para 24)

That is however, a rebuttable presumption and it is always open to a party to plead and to lead evidence to show that what purported to have been done was not, in fact, done and the memorandum of as sociation did not, in fact, contain the signa tures of seven or more persons. Once such plea had been raised and some evidence led in support of that plea, no presumption could be raised under Section 3 of the Societies Registration Act read with Section 114 of the Evidence Act that any particular per son had signed the memorandum of asso ciation. (Para 25)

Where a certified copy of the memoran dum of association has been filed a presump tion arises under Section 19 of the Act, that the persons whose signatures appeared on that memorandum had signed the same unless that presumption was rebutted by satisfactory evidence AIR 1938 PC 73 Dist.

(Para 25)

Where the defendants who alleged that the memorandum of association was not signed by seven persons are not even aware whether or not the memorandum of associa tion had been signed by seven or more per sons and the plaintiffs have produced the certified copy of the registration it is not necessary to prove who the persons were who had actually signed the memorandum of association. Nor is it necessary to file a copy of the memorandum of association.

(Para 28)

(D) Evidence Act (1872), Ss 21, 31 and 115 — In income-tax assessment proceedings against predecessor of defendant in present suit, the predecessor and the defendant al leging that properties belonged to society reg istered under Societies Registration Act — Thus admission is binding on defendant in present suit against him and can be taken as evidence of fact that the society was duly registered under Societies Registration Act, which fact is denied by defendant in the present suit.

(Para 30)

(E) Societies Registration Act (1860) S. 20 — Society for charitable purposes — Some objects religious but dominant object, charit able — Society can be registered.

Societies Registration Act permits registra tion of societies for charitable purposes. A religious society can also be called a chari table society for a religious purpose may also be a charitable purpose and religious society might legally be registered under the provisions of the Act. (1901) ILR 28 All 384 and AIR 1940 Mad 167 and AIR 1939 All 557 Rel on.

(Para 33)

A society some objects of which are chant able and some are religious but the para mount object of which is charitable may be validly registered under the said Act.

(Para 33)

Held on consideration of the objects and byelaws of the plaintiff Radhaswami Sat sang Sabha, Dayalbagh, which was a society

registered under the Societies Registration Act that the paramount object of the Society was charitable, and even though some of the objects were religious, the dominant intention was charitable and that the Sabha could be validly registered under the Act.

(Para 33)

(F) Societies Registration Act (1860), S. 13 — Manner of dissolution of society is indicated in S. 13 — By-law of society that it shall stand dissolved in case no Sant Sad Guru reappeared within two years of the death of the last Sant Sad Guru militates against S. 13 and must therefore be deemed to be invalid and inoperative.

(Para 38)

(G) Societies Registration Act (1860), S. 6 — Civil P. C. (1908), O. 1, R. 10; O. 29, R. 1 — Suit brought in the name of society through its secretary who was named—Suit as laid is valid — The provision in Sec. 6 which begins with the words “may sue or be sued” in the name of one of its officers cannot take away the right of the Society itself to sue or be sued in its own name. Sec. 6 is merely an enabling provision — AIR 1950 All 480 and AIR 1960 Cal 409 and 1956 All LJ 790 and AIR 1946 Bom 516, Rel. on.

(Paras 41, 42)

(H) Religious and Charitable Endowments — Radhaswami faith and Dayalbagh — Tenets of Radhaswami faith and history of Dayalbagh institution at Agra traced.

(Paras 44-50)

(I) Registration Act (1908), Ss. 17, 2 (6) — Document making a gift of cash in favour of a deity does not require registration. AIR 1927 Mad 686, Rel. on.

(Para 64)

(J) Evidence Act (1872), Ss. 34, 114, Illus. (f) — Entries in property register of society showing properties gifted to the society — That the entries were made not immediately but after some time will not by itself make the document inadmissible in evidence to show what properties were gifted.

(Para 76)

(K) Transfer of Property Act (1882), Section 105 — No interest in property passed to occupier — Occupier is licensee and not lessee — Fact that ground rent was being charged would not make him lessee — Easements Act (1882), S. 52.

Where the document by which the residential right was given to the occupier provided that the occupiers should keep their residential houses neat and clean and must not give any chance of complaint to any of the officers of the Sanitary Department of Society to whom house belonged and it was laid down that in case of non-compliance or breach of any of the rules the Executive Committee of the Society shall be empowered to get the house vacated by the occupant, the right conferred on the occupier was in the nature of a licence to live in the house. Since no interest in the property was transferred, it was not a lease. The facts that ground rent or rent was being realised from the occupiers or that they were allowed to live in the houses will not show that the

position of the allottee was that of lessee. Licence fee can be charged from the licensee and the same may even be described as rent. Even exclusive possession may be given to a licensee. AIR 1965 SC 610, Rel. on.

(Para 83)

(L) Religious and Charitable Endowments — Concept and early history of charitable and religious trusts, right from the period of Roman law, traced with special reference to property gifted to the institution and the ownership of such property. In this connection law of gifts to corporation and corporation sole under English law also discussed. Hindu juridical notions regarding gift to God and charitable institutions also discussed. Case-law referred — Transfer of Property Act (1882), S. 122 — Hindu Law — Religious Endowment.

(Paras 87-91)

(M) Transfer of Property Act (1882), S. 122 — Gift to idol, an impersonal deity — Gift to Radha Swami Satsangis — Validity — Effect — Beneficiaries, who are — Dedication held valid — Hindu Law — Religious Endowment.

An endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies provided the settlor has clearly and unambiguously expressed his intention in that behalf. AIR 1957 SC 133 and AIR 1938 Lah 686 and AIR 1956 Raj 171, Ref. to.

(Para 94)

Held, that once it was understood that the true purpose of gift of properties to the idol was not to confer any benefit on God but to acquire spiritual benefit by providing opportunities and facilities for those who desire to worship, there could be no difficulty in understanding the true nature of the gift to Radha Swami Dayal. The gift did not and could not confer any benefit on Radha Swami Dayal, the impersonal Deity of the Radha Swami Satsangis. Being an impersonal deity and not being one of the Gods of the Hindu pantheon, Radha Swami Dayal could not be said to be a juristic person. However, when a Satsangi made a gift of money to Radha Swami Dayal for the construction of a house inside Dayal Bagh Colony, Agra, there could be no doubt that there was no uncertainty either in his mind or in the mind of others that, although the gift was to Radha Swami Dayal, the Satsangi knew that the gifted property would go to the Sabha as Radha Swami Dayal himself could not hold the property.

The purpose of the endowment was definite and both religious and charitable. The Sabha was a body registered under Act No. 21 of 1960, and as a juristic person could hold the property which had been gifted to Radha Swami Dayal (or in the name of Radha Swami Dayal) for the benefit of the Satsangis of Dayal Bagh group, the real beneficiaries. There was nothing illegal in such a dedication.

Intention of the donor was to make a gift to Radha Swami Dayal for the benefit of the Satsangis of the Dayal Bagh group. By exe-

cutting the memorandum the donor had clearly and unambiguously divested himself of entire interest in the money donated. Both these conditions were satisfied. The purpose was religious and charitable. Therefore, there was no reason why the dedication should not be held to be valid even though it might be said that Radha Swami Dayal was not a juristic person and, therefore, incapable of accepting the gift. The provisions of the Transfer of Property Act, where acceptance is also necessary in the case of gift, will not apply to endowments of public nature. AIR 1966 All 100, Rel. on. (Para 95)

People making endowments sometimes reserve for themselves and their heirs the right to manage the dedicated property, without affecting the validity of the endowment. AIR 1954 SC 69, Rel. on. (Para 102)

It, however, always depends on the facts and circumstances of each case to determine whether or not an absolute dedication was intended to be made. (Para 103)

There could be no doubt that the gift for the construction of a house in Dayal Bagh, Agra, which was made by a Satsangi to (or for) Radha Swami Dayal was for a religious and charitable purpose and the beneficial owners of the gift or dedication were the Satsangs of Dayal Bagh group, who believed in Radhaswami Dayal as to the Supreme Being. Case law Referred. (Para 100)

(N) Transfer of Property Act (1882), S 123 — Gift by Sant Sat Guru to Radha Swami Dayal, the supreme deity — Sant Sat Guru, according to tenets of Dayal Bagh sect not regarded as representative of Supreme Being on earth — Gift to be utilised for benefit of Dayal Bagh group of Satsangs — Registered Society formed for same purpose — Gift to vest in Sabha — Gift is not by Sant Sat Guru to himself and is valid — The gift vested in Sabha for the benefit of Satsangs — Hindu Law — Religious Endowment — Dedication. (Para 107)

(O) Specific Relief Act (1877), S 42 — Suit for mere declaration that suit property belongs to the plaintiff and that the defendants in occupation are mere licensees, without a prayer for their ejectment is maintainable. (Para 110)

Cases Referred. Chronological Paras

- (1966) AIR 1966 All 100 (V 53) = 58 ITR 721, Ram Kumar Ram Chandra & Co v. Commr. of Income-tax, U P 94
 (1965) AIR 1965 SC 610 (V 52) = (1964) 8 SCR 642, M N Clubwala v Fida Hussam Sahab 83
 (1960) AIR 1960 Cal 409 (V 47), Sonar Bangla Bank Ltd. v. Calcutta Engineering College 41
 (1959) AIR 1959 SC 31 (V 46) = ILR (1958) Ker 1340, Moran Mar Basseilos Catholics v. Thukalan Paula Avira 19

- (1957) AIR 1957 SC 183 (V 44) = 1956 SCR 758, Deoki Nandan v. Murlidhar 19, 89, 90, 94
 (1956) 1956 All LJ 790, Managing Committee of the National English Middle School, Marglour v District Inspector of Schools, Saharanpur 41
 (1956) AIR 1956 Raj 171 (V 43) = ILR (1956) 6 Raj 342, Deepalal v. Parashwanath Digambar Jam Vidyalaya 94
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 (1948) AIR 1948 Bom 516 (V 33) = 229 Ind Cas 84, Satyavarat Sidhan-talankar v Arya Samaj, Bombay 41
 (1946) AIR 1946 Mad 485 (V 33) = ILR (1947) Mad 47, Veluxami Gonnadan v Dandapani 98
 (1940) AIR 1940 Mad 167 (V 27) = ILR (1940) Mad 671, Mohd Hussain v. Majide Husam Mohd. Managing Committee 83
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 (1935) AIR 1935 PC 97 (V 22) = ILR 57 All 330, Chhotabhai v. Juan Chandra Barak 46, 106
 (1932) AIR 1932 All 244 (V 19) = ILR 53 All 710, Bankey Lal v. Pearo Lal 95, 96, 97
 (1930) AIR 1930 P C 57 (1) (V 17) = 56 Mad LJ 7, Siddik Mahomed Shah v Mt. Saran 19
 (1927) AIR 1927 Mad 636 (V 14) = ILR 50 Mad 637 (FB), Narsumha-swamy v Venkataalingam 64, 94
 (1925) AIR 1925 PC 139 (V 12) = 52 Ind App 245, Pramatha Nath Mullick v. Pradyumna Kumari Mullick 90
 (1923) AIR 1923 Mad 376 (V 10) = ILR 46 Mad 300, G Venkata Nara-sumha Rao Garu v Nyapathy Subba Rao Pantulu Garu 99
 (1919) AIR 1919 Cal 199 (V 6) = ILR 46 Cal 951, Ghandi Charan Mitra v Haribola Das 96

- [1911] ILR 33 All 793 = 8 All LJ 95, 96
 944, Phundan Lal v. Arya Prithi
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 [1910] ILR 37 Cal 128 = 10 Cal LJ 89, 90, 91
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 (PC), Jatindra Nath Roy v. Rani
 Hemanta Kumari Debi
 [1901] ILR 28 All 384 = 3 All LJ 90
 124, Anjuman Islamia v. Nasir-
 uddin
 [1874-75] 2 Ind App 145 = 23 WR 83
 253 (PC), Prosunno Kumari Debya
 v. Golab Chand Baboo
 [1817] 3 Mer 353 = 17 RR 100, 89
 Attorney-General v. Pearson

J. Swarup, G. S. Pathak, Chandra Shekhar Prasad Singh, for Appellant; G. D. Srivastava, Swami Dayal, Dojal Saran, Keshav Sahai, V. B. Singh, K. C. Dwevedi, K. C. Saxena, P. N. Katju, Sidheshwari Prasad, for Respondents.

S. D. KHARE, J.: An interesting point of law that arises for consideration in this appeal is whether a gift or dedication of movable property (Rs. 23,038 cash) could be made by a Satsangi of the Radha Swami faith (in the present case the Sant Sad Guru himself) to Radha Swami Dayal, the impersonal deity of Radha Swami Satsangis, and, if so, in whom would that property vest. It is also in dispute whether any such gift or dedication had, in fact, been made.

2. The property in dispute is a residential building, known as "Tej Punj" constructed in the year 1934 inside the Dayal Bagh Colony at Agra. It is the admitted case of the parties that the entire cost of the construction of the building was borne by Sir Anand Swarup (hereinafter described as "Shri Sahabji Maharaj"). The construction became complete in the year 1935, and Shri Sahabji Maharaj along with other members of his family shifted to that building. Shri Sahabji Maharaj departed from this world on 24-6-1937. Thereafter his widow Lady Sohandei and other members of the family lived in that house. In the year 1953, when the suit, giving rise to this appeal was instituted, Lady Sohandei (defendant No. 1) and her son, Shanti Swarup (defendant No. 2), along with other members of the family, were living in that house.

3. The suit was instituted by the Radha Swami Satsang Sabha, Dayal Bagh, Agra (hereinafter referred to as "the Sabha") a society registered under the Societies Registration Act No. 21 of 1860, through its Secretary, Sri Babu Ram Jadon, M.A., and the only two defendants were Lady Sohandei and Shanti Swarup.

The plaintiff's case was that the plaintiff is a society registered under Act No. 21 of 1860, and is a representative body of that section of the followers of Radha Swami faith, which is popularly known as the Dayal Bagh group. The followers of the Radha Swami faith used to make bhents

(gifts or dedications) to the impersonal deity, Radha Swami Dayal. Such bhents and the properties acquired therefrom and their income vested in the plaintiff Sabha and was held by it for application wholly to religious and charitable purposes of the Sabha. The bhents were offered for various purposes, one of them being the construction of houses inside Dayal Bagh Colony. Like every other bhent, the bhent made for the construction of houses also vested in the plaintiff Sabha and the Satsangi offering the bhent retained no interest in the money. The Sabha constructed houses for the temporary stay of pilgrims within Dayal Bagh and the residence of Satsangis residing there including such other persons as are entitled under the rules framed by the Sabha to reside in Dayal Bagh. The persons who offer bhent for the construction of houses are granted rights of occupancy in houses, in law amounting to licence, limited to the lifetime of the offerer, subject to the observance of rules for the time being in force with absolute discretion vesting in the Sabha to grant similar rights after the death of the offerer to a nominee or heir of such person in case such nominee or heir is considered fit for residence in Dayal Bagh.

Shri Sahabji Maharaj was the founder of the Dayal Bagh Colony and the rules mentioned above and the principles on which such rules were based emanated from him. Shri Sahabji Maharaj was a rigid observer of all rules and regulations of the Sabha and insisted to be bound and governed by the same rules as applied to any common Satsangi. Like every other Satsangi, Shri Sahabji Maharaj offered bhent for the construction of a house and made an application in that connection on 21st April, 1934, and voluntarily undertook to be bound by all the rules and conditions relating to houses and residence in Dayal Bagh then in force or that might thereafter be made and put into force. The building known as "Tej Punj" was constructed in those circumstances for Shri Sahabji Maharaj, and he finally accepted the licence to occupy the same in pursuance of the rules mentioned above.

During his lifetime Shri Sahabji Maharaj voluntarily accepted the position of a licensee for occupation of "Tej Punj" like a common Satsangi offering bhent for construction of houses, and nominated his wife, Lady Sohandei (defendant No. 1) for Sabha's consideration for being granted a licence on termination of his own licence at his demise. After the death of Shri Sahabji Maharaj on 24th June, 1937, Lady Sohandei (defendant No. 1) applied for the grant of licence for residence in "Tej Punj", and the same was granted to her by resolution No. 4 (a), dated 10th October, 1937, passed by the Executive Committee of the Sabha. The Sant Sad Guru, who succeeded Shri Sahabji Maharaj, was Mehtaji Maharaj, who was accepted as such by a vast majority of the Satsangis. Shanti Swarup (defendant No. 2), however,

did not recognise Mehtaji Maharaj as the Sant Sad Guru. On the other hand, he for sometime declared Rajji Maharaj as the Santsad Guru succeeding Shri Sahabji Maharaj.

Defendant No. 2 and his elder brother, being the sons of Lady Sohander, continued to live in "Tej Punj" and committed several breaches of the rules of the Society. No action was, however, taken against them because some consideration was shown to them as they were the sons of the late Sant Sad Guru and also because Mehtaji Maharaj, the present Sant Sad Guru pleaded for them in the hope that they would, in future, mend their conduct. Shanti Swarup (Defendant No. 2), however, started proceedings under Section 145, Cr.P.C., in respect of the land around "Tej Punj" claiming the same to be appurtenant to "Tej Punj", and on 10th July, 1953, the second officer of Harparbat police station called the Secretary of the Sabha to sign an incomplete report of attachment of a plot of land lying to the east of "Tej Punj".

Defendant No. 2 alleged during the course of Section 145, Cr.P.C. proceedings that defendant No. 1 was the owner of "Tej Punj". That assertion cast a cloud on the title of the plaintiff to the building known as "Tej Punj", and, therefore, a declaration was sought that the plaintiff Sabha is the owner of "Tej Punj" in which the defendants had no proprietary interest and that defendant No. 1 alone was holding it as licensee for her life. A further declaration was sought that the strip of land to the east of "Tej Punj" and the land on the other three sides of "Tej Punj" was not appurtenant to that building.

4. Both the defendants filed separate but similar written statements. They did not admit any of the material allegations made in the plaint, and pleaded that Shri Sahabji Maharaj had not made a gift of money for the construction of "Tej Punj" but had got that building constructed for his residence and for the residence of the members of his family after the executive committee of the plaintiff Sabha had fired a reasonable ground rent for the land to be occupied by him.

It was further pleaded that the theory of hibet as propounded in the plaint was entirely false and that the memorandum (Exhibit 8) did not bear the signature of Shri Sahabji Maharaj. It was also pleaded that no gift or hibet could legally be made or presumed to be made by Shri Sahabji Maharaj to himself, he himself being the Sant Sad Guru and, according to Radha Swami tenets, the manifestation of impersonal deity in human form. It was further pleaded that the intent and purport of the memorandum dated 21st April, 1934 (the genuineness of which was denied) only implied creation of some contractual obligations of purely financial nature.

It was also pleaded that after the death of Shri Sahabji Maharaj the members of his family had temporarily left Dayal Bagh

after locking their belongings in the "Tej Punj". It was in the month of December, 1938, that the defendants and Prem Swarup returned to Dayal Bagh, but their entry was blocked. They, however, used force in order to reach up to their residence, namely, "Tej Punj", and on finding that the plaintiff Sabha had put its own locks in place of the locks which had originally been put by the defendants they broke open the locks of the Sabha and occupied their own house, and since then they have been not only in proprietary possession but (in case their ownership was not proved) in adverse possession of that building.

It was also pleaded by them that the plaintiff Sabha could not be registered as a charitable society under Act 21 of 1860 and that it had ceased to function inasmuch as no Sant Sad Guru had reappeared within two years of the death of Shri Sahabji Maharaj. The other pleas raised by them were of bar of limitation and of Section 42, Specific Relief Act. They also contended that the suit was barred by estoppel and acquiescence.

5. The learned Civil Judge framed the following issues—

(1) Whether the defendants are in adverse possession for more than 12 years and the suit is barred by Article 144 of the Limitation Act?

(2) Whether the suit is barred by Article 142 of the Limitation Act?

(3) Whether the plaintiff has been receiving ground rent or licence fee about the land in suit? If so, its effect?

(4) What is the area and situation of the land including the building for which the ground rent or licence fee is realised by the plaintiff?

(5) Whether the house was constructed at the cost of Shri Sahabji Maharaj?

(6) Whether the money out of which the disputed house was constructed was donated by Shri Sahabji Maharaj to the plaintiff Sabha?

(7) Whether Shri Sahabji Maharaj signed and executed the memorandum? If so, what is its effect?

(8) Whether the defendants are mere licensees of the house as well as its site and the land, if any, appurtenant thereto, or whether the defendants were in possession as members of the joint Hindu family along with Shri Sahabji Maharaj in his lifetime and after the death of Shri Sahabji Maharaj are in possession in their own rights as survivors?

(9) Whether the agreement dated 21-4-34 is a legal, valid and binding document?

(10) Whether the house was constructed at the cost of Shri Sahabji Maharaj through the agency of the plaintiff Sabha in terms of resolution of the executive committee and the rules framed by the Sabha, if any? If so, its effect?

(11) Whether the plaintiff is entitled to sue or to maintain the suit?

(12) Whether defendant No. 1 ever applied for the licence of the building or the land in suit to the plaintiff and whether the plaintiff ever treated her as a licensee?

(13) Whether the suit is barred by Sec. 42 of the Specific Relief Act?

(14) Whether the suit is barred by estoppel and acquiescence?

(15) To what relief, if any, is the plaintiff entitled?

(16) Whether Babu Ram Jadon is the duly appointed secretary of the Sabha and is competent to bring the suit on behalf of the Sabha?

(17) Whether the land marked by ABCD in the plaint as well as the site of "Tej Punj" belongs to the plaintiff?

6. Under issues Nos. 11 and 16 the finding recorded by the learned Civil Judge was that the plaintiff Sabha was a registered society under Act No. 21 of 1860 and that it could be validly registered under that Act, being a religious and charitable society. He also held that Shri Babu Ram Jadon was the duly appointed Secretary of the Sabha.

7. An argument was, however, raised on behalf of the defendants that the plaintiff Sabha was not a duly registered body inasmuch as the plaintiff had failed to establish that seven persons had actually signed the memorandum of association for the registration of the Sabha. The learned Civil Judge held that the defendant had not raised any specific plea to that effect. He further observed that there was sufficient material on the record to show that the Sabha had been duly registered.

8. Issues Nos. 3 to 10, 12, 14 and 17 were considered by the learned Civil Judge at one place and the findings arrived at by him were that the agreement dated 21st April, 1934, bore the signatures of Shri Sahabji Maharaj and was a legal, valid and binding document, that Shri Sahabji Maharaj made bhent for construction of "Tej Punj" on the terms and conditions contained in the memorandum (Ext. 8) and acquired tenancy rights on those terms and conditions in building known as "Tej Punj" and also the land appurtenant to it, to wit, the strip of land lying to the east of "Tej Punj" and also the land on the remaining three sides of the building, that the building known as "Tej Punj" belonged to the plaintiff Sabha and that defendant No. 1 was occupying the same as a tenant on payment of rent on the terms and conditions contained in the memorandum (Ext. 8). It was also held that the suit was not barred by estoppel and acquiescence and that the site of "Tej Punj" as well as the land appurtenant to it on all the four sides of the building belongs to the Sabha.

9. On the question of adverse possession the finding recorded was that the incident of 15-12-1938, as alleged by the defendants, did not take place and the possession of the defendants was referable to a little (title?) and there could hardly be any question of prescribing title by adverse possession

and that the suit was not barred by time. He also held that the plaintiff had all along been receiving the rent for the building from Shri Sahabji Maharaj and also from the defendants.

10. The learned Civil Judge, therefore, decreed the plaintiff's suit with this modification only that the defendants were held to be tenants under the terms and conditions of the memorandum (Ext. 8).

11. Lady Sohandai died before the appeal could be filed and her heirs were impleaded as respondents. The appeal was preferred by Shanti Swarup (defendant No. 2) alone. All the grounds taken up by the defendants in the original Court were reiterated in appeal, and one more ground taken was that the Sabha was not a duly registered society, as the memorandum and the rules were not signed by the requisite number of persons (ground No. 2).

12. The Sabha (respondent No. 1) filed a cross-objection against the finding of the learned Civil Judge and contended that the status of Lady Sohandai was that of a licensee only and not that of a tenant.

13. A preliminary objection taken by the appellant, that the cross-objection filed by the respondent Sabha is beyond time, is based on the misconception that the appeal was admitted by the Registrar soon after it was filed. In fact, in view of Rule 9, Chapter XI, Rules of Court the appeal could not have been admitted by the Registrar. The order for admission was, therefore, passed by the Court on 23rd October, 1967, and the cross-objection was filed within time in relation to the date of admission of the appeal. There is, therefore, no force in this preliminary objection.

14. Before we proceed to consider the main controversies of fact and law between the parties, it would be proper to consider the question of the right of the Sabha to institute the suit giving rise to this appeal.

15. The plaintiff Sabha had alleged in paragraph 1 of the plaint that it was a society registered under Act No. 21 of 1860. Both the defendants did not admit that the allegation made in the plaint. Both the defendants pleaded that the plaintiff is not a legally constituted body and that it could not validly be registered under Act No. 21 of 1860. The pleas raised by the defendants in the written statements were by no means clear, and, therefore, the plaintiff, by means of an application (paper No. 45-C), dated 12th March, 1954, pressed for their clarification. The reply which was given by defendant No. 1 on 29th March, 1954, was "that the plaintiff-applicant had no right to call for any further particulars in order to fish out some new case."

On 31st August, 1954, defendant No. 1 sought adjournment to enable her to consult the Solicitor-General. On 3rd May, 1965, the learned counsel for the parties agreed that the pleadings may be cleared on the date of issues. Accordingly, 22nd July,

1955, was fixed for clarification of the pleadings and for issues. The pleadings were, however, cleared on the next date for issues, i.e., on 24th March, 1958. All that was stated on behalf of the defendants on that date with regard to this particular plea of the defendant was that—

"the Sabha ceased to have its existence as after the death of Sahabji Maharaj, other Sahabji Maharaj was not appointed within two years from his death and in fact the said Sabha could not be registered under the Societies Registration Act"

15-A. It, therefore, became clear from the pleadings of the parties that the grounds on which the right of the Sabha to maintain the suit was challenged were as follows—

(1) The Sabha was not a registered society

(2) Sri Babu Ram Jadon was not its Secretary

(3) The Sabha had ceased to exist because no Sant Sad Guru had been elected within two years of the death of Shri Sahabji Maharaj

(4) The Sabha could not be registered under the Societies Registration Act, the contention being that it was not a religious and charitable society

16 The plaintiff Sabha, in order to make sure that the defendants had raised all the pleas which they intended to take in that connection moved application No 347-C on 16th July, 1958. It was specifically mentioned in that application that unless the defendants made their position clear, the plaintiff would assume that no other plea had been taken up and that all other conceivable pleas had been given up. No reply was given by the defendants to that application. Again, a similar application (paper No 412-C) was moved on behalf of the plaintiff on 30th August, 1958 after most of the plaintiff's evidence had been led. The plaintiff made his position clear by stating that he does not want that from any vague or indefinite matter on the record the Sabha may be taken by surprise by the defendants. It was also mentioned that—

"If, however, the defendant insists on pressing those pleas, the plaintiff is prepared to meet them forthwith and prays that issues on the same be framed allowing the plaintiff to file documents relating to them which he is prepared to file at once."

Shanti Swarup (appellant), who was defendant No 2 in the suit, gave a reply to that application on the same day by mentioning that no plea taken in the written statement was intended to be given up and no additional issue was necessary.

17 On 1st October, 1958, the plaintiff's evidence was closed. Such of the plaintiff's witnesses who could be expected to have seen the memorandum, were asked no question in cross-examination on the point whether or not the memorandum of association had been signed by seven persons. When defendant No 2 entered the witness-box, he stated in examination-in-chief that the

memorandum of association had been signed by six or seven persons. Even at that stage he did not state that he was certain that it was signed by less than seven persons. When cross-examined, he admitted that he had been informed by his own uncle Shri Brij Basi Lal that the memorandum of association had been signed by seven or eight persons and that he had passed on that information to his counsel.

18 In the circumstances mentioned above the learned Civil Judge rightly arrived at the conclusion that the plea that the memorandum of association had not been signed by at least seven persons was not taken by the defendants. Such a plea was not even in the contemplation of the defendants and could not have been taken by them at any stage of the pleadings.

19 It was not incumbent on the plaintiff to prove specifically that the memorandum of association had been signed by not less than seven persons. The law is well settled that no evidence need be led by any party on a point which is not in issue between the parties (vide *Siddik Mahomed Shah v. Mt. Saran*, AIR 1930 PC 57 (1), *Deoki Nandan v. Murlidhar*, AIR 1957 SC 183, and *Moran Mar Basileos Catholicos v. Thukalan Paulo Avira*, AIR 1959 SC 61)

20 A certified copy of the registration certificate (Ext. 2) has been filed. It clearly shows that the plaintiff Sabha was registered as a society under Act No 21 of 1860 on 17th November, 1921. Sections 1 to 3 of Act No 21 of 1860 read as follows—

"1 Any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in Section 20 of this Act, may, by subscribing their names to a memorandum of association, and filing the same with the Registrar of Joint Stock Companies form themselves into a society under this Act.

2 The memorandum of association shall contain the following things (that is to say)

The name of the society.

The objects of the society

The names and addresses, occupations of the governors, council, directors, committee or other governing body to whom by the rules of the society, the management of its affairs is entrusted.

A copy of the rules and regulations of the society, certified to be correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association

3 Upon such memorandum and certified copy being filed, the Registrar shall certify under his hand that the society is registered under this Act. There shall be paid to the Registrar for every such registration a fee of fifty rupees, or such smaller fee as the State Government may from time to time direct, and all fees so paid shall be accounted for to the State Government."

21. Section 1 of Act 21 of 1860 requires that the memorandum of association shall be

signed by seven or more persons. Section 2 provides that the rules and regulations of the society shall be certified to be correct copy by not less than three of the members of the governing body, while Section 3 lays down that "upon such memorandum and certified copy being filed, the Registrar shall certify under his hand that the society is registered. It is, therefore, abundantly clear that the Registrar is not expected to register a society unless the provisions of Sections 1 and 2 of Act 21 of 1860 have prima facie been complied with.

22. It is true that the Registrar is not in a position to know whether the persons whose signatures appear on any memorandum of association have actually signed that memorandum of association, but before registering a society he has to satisfy himself that the memorandum, as required by law, has been filed. In other words, the memorandum must purport to have been signed by at least seven persons and the copy of the rules and regulations of the society must, on the face of it, bear the signatures of not less than three of the members of the governing body.

23. Section 114 of the Indian Evidence Act, 1872, lays down that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of the natural events, human conduct and public and private business, in relation to the facts of the particular case. Illustration (e) to the section is—

"The Court may presume—

(e) That judicial and official acts have been regularly performed....."

24. Once the registration of a society has been proved, it can safely be assumed, relying on the presumption which can be raised under Section 114 of the Evidence Act, that the necessary formalities which were required to be observed before a society could be registered by the Registrar had prima facie been observed and at least on the face of it the memorandum of association purported to have been signed by seven different persons.

25. That is, however, a rebuttable presumption, and it is always open to a party to plead and to lead evidence to show that what purported to have been done was not, in fact, done and the memorandum of association did not, in fact, contain the signatures of seven or more persons. For example, it could be said that although the memorandum of association purported to have been signed by seven persons, one of them had, in fact, not signed the same and his signatures on the memorandum of association had been forged. Once such plea had been raised and some evidence led in support of that plea, no presumption could be raised under Section 3 of the Societies Registration Act read with Section 114 of the Indian Evidence Act that any particular

person had signed the memorandum of association. Section 19 of Act 21 of 1860, however, provides that where a certified copy of a document filed with the Registrar had been obtained, "such certified copy shall be prima facie evidence of the matters therein contained in all legal proceedings whatever." Where a certified copy of the memorandum of association has been filed, a presumption arises that the persons whose signatures appeared on that memorandum had signed the same, and unless that presumption was rebutted by the satisfactory evidence, even the vague denial of one of the signatories to any such memorandum could hardly be of any avail.

26. The case of *Sunder Singh Mallah Singh, Sanatan Dharam High School Trust, Indaura v. Managing Committee, Sunder Singh Mallah Singh Rajput High School, Indaura*, AIR 1938 PC 73, is relied upon by the learned counsel for the appellant for the proposition that the presumption that an association is duly registered arises not on the certificate of registration granted by the Registrar under Section 3 but on the copies of the rules and regulations and memorandum certified under Section 19 of Act No. 21 of 1860 which constitutes them prima facie evidence of the matters therein contained. It has been submitted that it was necessary for the plaintiff to have filed certified copies of the certificate of registration and the rules and regulations and memorandum of association certified under Section 19 to prove valid registration of the society.

27. In our opinion there is no force in that contention. The facts of the case relied upon by the learned counsel for the appellant are very much different from the facts of the present case. In the case of *Sunder Singh Mallah Singh Sanatan Dharam High School Trust, Indaura*, AIR 1938 PC 73 (supra), a definite plea had been raised on behalf of the defendant that the plaintiff committee was not a duly registered body and issue No. 3 was framed in the following words:—

"Whether the plaintiff committee is not a duly registered body."

One of the signatories to the memorandum of association (named Kharak Singh) had stated during the course of cross-examination that—

"I did not see the original Articles of Association (nor sign them) sent to Registrar."

Commenting on that statement made by Kharak Singh, one of the signatories, their Lordships of the Privy Council observed:

"Whatever one might think probable, it is left uncertain whether this witness was referring to the Memorandum as the Articles of Association; counsel were unable to inform their Lordships definitely what was the reason of the brackets round the words 'nor sign them'. If the defendants really desired to displace the presumption in this respect, it was clearly their duty to seek to recover the original memorandum and to put the

signature thereon to the witness. Their Lordships are, therefore, of opinion that the association was duly registered and, therefore, locus standi to maintain the suit." It was in this context that it was mentioned earlier in the body of the judgment that—"their Lordships are of the opinion that presumption arises, not on the certificate of registration granted by the Registrar under S 3, but on the copies of the Rules and Regulations and Memorandum certified under S 19, which constitutes them *prima facie* evidence of the matters therein contained."

The presumption referred to is regarding the signature of Kharak Singh on the Memorandum of association and not regarding the valid registration of the society.

28 The case of *Sunder Singh Mallah Singh Sanatan Dharam High School Trust*, AIR 1938 PC 73, does not help the appellant's contention that even in cases where valid registration was not questioned in the pleadings and at the stage of evidence, it was incumbent on the plaintiff to file a certified copy of the memorandum of association. Inasmuch as the registration of the society was not specifically admitted, all that was required of the plaintiff was to file a copy of the certificate of registration. It is only a copy of the certificate of registration which could prove the registration (as distinguished from valid registration) of the society. In a case like the present one where the defendants are not even aware whether or not the memorandum of association had been signed by seven or more persons, it is not necessary to prove who the persons who had actually signed the memorandum of association. Nor was it necessary to file a copy of the memorandum of association.

29 Shanti Swarup (defendant No 2) during the course of his cross-examination stated that the original memorandum of association was missing from the office of the Registrar and was not available for inspection. In such circumstances no copy of the memorandum of association could be filed by the plaintiff.

30 It appears from the record that the defendants had in an earlier litigation admitted the valid registration of the society. The Income-tax Officer, Agra, treating all the contributions made by the Dayal Bagh Satsangs and all the properties which had been acquired from those contributions as also of the income which arose out of such properties as the personal property of Shri Sahabji Maharaj started proceedings against him for assessment of income. The Sabha filed suit No. 4 of 1937 against the Secretary of State for India in Council and also impleaded Shri Sahabji Maharaj as a defendant. It was alleged in paragraph 1 of the plaint (Ext. 157) that the plaintiff Sabha was a validly registered society under Act No 21 of 1860. Shri Sahabji Maharaj filed a written statement (Ext. 19) on 14th April, 1937, admitting paragraphs 1 to 21 of the plaint.

Shri Sahabji Maharaj died during the pendency of the suit, and one Prem Swarup and both the defendants of this suit were impleaded as his heirs. It is clear from the statement made by Shanti Swarup (defendant No 2) that he and the other heirs of Shri Sahabji Maharaj had adopted the same written statement which had been filed by Shri Sahabji Maharaj. The defendant's own admission can be regarded as evidence of the fact that the plaintiff Sabha had been duly registered under Act No 21 of 1860.

31. In view of what has been stated above, we have no hesitation in affirming the finding of the learned Civil Judge that it was also affirmatively proved that the Sabha had been duly registered under Act No 21 of 1860.

32. The next question which arises for consideration is whether the Sabha is a religious or charitable society and could be registered under the provisions of Act No 21 of 1860. The objects of the Sabha as set out in the three clauses of Section 2 of the by laws of the Sabha (1921) read as follows:

(a) To regulate the conduct of business pertaining to the Satsangs, i.e., the followers of the Radhaswami faith and the institutions of the Radha Swami faith in the conduct of religious services i.e., the Central Satsang and branch Satsangs.

(b) To collect, preserve and administer the properties, movable and immovable that have been or may hereafter be dedicated to Radha Swami Dayal or that may be acquired for, or presented to, Radha Swami Satsang and to deal with and apply the same to the furtherance of the religious and charitable objects of that Satsang.

(c) To do the above and all such other things as are conducive to the attainment of, or incidental to, the above objects in accordance with the mandates of the Sant Sad Guru at the time, who is recognised as the representative of the Supreme Creator Radha Swami Dayal and whose mandate shall be paramount and absolute in all matters referred to above.

33. The by laws of the association are 65 in number and lay down rules and regulations for the Sabha itself, for its executive committee for the Central Assembly of the Satsangs, for the branch Assembly of Satsangs and for the maintenance of the Radha Swami Educational Institute, the Engineering and Industrial Institute, known as Model Industries, a Bhandar Ghar (common Mess) and of a dispensary, known as the Dayal Bagh Dispensary and other miscellaneous institutions. Some of these institutions for which provision is made are distinctly religious, but many of them are clearly charitable, though some of them may be said to be not directly religious or charitable.

Act 21 of 1860 permits registration of societies for charitable purposes, and charitable purposes are detailed in Section 20 of the said Act. It is not clearly mentioned in Section 20 that religious societies may

accepting the general stamp paper furnished by her on the value of the amount for which she purchased the property. No order as to costs as the other side is not represented.

BDB/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 145
(V 56 C 45)

VAIDYA, J.

Sakhamani Anantha Padmanabha Prasad and another, Petitioners v. Addepalli Venkataramanaiah, Respondent.

Civil Revn. Petn. No. 818 of 1967, D/- 30-1-1968, from order of Sub J., Narasaraopet D/- 6-3-1967.

Civil P. C. (1908), O. 33 R. 9 — Petition to dispauper plaintiff — When allowed.

It is not correct to say that a person can be dispaupered only if he comes into possession of funds or property after institution of suit. If it is brought to the notice of the trial Court that the plaintiff, when he filed an application for permission to sue as a pauper, was in possession of certain properties or entitled to the same and could have, on the strength of this possession or right, raised the necessary funds for payment of the Court fees and that matter was suppressed from the Court, it would be a sufficient ground to dispauper such a plaintiff. In such a case it would amount to a fraud on the Court. AIR 1945 Mad 296, Rel. on.

(Para 2)

Cases Referred: Chronological Paras (1945) AIR 1945 Mad 296 (V 32)=(1945)

1 Mad LJ 53, Chellammal v. Muthulakshmi Ammal

2

R. V. Vidya Sagar, for Petitioners; A. Suryanarayana Murthy, for Respondent.

ORDER: The defendants 3 and 4, who are the petitioners herein, had filed an application under Order 33, Rule 11 read with Section 151 C. P. C. to dispauper the plaintiff. It was alleged in the affidavit of the 4th defendant that the plaintiff, who gave evidence as P. W. 2, admitted that his family owned 900 square yards of house site in Sitharamapuram in Vijayawada and another site attached to Vishnu Oil and Flour Mills by the time of the death of his father and that both the above sites were sold away in 1961 for Rs. 20,000 out of which his share is Rs. 10,000. The plaintiff further stated that he is in possession and management of his late father-in-law's estate worth more than one lakh of rupees and that his father-in-law's estate is financing the litigation. It is further pleaded that the

plaintiff has means and funds to pay the court fees and can no longer be permitted to sue as a pauper. The respondent filed a counter that he did not come into any funds after the institution of the suit and that his mother sold the site and did not give any share to the plaintiff. His contention is that even according to the family arrangement, those sites were given to the mother. His deposition did not mean that he had got into possession of the property or was possessed of any means. The statement regarding the use of the estate of his father-in-law in financing the litigation is also misconstrued. The plaintiff, therefore, contended that he cannot be dispaupered.

2. The trial Court, after reference to Order 33, Rule 9 C. P. C. came to the conclusion that a person can be dispaupered only if he comes into funds or property after the institution of the suit. It cannot be considered as to whether he had certain property at the date he was declared to be a pauper and whether that fact was suppressed from the Court. The view taken by the trial court is wrong. If it is brought to the notice of the trial Court that the plaintiff, when he filed the application for permission to sue as a pauper, was in possession of certain properties or entitled to the same and could have, on the strength of his possession or right, raised the necessary funds for payment of the court fees and that matter was suppressed from the Court, certainly it would be a sufficient ground to dispauper such a plaintiff. In such a case, it would amount to a fraud on the Court. A Division Bench of the Madras High Court in Chellammal v. Muthulakshmi Ammal, (1945) 1 Mad LJ 53=(AIR 1945 Mad 296) has held that where it is found that leave to appeal as a pauper was obtained by a person without disclosing his assets and interests in the property, such a plaintiff should be dispaupered. It is contended by the learned counsel for the respondent that the question that these matters were suppressed from the Court at the time when his client was permitted to sue as a pauper, is being argued for the first time in this Court. That was never the case pleaded by the petitioners in the lower court. There is some force in this argument because from the affidavit that was filed, it is clear that this specific case was not pleaded by the petitioners in the lower court. No doubt, this is brought to the notice of the lower court in the statement given by the respondent in his evidence as P. W. 2 who is sought to be dispaupered. It is, therefore, just that the respondent should be given an opportunity to meet the case that he had certain assets or rights in certain assets and suppressed the same at the time when he was declared as a pauper. I set aside the order of the lower

court and remand this case for that purpose. The lower court shall consider the allegation that the respondent-plaintiff was possessed of certain assets or be had certain assets and rights in the property, on the strength of which he could raise the necessary court fees at the time of the institution of the suit and suppressed the same from the Court, and decide the matter. Both sides will be at liberty to lead evidence in the lower Court.

3. With this direction, the revision is allowed. No order as to costs.

DGB/D V C. Revision allowed.

AIR 1969 ANDHRA PRADESH 146
(V 56 C 46)

GOPALRAO EKBOTE, J

Sikander Shah, Petitioner v Syed Abdul Rehman, Respondent.

Civil Revn. Petn. No 1856 of 1966 D/- 30-12-1967 from order of Sub J., Warangal, D/- 23-6-1966

Civil P C. (1908), O 21, R. 19—Specific Relief Act (1877), S. 28 — Decree for specific performance — Defendant to execute sale deed on plaintiffs depositing purchase money within fixed time — Defendant also to pay costs — Amount of costs larger than purchase money — Plaintiff seeking set off under R. 19(b) of O 21, C P C. instead of depositing money within fixed time — S. 28 of Specific Relief Act (1877) not attracted.

A set-off under O 21, R. 19 can be ordered even though the remedy of each party against the other is not precisely of the same character. Thus costs awarded can be set off against the purchase money which the vendee is directed to deposit within a specified time in a decree for specific performance, or vice versa. If, therefore, the amount of costs awarded is larger than the purchase money which the vendee is directed to deposit within a specified time and the vendee files an execution petition to claim set off under O 21, R. 19(b) instead of depositing money within that time, the vendee is justified in claiming a set off and the judgment-debtor cannot get the contract rescinded under Section 28 of the Specific Relief Act. AIR 1954 Bom. 335 and AIR 1936 Mad 626 Followed.

(Paras 9, 11)

Cases Referred. Chronological Paras
(1954) AIR 1954 Bom 335 (V 41) =

ILR (1954) Bom 678, Ganpati v Nilkanth 10

(1936) AIR 1936 Mad 626 (V 23) =

71 Mad LJ 506 Chinnammal v Chidambaram 10

T Venugopala Reddy, for Petitioner;
Aziz Ahmed Khan, for Respondent.

JUDGMENT. This is a revision petition filed against the order of the Subordinate Judge, Warangal given on 23rd June, 1966 whereby the learned Subordinate Judge dismissed the petition filed by the petitioner before me under Section 28 of the Specific Relief Act.

2 The material facts are that decree for specific performance was passed on 14-2-1965 in O S No 55 of 1965 in favour of the respondent and against the petitioner before me in the following terms:—

"The defendant should execute and register the sale deed in respect of the suit property in plaintiff's favour on payment of Rs. 1100 by the plaintiff within 3 months from this date. In default the plaintiff will be entitled to get the sale deed executed through court by depositing the balance of sale consideration and registration expenses. The defendant shall bear the costs of the suit incurred by the plaintiff."

3 The petitioner, who was the defendant in the suit, filed an application under Section 151, C P C. alleging inter alia that since the plaintiff has not deposited the amount specified in the decree within three months as the decree directed, the decree should be rescinded.

4. In his counter, the decree-holder-respondent stated that he had already filed E. P. No 10 of 1966 asking the Court to enter satisfaction upon the decree for Rs. 1100 to be paid by him to the judgment-debtor towards the balance of consideration and for executing the decree for the balance of Rs. 739-65P recoverable by him towards the costs awarded. It was in these circumstances he contended that there was no question of depositing the sale consideration in the court within three months. The judgment-debtor himself was bound to pay to the respondent a higher amount by way of costs under the decree.

5 The learned Subordinate Judge accepted the contention of the decree-holder and dismissed the petition filed by the judgment-debtor. It is this view that is now questioned in this revision-petition.

6 It is no doubt true that the judgment-debtor had filed the application in the Court below under Section 151, C. P. C. but the provision applicable to such a petition is Section 28 of the Specific Relief Act, which runs as follows:

"(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immoveable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further time as the Court may allow, pay the purchase money or other sum which the Court has ordered

him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require".

I am not concerned with the other subsections in this case. It is under this provision that it was contended in the application filed by the judgment-debtor in the Court below that since the decree-holder has failed to deposit the amount as directed by the decree within three months, which amount was the consideration for the sale, the judgment-debtor is entitled to get the contract rescinded. The contention of the decree-holder on the other hand was that he would be deemed to have deposited the amount because he made his intention clear by filing execution petition that he has set off the amount which he had to pay under the decree to the judgment-debtor towards consideration for the sale against the amount of costs which is larger than the amount of consideration of sale which he is entitled under the decree to get from the judgment-debtor. Section 28 in those circumstances cannot be invoked by the judgment-debtor.

7. The short question therefore for my consideration is as to whether the decree-holder was justified in setting off the amount of sale consideration which he was directed to deposit in the Court within three months from the date of the decree against the larger amount of costs which he had to recover from the judgment-debtor.

8. Now, under Order XXI Rule 19, C. P. C., where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other then—

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree and under Cl. (b), if the two sums are unequal, execution can be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered upon the decree.

9. A careful reading of this Rule would indicate that it provides for a set off in the case of cross claims contained in the same decree. The principle underlying the provision is to prevent each side taking out execution in respect of sums due under the same decree. Although at one time the Allahabad High Court had held a view that a set off could not be ordered unless the parties had identical rights of execution in respect of their claims, it is now firmly settled

that a set off under Rule 19 of Order XXI, C. P. C. can be ordered even though the remedy of each party against the other is not precisely of the same character. Thus, costs awarded can be set off against the purchase money which the vendee is directed to deposit within a specified time in a decree for specific performance or vice versa.

10. In *Chinnammal v. Chidambara* AIR 1936 Mad 626 a decree was passed by the Court which provided that on the plaintiff's depositing into Court a certain sum within a fixed time, the defendant was to execute a deed of conveyance in plaintiff's favour, and further that the defendant was to pay the plaintiff a certain amount by way of costs. The plaintiff deposited a sum of money after deducting the amount of costs payable to him under the decree and also other sums claimable by way of restitution and interest thereon. The learned Judge held that the claims were in the nature of cross demands arising out of the same transaction and the doctrine of equitable set off allowed by the Courts of equity held good and hence the plaintiff deposited the proper amount in Court. Following the principles laid down in this case, the Bombay High Court held in *Ganpati v. Nilkanth* AIR 1954 Bom 335 at p. 337:

"(i) Apart from the language of Order 21 Rule 19(b), the plaintiffs were entitled to deduct Rs. 1469-6-3 from the sum of Rs. 2,172 and the defendant was bound to execute a sale deed in favour of the plaintiffs upon receiving Rs. 1,702-9-9 after deducting Rs. 469-6-3 from the sum of Rs. 2,172.

(ii) If the defendant was entitled to a sum of Rs. 2,172 from the plaintiffs, the plaintiffs had a claim against the defendant to the extent of Rs. 469-6-3 and the plaintiffs were entitled to rely upon Order 21 Rule 19(b).

But even in a case where the decree is worded in a different language, i. e., where the decree provides that upon the plaintiff paying the defendant a stated sum of money, the defendant shall execute a sale deed in favour of the plaintiff, in such a case also O. 21 R. 19(b) may apply."

11. It will thus be clear that whether the set off is taken to fall under Order XXI Rule 19(b) C. P. C. or is permitted on general principles of equity and in exercise of the inherent power of the executing court, in either case, the decree-holder was justified in claiming a set off. In these circumstances, it cannot validly be contended that the decree-holder had failed to deposit the amount within three months from the date of the decree as was directed by the decree. Section 28 of the Specific Relief Act therefore cannot be successfully invoked by the

judgment-debtor in such a case. I am therefore satisfied that the judgment of the Court below does not suffer from any infirmity which calls for interference at the hands of this Court.

12. The revision petition therefore is dismissed with costs.

GDR/D.V.C. Revision dismissed.

AIR 1969 ANDHRA PRADESH 148

(V 56 C 47)

GOPALRAO EKBOTE, J.

The President, Shishu Vihar Bhagini Mandal, Hyderabad and another, Petitioners v. Yellalah, Respondent.

Civil Revn. Petns. Nos. 1968 and 1969 of 1966, D/- 27-12-1967 from decrees of Chief Judge, City Sm. C. C. Hyderabad D/-18-11-1968.

Evidence Act (1872), S. 145 — Recall of witness for cross-examination — Statement — Meaning of — Statement not fully recorded or recorded in form of memorandum falls within ambit of section.

The term "statement" is not defined anywhere in the Evidence Act. It has a wider connotation. The Section itself contemplates a statement which is either written by the witness himself or which was reduced into writing by some one else. It would not therefore be proper to construe the expression "statement" in a narrower way. That would defeat the very purpose of Section 145. It is therefore clear that even the statements which are not fully recorded or statements which are recorded in the form of memorandums are statements falling within the ambit of S. 145 of the Evidence Act. AIR 1959 SC 1012 (1023) and AIR 1933 Pat 589 and AIR 1945 Cal. 159, Ref.

(Paras 2A and 7)

Cases Referred: Chronological Paras

(1959) AIR 1959 SC 1012 (V 46)=

1959 Cri LJ 1231, Tahsildar Singh v. State of U. P. 4

(1945) AIR 1945 Cal 159 (V 32)=

46 Cri LJ 692, Emperor v. Ajit Kumar 6

(1933) AIR 1933 Pat 589 (V 20)=

35 Cri LJ 379, Emperor v. Najibuddin 5

(1847) 1 Ex 91=16 LJ Ex 259,

Attorney General v. Hitchcock 2

J. V. Vaidya and L. P. Sahagal, for Petitioners; H. S. Gururaj Rao, for Respondent (in C. R. P. No. 1969/66).

JUDGMENT: These two revision petitions arise out of two I.A.s filed in the Court below for the purpose of recalling P. W. 1 and for permission to cross-examine him with reference to previous statements recorded by the same Court.

BL/KL/A694/68

The relevant facts are that the respondent-plaintiff instituted the suit in the court of small causes for recovery of a certain amount. The trial of the said suit had an unfortunate and chequered career. The Chief Judge, who tried the case first, was transferred before the case was concluded. He had recorded the statement of P. W. 1, the plaintiff. It is known that under the provisions of the Hyderabad Small Cause Courts Act full evidence of a witness is not recorded nor it is read out to the witness nor his signature taken thereupon. What is recorded is only the notes made of the statement before the Small Cause Court by the Judge. Subsequently another Chief Judge came in. According to the provisions of the Small Cause Courts Act, a de novo trial had to be made. The evidence of P. W. 1, was again recorded by the learned Chief Judge. This time before the trial could be concluded he was also transferred, and the present Chief Judge of the City Small Cause Court commenced the trial. He recorded the statement of P. W. 1 again. While the witness was in the course of cross-examination, the learned counsel for the defendants sought to put to P. W. 1 certain statements he had made previously before the two Presiding Officers of the Small Cause Court in this very case for the purpose of contradicting the witness under Section 145 of the Evidence Act.

The plaintiff objected to this course and consequently I. A. No. 513 of 1966 was filed by the defendants with a request that P. W. 1 should be permitted to be cross-examined with reference to the previous statements. Both these applications were objected to by the plaintiff. The lower court dismissed both these petitions mainly on the ground that the notes of the statement of P. W. 1 made by the two Presiding Judges of the Court of Small Causes, Hyderabad do not come within the meaning of the word "statement" appearing in Section 145 of the Evidence Act. The defendants therefore cannot be permitted to cross-examine P. W. 1 with reference to those two previous statements for the purpose of contradicting him under Sec. 145 of the Evidence Act. It is this view that is now questioned in these two revision petitions. Since the questions are common I would dispose them of by one common order.

2A. Section 145 of the Evidence Act reads as follows:

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention

must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The preliminary portion of the said section permits a witness to be cross-examined with reference to previous statements made by him either in writing or which statements were reduced into writing. In either case, the cross-examination must be relevant to the matters in question. That can be done even without such writing being shown to him or being proved. But if the purpose of the cross-examination is to contradict him by the previous statement or any portion thereof, before the writing can be proved, the attention of the witness must be called to those parts of the previous statements which are sought to be used for the purpose of contradicting him. The term 'statement' is not defined anywhere in the Evidence Act. It has a wider connotation. The section itself contemplates a statement which is either written by the witness himself or which was reduced into writing by some one else. It would not therefore be proper to construe the expression "statement" in a narrower way. That would defeat the very purpose of Section 145.

2. The object and effect of the rule in Section 145 has been thus stated by Alderson, B. in *Attorney General v. Hitchcock*, (1847) 1 Ex 91 (102):

"A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witnesses' testimony, given on the trial of the issue, and, if that question is put to him and answered, the opposite party may then contradict him You may ask him any question material to the issue, and if he denied it, you may prove that fact, as you are at liberty to prove any fact material to the issue".

3. In this case the previous statement is the evidence given by P. W. 1 before the Court of Small Causes. It is no doubt true that under the provisions of the Small Cause Courts Act it was not obligatory on the part of the Court to record the statement in full and then read it out to the witness and obtain his signature thereon. Under the provisions of that Act, it is enough if the notes of the evidence are reduced into writing by the Judge of the Small Cause Court. Merely because the statement is not recorded in full or it is not read out or his signature obtained thereon, I fail to see how such a record of evidence could be excluded from the meaning of the word "statement" appearing in Section 145. It is a statement which though not in the hands of the witness himself, yet it is a statement which has been reduced into writing by the Judge of the Small Cause Court.

Such a statement therefore can be put to the witness under Section 145 for the purpose of contradicting him. It cannot be in doubt that the previous statement may be letter, account books, written statement or even depositions. In the case of depositions they can either be in the form of fully recorded statements by the Court or notes made of the statement under the provisions of the Small Cause Courts Act. I do not therefore see as to why a statement, which was reduced into writing, in the form of notes by a Court of Small Causes cannot come within the ambit of Section 145. I am of the view that any evidence taken in a summary case including a small cause case may be admissible upon the conditions and for the purposes described in Section 145 of the Evidence Act. Unless otherwise compelled by any authority, I am inclined to hold that such a statement falls within the purview of Section 145 of the Evidence Act. I do not therefore agree with the learned Chief Judge that the defendants could not put questions under Section 145 with reference to those previous statements of P. W. 1 with a view to contradict him under Section 145 of the Indian Evidence Act.

4. There is no direct authority which will cover the case in point. There are, however, observations made in the following cases which support the conclusion. In *Tahsildar Singh v. State of U.P.*, AIR 1959 SC 1012 at p. 1023 their Lordships observed:

"The record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the object of the section would be defeated".

5. In *Emperor v. Najibuddin*, AIR 1933 Pat 589 a Bench of the Patna High Court said:

"A statement to an investigating officer can be deemed to have been 'reduced into writing', even when the officer has not recorded the statement in full, but has merely noted the gist of what was stated to him".

6. In *Emperor v. Ajit Kumar Ghosh*, AIR 1945 Cal 159 it was observed by the learned Judges:

"For S. 162 it is immaterial whether the statement is recorded in the actual words of the witness. It is sufficient if it is written in the diary merely in the form of a memorandum".

7. It will thus be clear that in the abovesaid cases even the statements which were not fully recorded or statements which were recorded in the form of memorandum were treated as statements falling within the ambit of section 145 of the Evidence Act. I am therefore satisfied that the Court below has erred in disallowing the two applications.

8. I would therefore allow the revision petitions and set aside the orders of the Court below. The Court below would permit P. W. 1 to be recalled and allow the defendants to cross-examine P. W. 1 with reference to his previous statements for the purpose of Section 145, Evidence Act. The petitioners will get their costs in C. R. P. No 1963 of 1966 only.

VGW/D V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 150
(V 56 C 48)

MOHAMED MIRZA, J.

K. Janardhan Reddy, and another, Petitioners v The Vith City Magistrate Criminal Court, Hyderabad, and others, Respondents.

Criminal Revn. Cases Nos. 337 of 1967 and 338 of 1967 and Criminal Revn. Petns. Nos. 311 and 312 of 1967, D/- 13-12-1967

Criminal P. C. (1898), S. 145 — Possession of part of joint family property by one member — Not proper ground to initiate proceedings under S. 145—(Hindu law — Joint family property).

Where the property in dispute is a joint family property, proceedings under S 145 cannot be initiated on the ground that one member of the family is in actual and exclusive possession of part of the family property, which may give rise to the dispute likely to cause breach of peace. Unless there is a partition in the family, any member who is in possession of any part of the joint family property, can only be in possession on behalf of other family members. (Paras 6, 7)

T V Sarma and G S Dwarakeswararao, for Petitioners (in both petns.), K. Jayachandrarreddy, Addl. Public Prosecutor, for 1st Respondent (State) (in both petns.), B V. Subbarayudu and M. A. Khader, for 2nd Respondent (in both petns.), C. M. Reddy, for 3rd Respondent (in Cr. R. C. No 337/67), M. Sudhakarreddy for 4th Respondent (in Cr. R. C. No 337/67)

ORDER- Criminal Revision Petition No 337 of 1967 is directed against an order of the learned 6th City Magistrate, Hyderabad initiating proceedings under S 145, Cr P C. in M. C. 8 of 1967 on his file.

2. It appears that a petition was filed by one K. Narasimha Reddy and K. Krishna Reddy against K. Janardhan Reddy and K. Pulla Reddy, alleging that the parties were members of a joint Hindu family. No partition of joint family property had taken place till the time this petition was filed, and it was also stated that K. Janardhan Reddy and K. Pulla Reddy, and other members of the family

were living in the house from the time the construction was started. Some other facts were also mentioned, but I am not concerned with those facts, because they are not necessary for a decision of this case. But, it was mentioned before the Magistrate's Court that K. Janardhan Reddy and K. Pulla Reddy, in collusion with one Satarama Raju, who is a tenant, had planned to dispossess the petitioners from the house, a portion of which was in his possession, and it was requested that in view of the likelihood of the breach of peace, proceedings under Section 145 Cr. P. C. may be started.

3. It appears that the learned Magistrate was satisfied only on the basis of this petition that there was a likelihood of the breach of peace, and, therefore, he initiated the proceedings. This petition is filed on behalf of K. Janardhan Reddy and K. Pulla Reddy, challenging the jurisdiction of the Magistrate to initiate the proceedings under S 145, Cr. P. C.

4. The learned counsel for the petitioners has contended that it is a joint family property, and as such, the Magistrate should not have started any proceedings, as he does not get any jurisdiction to do so. I have set out the salient features of the petition earlier in the course of this order from which, it is quite clear, that the house about which it is alleged that there was a likelihood of the breach of peace, is a joint family property, and it also is a fact that no division of the joint family property has taken place so far. In this situation can it be said that K. Narasimha Reddy and K. Krishna Reddy were in actual and exclusive possession of the portion of the house in dispute?

5. The learned counsel for the respondents has urged before me that what the court has to see is whether a party is in actual possession of the property in dispute, and if it is satisfied on that account, the proceedings cannot be said to be irregular.

6. It is settled law that proceedings under S 145 Cr. P. C. can be started only on the ground that a dispute likely to cause a breach of peace exists concerning land or water, and the court has to decide the question of actual possession. If a member of the joint family is in possession of a part of the property, can it be said that he is solely in actual possession? Unless there is a partition in the family, any member who is in actual possession of any part of the joint family property, can only be in possession on behalf of other family members. In matters of joint family property, no member of the joint family can claim any part of the joint family property exclusively for himself, because, inherently, every member of the joint family has a right in the pro-

perty, though, some portion may be in possession of one of the members of the joint family.

7. A number of affidavits have been filed on behalf of the petitioner herein, and counter-affidavits have also been filed, but, I am disinclined to take those affidavits, and counter-affidavits into account in disposing of this petition. I am restricting myself only to the averments made in the original petition given by the respondents herein, and from which, I am satisfied that the property in dispute, is a joint family property, and no one member of the joint family can claim actual and exclusive possession. As such, I think the learned Magistrate was not competent to initiate the proceedings under S. 145 Cr. P. C., and, therefore, I direct that these proceedings will be dropped.

8. In the result, Criminal Revision Case No. 338/67, which has been filed by one Sri G. Narayan Rao, who claims to be one of the tenants in the disputed house, fails, and is dismissed.

TC/D.V.C.

Revision dismissed.

AIR 1969 ANDHRA PRADESH 151 (V 56 C 49)

BASI REDDY, J.

R. Satyanarayana and others, Petitioners v. Saidayya and others, Respondents.

Election Petn. No. 15 of 1967 and Applns. Nos. 180, 122, 210, 212 and 211 of 1967, D/- 8-3-1968.

(A) Representation of the People Act (1951), Ss. 86(1), 79(b), 82(b), 123(1) (B) (a) — Election petition — Parties to — Candidate withdrawing from contest — Allegations of bribery against him — He is a necessary party to election petition — Failure to implead him is fatal.

It is well settled that a candidate whose nomination has been accepted but who withdraws from the election and does not contest the election, is a candidate within the meaning of S. 79(b) of the Act, and under S. 82(b) it is incumbent on the election petitioner to join him as a respondent, if it is alleged that he had received bribe as a reward for withdrawing.

(Para 13)

(B) Representation of the People Act (1951), S. 123 — Scope.

Under S. 123, both the giver and the taker would be guilty of the corrupt practice of bribery.

(Para 16)

(C) Representation of the People Act (1951), S. 86 — Election petition — Necessary party not impleaded — Petition liable to be dismissed — Delay cannot be condoned — (Limitation Act (1963), S. 5) — (Civil P. C. (1908), O. 1 R. 10).

EL/LL/C515/68

Where the statutory provision like S. 86 of the Representation of the People Act commands the Court to dismiss an election petition in limine if certain requirements are not satisfied, neither Order I, Rule 10 of the Code of Civil Procedure nor Section 5 of the Limitation Act can be called in aid.

(Para 18)

(D) Representation of the People Act (1951), S. 86(1) and (4) — Sub-section (4) when comes into play.

Sub-section (4) of S. 86 permits a candidate not already a respondent to come on record; but that sub-section would come into play only in cases where sub-section (1) of S. 86 does not operate. Therefore, if under sub-section (1) of Section 86 the High Court dismisses an election petition for non-compliance with the provisions of S. 82, there is no election petition pending in which a candidate can seek to be added as a respondent.

(Para 22)

Y. Sivarama Sastry and P. Balakrishnamurthy, for Petitioner in the petition and applicant in Applications Nos. 122 and 210 of 1967 and 1st respondent in Applications Nos. 180, 211 and 212 of 1967; B. Balamukundareddy and Vada Rajagopala Reddy, for the 1st Respondent in the petition and 1st Respondent in Applications Nos. 122 and 210 of 1967 and Petitioner in Application No. 180 of 1967 and 2nd Respondent in Applications Nos. 211 and 212 of 1967; A. Rangacharyulu, for the Applicant in Applications Nos. 211 and 212 of 1967 and the Respondent No. 3 in the petition.

ORDER: Before dealing with all these connected applications arising out of Election Petition No. 15 of 1967, it is necessary to state the relevant facts in chronological order. At the last general election held in February 1967, five persons filed their nomination papers with a view to contest the election from the Gajwel reserved constituency for a seat in the Andhra Pradesh Legislative Assembly. They were: (1) Gajwelli Saidiah, (2) J. H. Krishnamurthi, (3) A. L. Sailoo, (4) Mannay Balaiah and (5) Perka Narayana. After scrutiny of their nominations on 21-1-1967, the returning officer rejected the nomination paper of Perka Narayana and accepted the nominations of the remaining four candidates as they were found to be in order. On 23-1-1967 Mannay Balaiah gave a notice in writing signed by him to the returning officer, withdrawing his candidature. Thereafter a list of the names of the three contesting candidates was published by the returning officer. Polling took place on 21-2-1967, and Gajwelli Saidiah, who has stood on the Congress ticket, was declared to have been duly elected.

2. On 11-4-1967 one R. Satyanarayana, a voter of Gajwel reserved constituency,

presented the present election petition (Election Petition No 15 of 1967). To this election petition, he impleaded Saidiah, Krishnamurthi and Sailoo as the first, second and third respondents respectively. The election of the 1st respondent (Saidiah) was called in question on the main ground that he had committed various corrupt practices. The reliefs sought in the election petition were:

"1 To declare the election of the 1st respondent herein, viz. Saidiah, to the Andhra Pradesh Legislative Assembly from the Gajwel constituency as void,

2. To render a finding that the 1st respondent herein, his election agent, polling agents and other workers mentioned in Schedule-I, have committed the corrupt practices enumerated in Section 123 of the Act

3 Costs of this Election Petition be awarded, and

4. pass such further and other order or orders as may be found expedient under the circumstances of the case or as this Hon'ble Court deems fit

3 It is not necessary for the present purpose to enumerate the numerous corrupt practices alleged in the election petition. It will be sufficient to refer to paragraphs 5 and 8 of the election petition. Paragraph 5 is as follows:

"In addition to the three respondents herein, two other persons by name, Perka Narayana, resident of Konapuram, hamlet of Akkavaram village Gajwel taluq and Balaiah of Toopran village also filed their nomination papers. The said Balaiah has been made to withdraw by the 1st respondent herein on payment of illegal gratification of a sum of Rs. 3000."

Paragraph 8 reads

"The first respondent herein has committed the corrupt practice of inducing another candidate, Balaiah, to withdraw from the contest by making the gift of Rs. 3000 (Rupees three thousand) by way of illegal gratification. The result of the election has also been materially affected by the same."

On 19-4-1967 this Court found the election petition to be in order and notices were ordered to be issued to the respondents to appear and answer the claim made against them in the election petition. The petition was posted to 16-7-1967. On 30-6-1967 Sri Sivarama Sastry the learned advocate for the petitioner, sought for time to file an amendment petition. Time was granted and an amendment petition was filed in due course. One of the amendments sought by this petition was

"I pray that paragraph 5(a) may be permitted to be added in the following terms:

"The candidate Balaiah was made a payment of Rs. 3000 (Rupees three thou-

sand) by Saidiah (1st respondent) in the presence of M. Ranga Reddy, J. Narsiah and S. Malliah and two others at Toopran on 22-1-1967. The said amount was paid by M. Ranga Reddy to Saidiah who in turn paid to the said Balaiah. The said amount was paid by the 1st respondent calling upon the said Balaiah to withdraw his nomination."

This amendment petition was filed on 12-7-1967

4. By an order dated 21-7-1967 I allowed this amendment as well as the other amendments sought by the petitioner as they were merely an amplification of the corrupt practices already alleged in the main election petition. As regards the insertion of para 5(a), I said:

"Admittedly para 5(a) gives further particulars by way of amplification in respect of the corrupt practice already alleged in para 5 of the Election Petition, namely that Balaiah who had filed his nomination had been bribed and made to withdraw from the contest."

5 Then on 11-8-1967 the 1st respondent Saidiah filed Application No 180 of 1967 under Section 86(1) of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') praying that the High Court may be pleased to dismiss Election Petition No 15 of 1967 for non-compliance with the provisions of Section 82 of Act. In the affidavit filed in support of that application it was stated inter alia:

"I submit that the aforesaid allegation. (paragraphs 5 5(a) and 8 of the election petition) are allegations of corrupt practice against the said Balaiah, a candidate, under Section 123(1) (b) (a) of the Representation of the People Act 1951. The Election Petitioner ought to have joined the said Balaiah, the candidate as respondent to the Election Petition under Section 82(b) of the Representation of the People Act, 1951. The failure to implead the said candidate is fatal to the maintainability of the Election Petition."

I submit that Section 86(1) of the Representation of the People Act provides that the Election Petition which does not comply with the provisions of Section 81 or 82 or 117 of the Act, shall be dismissed by the High Court. As Sri Balaiah, the candidate against whom allegations of corrupt practice have been made, has not been joined as respondent to the Election Petition, the Election Petition does not comply with the provisions of Section 82 and is liable to be dismissed under Section 86(1) of the Representation of the People Act, 1951.

I, therefore, pray that this Hon'ble Court may be pleased to dismiss the Election Petition No 15/67 with costs under Section 86(1) of the Representation of the People Act."

6. A counter was filed to this application by the election petitioner on 24-8-1967 stating that there was no allegation of corrupt practice as such against Balaiah, within the meaning of Section 123(1)(b)(a) of the Representation of the People Act, and further that Section 86(1) of the Act is not mandatory and non-compliance with its provisions, is curable.

7. Subsequently on 24-8-1967 the election petitioner filed two applications, Applications Nos. 122 and 210 of 1967. By the first application he prayed that Balaiah may be impleaded as a party-respondent to the election petition. By Application No. 210 of 1967, which was filed under Section 5 of the Limitation Act, he prayed that the Court may be pleased to condone the delay in seeking to implead Balaiah as a party-respondent to Election Petition No. 15 of 1967 on the ground that he had been under a bona fide impression that Balaiah was not a necessary party to the election petition as no allegation of corrupt practice had been made against the said Balaiah specifically, and the failure to implead Balaiah was due to a misapprehension on his part.

8. Balaiah himself filed two applications — Applications Nos. 212 and 211 of 1967. Application No. 212 was filed under Section 86(4) of the Representation of the People Act praying that he may be impleaded as a party-respondent to the election petition; and by Application No. 211 filed under Section 5 of the Limitation Act, he prayed that the Court may be pleased to condone the delay in filing that application.

9. I shall deal with application No. 180 of 1967 first, then with Applications Nos. 122 and 210 of 1967, and then with Applications Nos. 212 and 211 of 1967 in that order.

Application No. 180 of 1967.

10. As noticed above, this is an application filed by the returned candidate Saidiah, who is the 1st respondent to the election petition. It is filed under Section 86(1) of the Act with a prayer that the election petition be dismissed under Section 86(1) of the Act for non-compliance with the provisions of Section 82 of that Act. Now, Section 86(1) of the Act is in the following terms:

"The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117."

Section 81 of the Act provides inter alia that an election petition may be presented by any candidate at such election or elector within forty-five days of the date of the declaration of the result of the election. Section 117 of the Act lays down that at the time of presenting an election petition, the petitioner shall deposit in the

High Court in accordance with the rules of the High Court a sum of two thousand rupees as security for the costs of the petition.

11. Section 82 of the Act, with which we are concerned, reads thus:

"Parties to the petition.—A petitioner shall join as respondents to his petition—

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition".

12. It is to be noted that under clause (b) of Section 82 of the Act, "any other candidate", which expression as defined by Section 79(b) of the Act means a person who has been duly nominated as a candidate for the election, shall be impleaded as a respondent to the election petition, if allegations of corrupt practice are made against him.

13. It is now well settled that a candidate whose nomination has been accepted but who withdraws from the election and does not contest the election, is a candidate within the meaning of Section 79(b) of the Act, and under Section 82(b) it is incumbent on the election petitioner to join him as a respondent, if a corrupt practice is alleged against him. In the present case, Balaiah was one of the persons whose nomination was accepted by the Returning Officer on 21-1-1967. On 23-1-1967 he withdrew his candidature. It was alleged in the election petition that Balaiah had been paid Rs. 3,000 by Saidiah in the presence of three named persons on 22-1-1967 and that the said amount was paid by the 1st respondent calling upon the said Balaiah to withdraw his nomination, and thereby the 1st respondent had committed the corrupt practice of inducing another candidate Balaiah to withdraw from the contest by making him a gift of Rs. 3,000 by way of illegal gratification. It was further alleged that by this act of bribery, Balaiah had been made to withdraw from the contest by the 1st respondent.

14. Thus there was an allegation that Saidiah had paid a bribe, that Balaiah had received the bribe, and that the bribe had been paid and received as a motive or reward for Balaiah withdrawing from being a candidate. Section 123 of the Act lays down what acts amount to corrupt practices. Sub-section (1)(B) (a) of that section provides:

"Bribery", that is to say—

(B) the receipt of, or agreement to receive any gratification, whether as a motive or a reward—

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being a candidate" Since an allegation of corrupt practice was made against a candidate whose nomination had been accepted but who had withdrawn his candidature, he would be a necessary party by virtue of Section 82(b) of the Act. Nevertheless Balaiah was not impleaded as a party-respondent to the election petition. In such a situation, Section 86(1) of the Act comes into play and it enjoins in express and explicit terms that the High Court shall dismiss an election petition which does not comply with the provisions of Section 82. Thus being a mandatory provision, the High Court has no other alternative in a situation like that but to dismiss the election petition.

15 It was, however, contended by Sri Sivarama Sastry on behalf of the election petitioner that the provisions of Section 86(1) are only directory and not mandatory and non-compliance with them does not entail the dismissal of the election petition. This contention is obviously untenable. It is perfectly plain that the sub-section is imperative and peremptory and not merely facultative and permissive, for it says that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. It leaves no discretion to the High Court, there is no option but to dismiss the election petition.

16 Sri Sivarama Sastry, while not contesting the position that though Balaiah had withdrawn from the contest, he is a candidate within the meaning of Section 82(b) of the Act, submitted that neither in the election petition nor in the amendment which was carried out by the insertion of paragraph 5(a) is there a specific allegation of corrupt practice against Balaiah. It was urged that the allegation made in the election petition was only against the 1st respondent (Saidiah) to the effect that he had given a bribe of Rs. 3,000 and made Balaiah withdraw from the contest. Since there was no allegation of bribery against Balaiah specifically the learned advocate contended that Balaiah is not a necessary party to the election petition. This contention is unacceptable for the simple reason that the averments made in the election petition and amplified by the amendment, make it abundantly clear that what was alleged was that the 1st respondent had given a bribe of Rs. 3,000 and induced Balaiah to withdraw from the contest, and that Balaiah had received the money and had in fact withdrawn from the contest.

Both the giver and the taker would therefore be guilty of the corrupt practice of bribery, as envisaged by Section 123 of the Act.

17. That being the true effect of the allegations made in the election petition, the failure to implead Balaiah as a party-respondent to the election petition is, in my opinion, fatal to its maintainability, and on that score the election petition is liable to be dismissed and must be dismissed.

Applications Nos. 122 and 210 of 1967.

18. As noticed already, the first of these applications is to implead Balaiah as a party-respondent and the second one is to condone the delay in seeking to implead him. In the first place, if as I have held, Section 86(1) of the Act is mandatory and leaves no option to the Court but to dismiss the election petition if a necessary party, as envisaged by Section 82 of the Act, is not impleaded, and the election petition is consequently dismissed, no question of impleading a party or excusing the delay in impleading a party would arise because in such a case there would be no election petition pending before the Court. In my judgment, neither Order L Rule 10 of the Code of Civil Procedure nor Section 5 of the Limitation Act can be called in aid in a situation like that, where the statutory provision commands the Court to dismiss an election petition in limine if certain requirements are not satisfied. A provision of this nature cannot be circumvented by having recourse to the provisions of other enactments. Therefore in a case like this, the question of impleading a party or condoning the delay in impleading a party does not arise at all.

19. However, even if it be conceded for the sake of argument that Section 5 of the Limitation Act can be invoked, I am not satisfied that there is sufficient cause in the instant case to condone the delay in making Balaiah a party-respondent. The protestation of the election petitioner that he was under a genuine misapprehension that he had not made any allegation of bribery against Balaiah is, in my opinion, rather naive and wholly unconvincing. He had made an allegation of corrupt practice against the 1st respondent and Balaiah in the clearest possible terms. He had given particulars of the amount of bribe, the date on which and the place at which it was paid, and the witnesses before whom it was paid. He had also mentioned that as a result of being bribed, Balaiah had withdrawn from the contest. Having made all these allegations, he did not implead Balaiah as a party-respondent. There is no sufficient cause for excusing the delay in impleading Balaiah. Therefore, in any view of the matter these two applications must be dismissed.

Applications Nos. 212 and 211 of 1967.

20. Application No. 212 to implead Balaiah has been filed under Section 86(4) of the Act. Section 86(4) is in these terms:

"Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent".

21. In this case the trial commenced on 16-6-1967 and since this application was filed long after fourteen days therefrom, Application No. 211 has been filed under Section 5 of the Limitation Act to condone the delay.

22. Now, if under sub-section (1) of Section 86 of the Act, the High Court dismisses an election petition, as indeed it is bound to do for non-compliance with the provisions of Section 82, there is no election petition pending in which a candidate can seek to be added as a respondent. Sub-section (4) of Section 86 permits a candidate not already a respondent to come on record, but in my opinion sub-section (4) would come into play only in cases where sub-section (1) of Section 86 does not operate. That is the necessary result of a harmonious reading of sub-section (1) and sub-section (4) of Section 86.

23. Moreover, I am fully satisfied that there are no bona fides in these applications. It is difficult to understand why Balaiah wants to be joined as a party-respondent, if the election petition is liable to be dismissed on the ground that he has not been impleaded as a party. It looks as though he is inviting the Court to give a finding of corrupt practice against him. There can be little doubt that he has been induced to file these applications at the instance of the election petitioner. These applications are therefore dismissed.

24. The net result is that Application No. 180 of 1967 is allowed and Election Petition No. 15 of 1967 is dismissed. In the circumstances of the case, there will be no order as to costs.

HGP/D.V.C.

Order accordingly.

AIR 1969 ANDHRA PRADESH 155
(V 56 C 50)

GOPALRAO EKBOTE, J.

P. K. Swamy, Petitioner v. South Eastern Railway, by its General Manager, Calcutta and another, Respondents.

Writ Petn. No. 252 of 1966, D/- 18-6-1968.

HL/LL/D271/68

(A) Railway Establishment Code, Rules 1702, 1703— Special provisions applicable to ex-B. N. Railway Company employees — General provisions in the Code do not apply till the special provisions are repealed or abrogated — Enquiry against petitioner — Charges framed by District Mechanical Engineer and enquiry ordered by him — Held, that the District Mechanical Engineer was not the Head of the Department and hence the proceedings were not valid. (Para 7)

(B) Railway Establishment Code, Rule 1702 — First notice mentioning proposed punishment — Prejudice.

If the first notice given to an employee mentions the proposed punishment, it amounts to prejudicing the issue, and the proceedings taken thereafter would be deemed to have been vitiated because of that infirmity. 1967-2 Andh WR 253, Foll. (Para 8)

Cases Referred: Chronological Paras
(1968) Second Appeal No. 282 of

1965 D/- 23-1-1968 (AP)

8

(1967) 1967-2 Andh WR 253,

Suryanarayana v. State of Andhra Pradesh

8

C. Poorniah, for Petitioner; S. P. Srivastava, S. C., for Respondent.

ORDER: In this application under Article 226 of the Constitution of India, the validity of the order of removal of the petitioner from railway service by the General Manager made on 9-11-1965 is challenged. The petitioner was originally appointed in 1939 as Shed Coolie. He underwent a training of five years to qualify himself to be appointed as Train Examiner. After the completion of that training, he was appointed as Train Examiner in 1945. He was working in that capacity at Waltair on 27-3-1962. On that date, two trains 1775 and 1779 reached Waltair station. The duty of the Neutral Train Examiner was to check the wagons and mark them so that repairs in regard to them as stated by him may be carried out. These repairs have to be carried out by the Train Examiner. It is alleged that on 27-3-1962 the trains reached Waltair Station at 4-30 p.m. The Neutral Train Examiner, who was also working that day, wanted the Train Examiner to carry out the repairs for another one hour so that he may complete his duty by that time. The Train Examiner seems to have refused to oblige him. Rival contentions thereafter started.

While it was contended by the Neutral Train Examiner that he had marked some wagons, but the petitioner did not carry out the repairs, the Neutral Train Examiner made a complaint against the petitioner to the Head Train Examiner on whose complaint the petitioner was put under suspension on 28-3-1962. The District Mechanical Engineer framed char-

ges against the petitioner on 4-4-1962. They were served upon the petitioner who was called upon to submit his explanation to the notice calling upon the petitioner as to why he should not be removed from service. The petitioner accordingly submitted his explanation on 24-4-1962. The District Mechanical Engineer on receipt of this explanation thought that the explanation was not satisfactory. The petitioner therefore was called upon by him on 27-4-1962 to give a list of witnesses. He also mentioned therein that some Assistant Officer would hold the enquiry. In response to this notice the petitioner submitted a list of witnesses on 8-5-1962 in which he mentioned the name of Sri S. Sankaran, Assistant Mechanical Engineer as his first witness.

2. The enquiry went on from 15-5-1962 to 3-3-1963. This enquiry was conducted by the same Sri S. Sankaran, Assistant Mechanical Engineer who was cited as a witness by the petitioner. The petitioner however did not raise any objection before him contending that he wanted to cite him as a witness and therefore he should not conduct the enquiry. On the completion of the enquiry, Mr. Sankaran submitted a report on 16-7-1964. This report was submitted by the Enquiry Officer to the General Manager as he was the authority to remove the petitioner from service. The petitioner was an ex-employee of the B. N. Railway Co. which was subsequently merged in the Indian Railways. The General Manager was of the opinion that the petitioner was guilty of the charges levelled against him. Evidently he did not agree with the report of the Enquiry Officer.

He therefore served the petitioner with a notice on 14-7-1965 to show cause as to why he should not be removed from service on the two charges mentioned therein which in his opinion, had been found to have been proved. The petitioner submitted his explanation on 9-9-1965 and further supplemented it by another explanation on 18-10-1965. The General Manager finally passed an order on 8-11-1965 which removed the petitioner from service. This order of removal was communicated by the Deputy Chief Personnel Officer, South Eastern Railway to the petitioner on 25-11-1965. It is this order that is now impugned in this writ petition.

3. Mr. C. Poorniah, the learned counsel for the petitioner raised before me three contentions. It was firstly argued that the District Mechanical Engineer who framed the charges and appointed the Enquiry Officer, was not competent to initiate the proceedings, frame charges or appoint any Enquiry Officer. The argument is that since the petitioner is an ex-employee of B. N. Railway Co., he could be removed only by the General

Manager and the charges should be framed in view of the delegation made by the General Manager to the Heads of the Departments by the Head of the Department. It is the Head of the Department that could not only frame the charges but either conduct the enquiry himself or direct any other officer to conduct the enquiry and submit a report. In support of this contention, reliance was placed upon page 5 of the South-Eastern Railway's Pamphlet issued on 11-10-1957 dealing with the procedure for conducting enquiries into the conduct of Non Gazetted Railway Employees, Paragraph 12 at page 5 is as follows:

'Special Instructions for removal or Compulsory retirement or dismissal of B. N. Railway Co. Staff.— The position of B. N. Railway Company staff is different from State Railway staff inasmuch as they were all deemed to have been appointed by the General Manager and as such, their removal or compulsory retirement or dismissal from service can only be ordered by the General Manager vide Railway Board's letter No. E45RG6/2/2 dated 15-2-48 reproduced as Appendix 'A'. In all cases of Ex-B. N. Railway Company's Staff, when the charges are sufficiently grave to indicate that the penalty likely to be imposed is that of dismissal or removal or compulsory retirement a formal departmental enquiry should be held in accordance with the rules in this section. The Heads of Departments should order the enquiry in such cases vide D. G. M. (P)'s Circular No. B/Ruling/6669 dated 25-2-57 (Estt. Serial No. 63/57) reproduced as Appendix 'A'.

In cases of reduction, however the enquiry can be ordered by the authority competent to impose the penalty.

In Appendix 'A' referred to in the said paragraph which is printed at pages 22 and 23 of the same pamphlet, it is stated:

'Clause (c) of Para 1707-R.1 lays down that the authority competent to impose the penalty shall cause a departmental enquiry to be held.

2. Accordingly, the General Manager hereby authorises the Heads of Departments to order enquiries and nominate a single officer or appoint a committee, in cases of Ex. B. N. Railway Company Staff against whom charge-sheets have been served for removal/dismissal from service.

4. In so far as these instructions are concerned, contained in the above-said letters, it can hardly be doubted that they make special provision in regard to Ex-B. N. Railway Co. employees in so far as the disciplinary proceedings are concerned. It is not in doubt that the Ex-B. N. Railway Co. employees are presumed to have been appointed by the

General Manager. When the General Manager is the appointing authority in cases of removal or dismissal, these letters concede that it is the General Manager who would be the authority that can pass an order of removal or dismissal. These instructions however say that it is not necessary for the appointing or the dismissing authority to conduct the enquiry. Under the delegation, the power to conduct the enquiry is entrusted to the Head of the Department in case of disciplinary proceedings against Ex-B. N. Railway Co. Staff.

5. It was, however, contended by Mr. Srivastava, the learned counsel for the Railways, that these instructions are not applicable to the petitioner's case because in the rules now printed in a book issued on 1-8-1961, Rule 1702, which is applicable to all the railway servants including those of Ex-B. N. Railway, enjoins that while the authority which can remove or dismiss a non-gazetted officer of the petitioner's character would be the General Manager, the enquiry can be made by any competent officer who can impose any one of the penalties mentioned in Rule 1707.

6. It is true that Rule 1702 gives the definitions of the appointing authority and the disciplinary authority. In so far as the Appointing Authority is concerned, there is no dispute as it is common ground that it is the General Manager who is the appointing authority in the present case. The definition of 'Disciplinary Authority' in so far as it is relevant for our purpose, is as follows:

"'Disciplinary Authority' in relation to the procedure for imposition of penalty on a Railway Servant means, the Authority competent to impose on him that penalty, provided that for imposing penalties of compulsory retirement, removal or dismissal that authority shall be the 'Appointing Authority'.

Provided further that:—

(a) 'Disciplinary Authority' in relation to the issue of charge sheets etc. under Rules 1709 to 1712 and issue of charge sheets under Rule 1716 means, so far as cases of Gazetted Officers are concerned, any authority competent to impose any of the penalties specified in Rule 1707.

(b) 'Disciplinary Authority' in relation to the issue of charge sheets under Rules 1709 and 1716 and permission to inspect official records under Rule 1711 in respect of non-gazetted staff means, any authority competent to impose any of the penalties specified in Rule 1707".

7. It is upon this rule that reliance is placed and it is contended that while the order of removal may be passed by the appointing authority, which means in this case the General Manager, the Rule permits the charge sheets to be framed

and enquiries to be conducted in respect of non-gazetted staff by any authority competent to impose any of the penalties specified in Rule 1707. Rule 1707 gives the punishments which could be inflicted. From the schedule to the Rules it is evident that Senior Scale Officer is one of such officers who is competent to impose some of the penalties mentioned in Rule 1707. These Senior Scale Officers include Class I and II Officers of the Railways. The District Mechanical Engineer being a Class I Officer would come within the purview of Senior Scale Officer mentioned in the Schedule. He is therefore one of the officers who can impose any punishment under Rule 1707. In the case of a non-gazetted member of the Railway Staff, it is true that while the appointing authority can impose the punishment of removal or dismissal, the charge-sheet can be framed and the enquiry conducted by any officer who is competent to inflict the penalty mentioned in Rule 1707. If the petitioner was not a member of the Ex-B. N. Railway Co., the argument of the learned advocate appearing for the Railways would, in my view, be flawless. But the question is whether the instructions mentioned above have been abrogated by the Rules mentioned above which were in force from 1-8-1961, and the book from which I am citing contains the Rules corrected upto 31-7-1966. The learned advocate for the Railways could not bring to my notice any provision or instruction whereby the special provisions made for the Ex-B. N. Railway Co., Employees have been abrogated.

As long as those instructions stand, it is the General Manager who can inflict the final penalty of removal or dismissal but the enquiry could be conducted only by the Head of the Department. Admittedly, the District Mechanical Engineer is not a Head of the Department. The term 'Head of the Department' has a significant meaning and that term admittedly does not include the District Mechanical Engineer. As long as those special provisions, which are applicable to Ex-B. N. Railway Co., employees are not repealed or abrogated, they are entitled to be heard by the Head of the Department although the final order of removal or dismissal can be passed only by the General Manager. Those special provisions must override the general Rule 1703. It is not contended before me that these instructions have no force of law.

If those instructions stand at par with Rule 1702, the special provisions must override the general provision. In other words, the general provision must give way to the special provisions applicable to the present case. That this position is true is not disputed. When once that is conceded, then it is under the special rule

that the petitioner's case ought to have been enquired into by the Head of the Department. Since the charges were framed by a person, who was not competent to frame charges or appoint the enquiry officer the entire proceedings in my view are vitiated. It may be that the final order was passed by the General Manager but since it is based upon an enquiry made by an incompetent person, the order also suffers from the infirmity

8. That apart, it is not disputed that the charge sheet issued by the District Mechanical Engineer and served upon the petitioner clearly indicates that the proposed punishment was removal. The second notice given to the petitioner also mentioned that the proposed punishment was removal. In so far as the second notice is concerned, no objection can be taken because that is the stage where the punishment proposed has to be necessarily mentioned in order to facilitate the petitioner to give his explanation if he wants to say anything in regard to the punishment. It is, however, objectionable to mention as to what punishment is proposed in the very first notice. The officer issuing that notice would be deemed to have already made up his mind in regard to the punishment. In a series of decisions, this Court has held that if the first notice mentions the proposed punishment, it amounts to prejudging the issue, and the proceedings taken thereafter would be deemed to have been vitiated because of that infirmity. See *R. Suryanarayana v State of Andhra Pradesh*, (1967) 2 Andh WR 253. I am bound by that Bench decision. It is not therefore considered necessary to refer to the cases of *Madhya Pradesh* and *Calcutta High Courts* cited by the learned advocate for the Railways. The *Madhya Pradesh* case was considered by Krishna Rao J., sitting singly in Second Appeal No 282 of 1965 dated 23-1-1968 (AP). The learned Judge followed the Bench decision referred to above.

9. The final contention of Mr. C. Pooriah, the learned advocate for the petitioner was that Sri S. Sankaran ought not to have been appointed as the Enquiry Officer because he was cited as a witness by the petitioner. It may be that the petitioner had cited him as a witness. But when he was appointed as the Enquiry Officer the petitioner did not raise any dispute nor objected to his appointment. In fact Sri Sankaran's report goes in favour of the petitioner. No such objection was taken even before the General Manager. I do not therefore think that merely because Sri Sankaran was cited as a witness by the petitioner, it would disqualify Sri Sankaran from conducting the enquiry, particularly when the petitioner had not raised any objec-

tion in that behalf. I do not therefore find any substance in this contention.

10. For the reasons which I have given the order must be quashed. I would therefore allow the writ petition and quash the order. The petitioner will have his costs. Advocate a fee Rs. 100

MVJ/D V C.

Petition allowed

AIR 1969 ANDHRA PRADESH 158
(V 56 C 51)

NARASIMHAM AND
KUPPUSWAMI, JJ

Mohammed Fiazuddin Khan, Appel-
lant v Custodian Evacuee Property And
Pra. and others, Respondents.

Writ Appeals Nos. 99 and 100 of 196
and W P No. 1994 of 1964 D/- 19-7
1968 against the judgment of High Court
in W P Nos. 638 of 1961 and 534 of 196
D/- 11-11-1963

(A) Administration of Evacuee Pro-
perty Act (1950) Ss. 1 and 2(a) — Allot-
ment of property declared as evacuee
under Act — No provision in law that
the property must be allotted to the
evacuee. (Para 8)

(B) Civil P. C. (1908), S. 11 — Writ
petition — Constructive *res judicata* —
Earlier writ petition considered on merit
— Subsequent writ petition on ground
different from those put forward in ear-
lier petition — Subject matter in two
petitions same — Held, subsequent writ
petition by same person is hit by doc-
trine of constructive *res judicata*. AIR
1965 SC 1150, Rel. on. (Para 8)

(C) Displaced Persons (Compensation
and Rehabilitation) Act (1954) Ss. 12 and
13 — Provisions of S. 12 are not depen-
dent on provisions of S. 13

The terms of S. 12(2) of the Act are
clear that on the publication of a noti-
fication under Section 12(1) the right
title and interest of any evacuee in the
evacuee property shall be extinguished
and the property shall vest absolutely in
the Central Government free from all
encumbrances. This is unconditional and
is not made to depend upon the fixation
or payment of compensation under S. 13.
AIR 1962 SC 994, Rel. on. (Para 14)

(D) Displaced Persons (Compensation
and Rehabilitation) Act (1954) S. 12 —
Acquisition of property declared to be
evacuee without payment of compensa-
tion — Act if violates Art. 31(2) of Con-
stitution.

The Act does not fix the amount of
compensation, nor does it specify the
principles on which and the manner in
which the compensation is to be deter-
mined and given. On the other hand, it

leaves the principles on which and the manner in which the compensation is to be determined to form the subject-matter of agreement between the Governments of India and Pakistan. Thus, it is clear that the Act infringes Art. 31(2) of the Constitution. But the provisions of Article 31(5)(b)(iii) would show that such is not the case. The language of Art. 31(5)(b)(iii) is very wide. It refers to a law with respect to the property declared to be evacuee property. It cannot be said that the Displaced Persons (Compensation and Rehabilitation) Act, 1954 is not a law with respect to evacuee property. It is clear therefore that Article 31(5)(b)(iii) applies to this Act. (Para 17)

The presence of words "or otherwise" in Art. 31(5)(b)(iii) would indicate that the Article is not confined to laws made in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country. The expression "or otherwise" in the Article is sufficiently wide to include the laws not only passed in pursuance of an agreement but in any other manner. AIR 1955 Mad 75 and AIR 1956 Pepsu 58, Foll. (Para 18)

It cannot be said that the expression should be given a meaning ejusdem generis with the portion occurring earlier namely, "in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country." By the time the Article was enacted there were already laws relating to evacuee property which were not made in pursuance of any agreement. It is apparent that the intention of the framers of the Constitution could not have been that the protection of Art. 31(5)(b)(iii) should be confined only to laws made in pursuance of an agreement or laws passed in similar circumstances. On the other hand, the intention seems to be clear that all laws relating to evacuee property should be covered by the said Article. The Act is therefore protected from attack that it infringes Art. 31(2), by Art. 31(5)(b)(iii). AIR 1957 SC 521, Rel. on; AIR 1955 Pepsu 148, Foll. (Paras 18, 20 and 21)

(E) Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 12 — Acquisition of evacuee property without compensation — Section not hit by Article 19(1)(f) of Constitution — C. A. 322 of 1961 D/- 1-12-1961 (SC), Rel. on. Case law discussed. (Para 25)

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1965-1 SCR 686, Devilal v. Sales
Tax Officer B

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Managing Officer-cum-Custodian of
E. P. Jaipur 9
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Ram v. Union of India 15
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v. State of West Bengal 24
(1961) AIR 1961 SC 1257 (V 48)=
(1962) 1 SCR 189, Harigir v.
Asst. Custodian E. P., Bhopal 17
(1961) AIR 1961 SC 1320 (V 48)=63
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Custodian Evacuee Property
Punjab 16
(1961) C. A. No. 322 of 1961 D/- 1-12-
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Custodian of Evacuee Property 18
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bay v. Sholapur Spinning and
Weaving Co., Ltd 23
(1951) AIR 1951 SC 41 (V 38)=1950
SCR 869, Chiranjitlal v. Union of
India 23
(1950) AIR 1950 SC 27 (V 37)=1950
SCJ 174=51 Cri LJ 1383=1950
SCR 88, A. K. Gopalan v. State of
Madras 23
C. Narasimhacharya, for Appellant (in
W. A. Nos. 99 & 100 of 64) and Petitioner
(in W. P. No. 1994 of 64); Prl. Govt.
Pleader, for Respondents (in all the cases).
KUPPUSWAMI, J.: The appellant in
the Writ Appeals and the petitioner in the
writ petition is Mohd. Fiazuddin Khan.
By an order D/- 18-9-1951 the Deputy
Custodian, Hyderabad, acting under the
provisions of the Administration of Eva-
cuee Property Act declared him as an
Evacuee and notified his property consist-

ing of a residential building known as Golden Lodge situated in Red Hills and an extent of Ac. 350-00 of land situated in the village of Atteli, Tahsil Medchal of Hyderabad District, as evacuee property. On appeal by the petitioner, the Custodian of Evacuee Property confirmed the order of the Deputy Custodian. On a further revision petition to the Custodian-General of Evacuee Property, the orders of the Custodian and the Deputy Custodian were set aside on the ground that the notice issued to the petitioner under Section 7(1) of the Act was invalid. The matter was remanded to the Deputy Custodian with a direction to issue a fresh notice conduct a fresh enquiry and give a decision in accordance with the law. After remand, the Assistant Custodian again passed an order D/- 8-3-1954 declaring the petitioner an evacuee and all his property as evacuee property. An appeal by the petitioner to the Additional Custodian was dismissed, as also a further revision to the Custodian-General of Evacuee Property. While dismissing the revision, the Custodian-General made the following observation in his order dated 17-8-1954:

"Mr Ali has very earnestly urged before me that his client has never been to Pakistan, except on that occasion and that all the members of his family are residing in Hyderabad and the petitioner himself has been in Hyderabad ever since his return. He fears that the effect of my order would be that the petitioner would be thrown out of his property. In this he is right, but I have no doubt that the Custodian would not dispossess the petitioner from the house and the holdings but would, in the peculiar circumstances of this case allot the house and the holdings to him".

The petitioner filed a review petition before the same authority which was ultimately dismissed on 22-8-58. The petitioner, thereupon, filed a writ petition under Art 226 of the Constitution in the High Court of Punjab for quashing the order of the Custodian General and all the prior proceedings. The Writ Petition was dismissed by a single Judge and a Letters Patent Appeal against that order was also dismissed by a Division Bench of the Punjab High Court even at the stage of admission. Thereafter, the petitioner preferred an appeal to the Supreme Court after obtaining special leave.

2 The only question that was raised before the High Court and before the Supreme Court was whether the notice issued by the Assistant Custodian to the appellant under S 7(1) of the Act was in conformity with the provisions of the section and was valid. The Supreme Court by its judgment dated 21-3-1961 rejected that contention and dismissed the appeal. The appellant sought to contend before

the Supreme Court that even if the notice was good, on the facts of the case it could be held that the appellant had not left India on account of partition within the meaning of Section 2-D(i) of the Act and hence he was not an evacuee. But, the Supreme Court refused to allow the appellant to raise this point for the first time before them as it was not even raised before the High Court. After the dismissal of the appeal by the Supreme Court, the Custodian issued a notice to the petitioner on 5-4-61 to surrender possession of the property. The petitioner, thereupon filed W P No 638/61 seeking a writ of mandamus directing the Custodian of Evacuee Property to allot him the properties in pursuance of the order of the Custodian-General dated 17-8-1954 passed on the revision petition preferred by the petitioner. More than a year later he filed another petition W P No 534/62 in which he again challenged the validity of the notice issued by the Asst. Custodian under Section 7 of the Act and also complained that the principles of natural justice had been violated in the proceedings taken by the authorities under the Act. He prayed that the Court may be pleased to call for the records relating to all the proceedings referred to earlier and quash the same by issuing a writ of certiorari or any other appropriate writ.

3 Both the writ petitions were heard together and by a common judgment, Justice Basi Reddy, dismissed the writ petitions with costs. W A No 99/64 is preferred against the judgment and order in W P No 638/61 and W A No 100/64 is preferred against the judgment and order in W P No 534/62.

4. While disposing of the writ petitions it was brought to the notice of our learned brother Basi Reddy, J that the Central Government had issued notification on 20-1-1962 under Section 12 of the Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954) whereunder the Central Government acquired all the properties which had been declared as evacuee properties of the petitioner for the public purpose connected with the relief and rehabilitation of displaced persons. In addition to various other reasons given by Basi Reddy, J, for dismissing the writ petition he also held that by reason of the above notification the property had vested in the Central Government absolutely free from all encumbrances and the petitioner's remedy, if any is only to claim compensation under Section 13 of that Act and for that reason also the writ petition was not maintainable. The petitioner has now filed W P No 1994/64 challenging the above notification as unconstitutional and pray for the issue of a writ of certiorari quashing the said notification. As the notification

sought to be challenged in W. P. No. 1994/64 is based on the assumption that the property is evacuee property and as the question whether the orders declaring the petitioner as an evacuee and his property as evacuee property are themselves the subject-matter for consideration in Writ Appeal Nos. 99 and 100 of 1964, it is convenient to take up the writ appeals in the first instance for consideration.

5. In W. P. No. 638 of 1961 which is the subject-matter of W. A. No. 100/64 the question for consideration was whether the petitioner was entitled to ask for the issue of a writ of mandamus directing the Custodian of Evacuee Property to allot him the properties in pursuance of the order of the Custodian-General dated 17-8-1954. Our learned brother, Basi Reddy, J., held that while dismissing the revision petition all that the Custodian-General said was "that he had no doubt that the Custodian would not dispossess the petitioner from the house and the holdings but in the peculiar circumstances of this case, allot the house and holdings to the petitioner" and this was nothing more than a recommendation and could not be construed as a direction by the Custodian-General to the Custodian to allot the property conferring on the petitioner any legal right to claim allotment. He held there was no legal duty on the Custodian to allot the properties to the petitioner. We agree entirely with this view. No other provision of law or statute has been placed before us whereunder there is a duty cast upon the authorities to allot the property declared as evacuee property to the evacuee himself. There is, therefore, no substance in the writ appeal which is dismissed with costs.

6. In W. P. No. 534/62 the petitioner sought once again to challenge the entire proceedings in spite of the fact that he had on an earlier occasion taken up the matter upto the Supreme Court which dismissed his appeal by its judgment D/- 21-3-1961. Basi Reddy, J., dismissed this writ petition on three grounds. He held that this court had no jurisdiction to quash the orders passed by the Custodian-General of Evacuee Property who was outside its territorial jurisdiction, that the Constitution 15th Amendment Act 1963 which came into force on 5-10-1963, which enabled any High Court to issue a writ even in respect of orders of authorities situated outside the territory in which a High Court exercises its jurisdiction, had no retrospective operation and therefore, the petitioner could not rely upon that amendment to invoke the jurisdiction to quash the order passed by the Custodian-General long before the said amendment came into force. Secondly he held that the same point viz., the

validity of the notification under the Evacuee Property Act had been agitated by the petitioner before all the authorities culminating in appeal to the Supreme Court and he cannot raise the same question once again in this writ petition. Finally he held that as the Central Government had issued a notification on 20-1-1962 under Section 7 of the Displaced Persons (Compensation and Rehabilitation) Act acquiring the property of the petitioner, the petitioner had no locus standi to maintain this writ petition, his only remedy being to claim compensation under Section 13 of that Act.

7. Mr. Narasimhachari challenges the correctness of all the three reasons given for dismissing the writ petition. In our view the second reason given by our learned brother, Basi Reddy, J., with whom we agree for dismissing the writ petition is sufficient to dispose of the writ Appeals. It is, therefore, unnecessary to consider the validity of the other two reasons.

8. From the facts stated earlier, it is clear that the petitioner had attacked the correctness and validity of the very same orders which he is now challenging in prior proceedings and ultimately his appeal before the Supreme Court was dismissed on 21-3-1961. Mr. Narasimhachari, however, contends that the only question which fell for consideration before the Supreme Court was whether the notice under Section 7 of the Evacuee Property Act was valid, whereas in the writ-petition he is seeking to challenge the order of the Tribunal under the Act on various other grounds including the ground that he is not an evacuee within the meaning of Section 2-D(i) of the Act, and as this aspect was not considered by the High Court of Punjab or the Supreme Court on an earlier occasion it is open to him to file a fresh writ petition questioning the orders on grounds different from those which he urged on a prior occasion. As a matter of fact, even before the Supreme Court he sought to raise the contention that even if the notice was good, on the facts the appellant was not an evacuee as he had not left India on account of partition within the meaning of Section 2-D(i) of the Act. The Supreme Court observed that:

".....This question was not raised before the High Court and we would not be justified to allow the appellant to raise it for the first time before us."

The question for consideration is whether the petitioner can be permitted to raise this objection in a fresh writ petition. We are of the opinion that he cannot be so permitted in view of the decision of the Supreme Court in *Devilal v. Sales Tax Officer*, AIR 1965 SC 1150. The facts in that case are also similar to the facts in the present case. In that case

the assessee challenged the validity of sales tax imposed upon him for a particular year by a petition under Article 226. The petition was rejected upon merits. An appeal also was dismissed by the Supreme Court upon merits. The assessee had attempted to raise two additional grounds before the Supreme Court. But the Supreme Court did not allow them on the ground that they had not been raised in the High Court and had not been raised before the Supreme Court at an earlier stage. Subsequently by writ petition under Article 226 before the High Court the assessee once again challenged the same assessment order but on grounds which the Supreme Court had not permitted to be raised by the assessee in the appeal before them in the previous writ petition. High Court rejected the petition on merits. The Supreme Court on appeal held that the second writ petition was barred by constructive res judicata. Their Lordships of the Supreme Court observed as follows:

"The result of the decision of this court in the earlier appeal brought by the appellant before it, is clear and unambiguous, and that is that the appellant had failed to challenge the validity of the impugned order which had been passed by the Asst. Commissioner against him. In other words, the effect of the earlier decision of this court is that the appellant, is liable to pay the tax and penalty imposed on him by the impugned order. It would, we think, be unreasonable to suggest that after this judgment was pronounced by this court, it should still be open to the appellant to file a subsequent writ petition before the Madhya Pradesh High Court and urge that the said impugned order was invalid for some additional grounds. In case the Madhya Pradesh High Court had upheld these contentions and had given effect to its decision, its order would have been plainly inconsistent with the earlier decision of this court, and that would be inconsistent with the finality which must attach to the decisions of this court as between the parties before it in respect of the subject-matter directly covered by the said decision. Considerations of public policy and the principles of the finality of judgments are important constituents of the rule of law and they cannot be allowed to be violated just because a citizen contends that his fundamental rights have been contravened by an impugned order and wants liberty to agitate the question about its validity by filing one writ petition after another."

Applying that principle to the present case we hold that the learned Judge was right in holding that the petitioner should not be permitted to agitate the same question again in this writ petition even

if it be on different grounds. The writ petition was rightly dismissed.

9 It is pointed by Mr Narasimhachari that the first reason given by Basu Reddy, J., that as the order of the Custodian-General was passed before the amendment when the High Court had no jurisdiction to issue writs in respect of authorities outside the territory of the Andhra Pradesh, the Constitutional 15th Amendment had no application and the writ petition was not maintainable, is not correct, and cited a decision in *Anwar Mohd. v Managing Officer Cum-Custodian of E. P. Jaipur* AIR 1964 Raj 260 where a different view was taken and the decision of Basu Reddy J., in this writ petition was dissented from. In that case the Rajasthan High Court had to consider whether the writ petition could be filed after the Constitution (15th Amendment Act) to quash the order of an authority outside the territory of Rajasthan which had been passed before the coming into force of the Constitutional amendment. In this case the position is different. On the date of the filing of the writ petition, this Court had obviously no jurisdiction to issue a writ to the authority outside the territory over which it has jurisdiction. The real question is whether any order can be passed in such a writ petition after the coming into force of the Constitutional amendment. It is however, unnecessary for us to go into that question, as we have taken the view that the petitioner is prevented on the principles of constructive res judicata from re-agitating the same question in a fresh Writ Petition.

10 The third reason given by Basu Reddy J., is based upon the notification under the Displaced Persons (Compensation and Rehabilitation) Act. It is unnecessary again to rely on this circumstance in view of the above conclusion of ours. As, however the validity of that notification is now challenged in a separate W P No. 1994/64, we are considering that question in that writ petition. In view of our decision on the question of res judicata and finality of the orders in the previous proceedings, the judgment and the orders in the writ petitions are confirmed. The writ appeals fail and are dismissed with costs. Advocates fee Rs. 100 in each case.

W P No 1994 of 1964

11. The impugned notification dated 20-1-1962 is in the following terms:

"Whereas the Central Government is of opinion that it is necessary to acquire the evacuee properties specified in the Schedule hereto annexed in the State of Andhra for a public purpose, being a purpose connected with the relief and rehabilitation of displaced persons including payment of compensation to such person.

Now, therefore, in exercise of the powers conferred by Section 12 of the Displaced Persons (Compensation and Rehabilitation) Act, Act 1954 (44/54), it is notified that the Central Government had decided to acquire, it hereby acquires, the evacuee properties specified in the Schedule hereto annexed".

12. Section 12 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 is in the following terms:

"12. Power to acquire evacuee property for rehabilitation of displaced persons.

(1) If the Central Government is of opinion that it is necessary to acquire any evacuee property for a public purpose being a purpose connected with the relief and rehabilitation of displaced persons, including payment of compensation to such persons, the Central Government may at any time acquire such evacuee property by publishing in the Official Gazette a notification to the effect that the Central Government has decided to acquire such evacuee property in pursuance of this section.

(2) On the publication of a notification under sub-section (1), the right, title and interest of any evacuee in the evacuee property, specified in the notification shall, on and from the beginning of the date on which the notification is so published, be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances.

(3) It shall be lawful for the Central Government, if it so considers necessary, to issue from time to time the notification referred to in sub-section (1) in respect of—

- (a) all evacuee property generally; or
- (b) any class of evacuee property; or
- (c) all evacuee property situated in a specified area; or
- (d) any particular evacuee property.

(4) All evacuee property acquired under this section shall form part of the compensation pool".

13. Section 13 refers to compensation for evacuee property and provides that—

"There shall be paid to an evacuee compensation in respect of his property acquired under Section 12 in accordance with such principles and in such manner as may be agreed upon between the Governments of India and Pakistan."

It is admitted by Sri Ramachandra Reddy, appearing for the Union of India that till now no principles have been agreed upon between the Governments of India and Pakistan according to which compensation may be paid, and no compensation has been fixed for being paid in respect of the petitioner's properties. The case was adjourned on a number of occasions extending over a period of several

months in order to enable Sri Ramachandra Reddy to obtain information from the Union of India, if there is any proposal at all to pay compensation in respect of the property acquired under that notification. We are informed by Sri Ramachandra Reddy that the Union of India has not given a definite reply as to whether any compensation will be paid and if so, what is the amount that will be paid. We have, therefore, to consider this petition on the basis that the property was acquired under S. 12, without any compensation under Section 13 of the Act

14. Mr. Narasimhachari contends that Sections 12 and 13 will have to be read together and no effect can be given to Section 12 unless and until the principles according to which the compensation is to be paid to the evacuee are agreed upon between the Governments of India and Pakistan and in accordance with those principles the compensation in respect of the property is to be determined. In support of his contention, the relief upon the well-known principle of statutory interpretation which is succinctly set out in the following passage of 'Maxwell on the Interpretation of Statutes', 11th Edition, p. 276.

"Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the legislature has so provided in clear terms. It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly if not in express words at least by clear implication and beyond reasonable doubt. It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it".

In this case we are of opinion that the terms of Section 12(2) of the Act are clear that on the publication of a notification under Section 12(1) the right, title and interest of any evacuee in the evacuee property shall be extinguished and the property shall vest absolutely in the Central Government free from all encumbrances. This is unconditional and is not made to depend upon the fixation or payment of compensation under Section 13. If the legislature intended that the extinguishment of rights of the petitioner or the vesting of the property in the Central Government is conditional upon the fixation of compensation under Section 13, provision would have been made to that effect. In view of the clear terms of Section 12 we have to accept the contention of Sri Ramachandra Reddy that

the property vests in the Central Government, notwithstanding the fact that the principles of compensation have not been agreed upon between the two Governments of India and Pakistan and has not therefore been fixed.

15 In *Basant Ram v Union of India*, AIR 1962 SC 994 it was held by the Supreme Court that the consequence of the notification under Section 12 is that all rights, title and interest of the evacuee in the property ceased, with the result that the property no longer remained evacuee property. The property became part of the compensation pool after the notification and could only be dealt with under the provisions of the Displaced Persons (Compensation and Rehabilitation) Act, 1954.

16 An earlier decision of the Supreme Court in *Gopal Singh v Custodian Evacuee Property*, Punjab, AIR 1961 SC 1320 to the same effect was followed. No doubt, these two decisions as pointed out by Mr. Narasimhachari do not deal with the exact contention raised by him, namely that the vesting will not take place until or unless compensation is fixed under Section 13 of the Act, but it is significant to note that their Lordships observed that on the making of notification under Section 12 the property vests in the Central Government.

17 It was next contended that if Section 12 is so construed as to enable the Central Government to acquire the property of a person even without the necessity of payment of compensation under Section 13 Section 12 would violate Article 31(2) of the Constitution which is in the following terms.

'31(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, the manner in which, the compensation is to be determined and given. In this case it is seen that the Act in question does not fix the amount of compensation, nor does it specify the principles on which and the manner in which the compensation is to be determined and given. On the other hand, it leaves the principles on which and the manner in which the compensation is to be determined to form the subject-matter of agreement between the Governments of India and Pakistan. Thus, it is clear that the Act infringes Article 31(2) of the Constitution. In fact, no serious attempt was made by Mr. Ramachandra Reddy to argue that the Act did not violate Article 31(2) of the Constitution, but he relied upon Article 31(5)(b)(iii) which says:

"Nothing in clause (2) shall affect the provisions of any law which the State may hereafter make in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property"

It is contended that as this is a law with respect to the property declared by law to be evacuee property, its provisions cannot be attacked on the ground that they infringe Article 31(2) of the Constitution. In *Harig v Assistant Custodian*, E. P. Bhopal, AIR 1961 SC 1257 it was held that clause (iii) of Article 31 (5) (b) of the Constitution cannot be limited to a law which itself declares any property to be evacuee property. It also includes a law which empowers an authority to declare any property as evacuee property. The words 'property' declared by law to be 'evacuee property' in the clause, would necessarily include property which could be declared as evacuee property. A law relating to evacuee property would concern itself with laying down the criteria for determining what property is to be considered as evacuee property and could not be expected to specify the particular properties which are to be treated as evacuee properties. The protection afforded by Art 31(5)(b) (iii) therefore, extends to the provisions of the Administration of Evacuee Property Act.

The language in Art. 31(5)(b) (iii) is very wide. It refers to a law with respect to the property declared to be evacuee property. It cannot be said that the Displaced Persons (Compensation and Rehabilitation) Act, 1954 is not a law with respect to evacuee property. It is clear therefore that Art 31(5)(b)(iii) applies to this Act.

18. It is, however, urged that in order to attract the provisions of Art. 31(5)(b) (iii) of the Constitution, the law should not only be one with respect to the property declared by law to be evacuee property but also should be one made in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country and as admittedly this Act was not passed in pursuance of any such agreement, the provisions of Article 31(5)(b)(iii) are not attracted. It is true that the Act was not made in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country as contemplated by first part of the Article 31(5)(b)(iii) but the argument ignores the presence of the expression 'or otherwise' in the Article. This expression is sufficiently wide in our opinion, to include the laws not only passed

in pursuance of an agreement but in any other manner.

In *Dhirajlal v. Dy. Custodian of Evacuee Property*, AIR 1955 Mad 75 dealing with the same argument, the Madras High Court observed as follows:

"But a law in pursuance of such an agreement would be a law 'otherwise' with respect to evacuee property. The impugned section is one such law." In *Mohan Kaur v. Custodian MEP Patiala No. 1*, AIR 1956 Pep 58 it was observed that—

"The parenthesis 'or otherwise' connotes that the law need not necessarily be based on an agreement with a foreign country but may be made unilaterally by the Government of India".

A decision to the same effect in *Sampuran Singh v. Competent Officer*, AIR 1955 Pep 148 was followed. It was contended that in the context of Article 31(5)(b)(iii) the expression 'or otherwise' should be given a meaning ejusdem generis with the portion occurring earlier, namely, "in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country". In other words, it was argued that the law must have been made in pursuance of some transaction which approximates an agreement.

19. In *Lilavati Bai v. Bombay State*, AIR 1957 SC 521 dealing with the explanation to Section 6(a) of the Bombay Land Requisition Act, 1948 which was in the following terms:

"For the purpose of this section,—

(a) premises which are in the occupation of the landlord, the tenant or the sub-tenant, as the case may be, shall be deemed to be or become vacant when such landlord ceases to be in occupation or when such tenant or sub-tenant ceases to be in occupation upon termination of his transfer in any other manner of his interest in the premises or otherwise". Their Lordships of the Supreme Court observed:

"The argument proceeds further to the effect that in the instant case admittedly there was no termination, eviction, assignment or transfer and that the words 'or otherwise' must be construed as ejusdem generis with the words immediately preceding them: and that therefore on the facts as admitted even in the affidavit filed on behalf of the Government there was in law no vacancy. In the first place, as already indicated, we cannot go behind the declaration made by the Government that there was a vacancy. In the second place, the rule of ejusdem generis sought to be pressed in aid of the petitioner can possibly have no application. The Legislature has been cautious and thorough-going enough to bar all avenues of escape by using the words

"or otherwise". Those words are not words of limitation but of extension so as to cover all possible ways in which a vacancy may occur But the Legislature, when it used the words "or otherwise", apparently intended to cover other cases which may not come within the meaning of the preceding clause, for example, a case where the tenant's occupation has ceased as a result of trespass by a third party. The Legislature, in our opinion, intended to cover all possible cases of vacancy occurring due to any reasons whatsoever. Hence, far from using those words ejusdem generis with the preceding clauses of the explanation, the Legislature used those words in an all inclusive sense". In a later portion of the judgment their Lordships observed:

"The rule of ejusdem generis is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the Legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning."

20. We are of the opinion that in the context of Art. 31(5)(b) (iii) also there is no scope for the application of the principle of ejusdem generis. By the time the Article was enacted there were already laws relating to evacuee property which were not made in pursuance of any agreement. It is apparent that the intention of the framers of the Constitution could not have been that the protection of Art. 31(5) (b) (iii) should be confined only to laws made in pursuance of an agreement or laws passed in similar circumstances. On the other hand, the intention seems to be clear that all laws relating to evacuee property should be covered by the said Article.

21. For the reasons above stated we accept the contention of Sri Ramachandra Reddy that the impugned law is protected from attack on the ground that it infringes Article 31(2), by Article 31(5)(b) (iii).

22. It was next contended that Section 12 violates Article 19 (1) (f) of the Constitution as it is an infringement of the right of the petitioner to hold and dispose of his property and the provision enabling the Government to acquire his property without payment of compensation cannot

in any sense be regarded as a reasonable restriction in the interests of the general public within the meaning of Article 19(5).

23 The question whether Article 19 applies to a law relating to deprivation of property coming under Article 31(1) or a law relating to acquisition of property coming under Article 31(2) has been considered in several decisions of the Supreme Court. In *Churanlal's case*, 1950 SCR 869=(AIR 1951 SC 41) it was held that Article 19(1)(f) would continue until the owner was, under Article 31 deprived of such property by authority of law. Again in *State of Bombay v Bhanu Munji*, 1955-18 SCJ 10=1955-1 SCR 777=(AIR 1955 SC 41) dealing with the contention that Sections 5(1) and 6(4)(a) of Bombay Land Requisition Act, 1948 violate Article 19(1)(f) of the Constitution, the Supreme Court observed as follows:

'In our opinion, Article 19(1)(f) does not apply to them. In *State of West Bengal v Subodh Gopal Bose*, 1954 SCJ 127-1954 SCR 587=(AIR 1954 SC 92) and *Dwarkanadas Srinivas of Bombay v Sholapur Spinning and Weaving Co Ltd.*, 1954 SCJ 175=1954 SCR 674=(AIR 1954 SC 119) the majority of the Judges were agreed that Articles 19(1)(f) and 31 deal with different subjects and cover different fields. There was some disagreement about the nature and scope of the difference but all were agreed that there was no overlapping. We need not examine those differences here because it is enough to say that Article 19(1)(f) read with Cl. (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by clause (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold and dispose of it, and as clause (5) contemplates the placing of reasonable restrictions on the exercise of those rights it must follow that the Article postulates the existence of property over which these rights can be exercised. In our opinion, this was decided in *Gopalan's case*, 1950 SCJ 174=1950 SCR 88=(AIR 1950 SC 27) where it was held that the freedoms relating to the person of a citizen guaranteed by Article 19 assume the existence of a free citizen and can no longer be enjoyed if a citizen is deprived of his liberty by the law of preventive or punitive detention. In the same way when there is a substantially total deprivation of property which is already held and enjoyed, one must turn to Article 31 to see how far that is justified.

This was followed in AIR 1957 SC 521=1957 SCR 721. However in *K. K. Kochuni v States of Madras & Kerala*, AIR 1960 SC 1080 Justice Subbarao who

delivered the judgment of the majority observed.

'The decision of this court in *Bhanji Munji's case*, 1955-1 SCR 777=(AIR 1955 SC 41) no longer holds the field after the Constitution (Fourth Amendment) Act, 1955'

In that case the Supreme Court had to deal with the validity of Madras Marumakkathayam (Removal of Doubts) Act (32 of 1955) which abolished a class of *sthanams* and converted them into *tarwad*, and their properties into *tarwad* properties and deprived *sthanams* of their right to the property. It was held by the Supreme Court that a law depriving a person of his property is invalid if it infringes Art. 19(1)(f) unless it imposes reasonable restrictions on the person's fundamental rights. In other words, even a law dealing with deprivation of property could be challenged on the ground that it contravenes Article 19. It may however be noted that the case in AIR 1960 SC 1080 did not involve any question of acquisition or requisition of property under Art. 31(2) but a mere deprivation of the property under Art. 31(1) which by the express provision of Art. 31(2A) was not to be deemed to be acquisition or requisition of property. This decision was rendered on the 4th May 1960. On 8th May 1960 the Bench of five Judges of the Supreme Court of whom four were parties to the judgment in AIR 1960 SC 1080 had to consider in *Barkya Thakur v State of Bombay* AIR 1960 SC 1203 the argument that the notification under the Land Acquisition Act violated Art. 19(1)(f) of the Constitution. This argument was summarily rejected in the following words:

'The other attack under Art. 19(1)(f) of the Constitution is equally futile in view of the decision of this Court in 1955-1 SCR 777=(AIR 1955 SC 41) and 1957 SCR 721=(AIR 1957 SC 521)

Thus, it would appear that the Supreme Court itself considered the law coming under Art. 31(2) could not be attacked as offending Art. 19. *Kochuni's case*, AIR 1960 SC 1080 was not referred to as perhaps they were of the view that the decision should be confined to a law under Art. 31(1). This was made clear in an unreported decision in *Sitabati Devi v State of West Bengal, C.A. No 322 of 1961 (SC)* where the petitioner sought to question the provisions of the West Bengal Land (Requisition and Acquisition) Act 1948. In rejecting this contention Sarkar J. said.

'Kavalapparao Kochuni's case held that after the amendment, Cl. (2) of Art. 31 alone dealt with acquisition and requisition of property by the State and Cl. (1) dealt with deprivation of property in

other ways. This case did not deal with a law of acquisition or requisition of property by the State but was concerned with a law by which deprivation of property was brought about in other ways, which law, it held, had to satisfy Article 19 and the principle in Bhanji Munji's case, 1955-1 SCR 777=(AIR 1955 SC 41) which could have saved that law before the amendment could not save it after the amendment. The observation in Kavalapparao Kochuni's case that Bhanji Munji's case, 1955-1 SCR 777=(AIR 1955 SC 41) 'no longer holds the field' has, therefore, to be understood as meaning that it no longer governs a case of deprivation of property by means other than requisition and acquisition by the State. Kavalapparao Kochuni's case, AIR 1960 SC 1080 was not concerned with a law of requisition or acquisition of property governed by Art. 31(2), as it now stands, and did not decide that question".

24. In *Sm. Kamala Bala v. State of West Bengal*, AIR 1962 Cal 269 also it was held that Kochuni's case was an authority for the proposition that Constitution (Fourth Amendment) Act, 1955 of Art. 31(1) did not exclude the operation of Art. 19(1) (f) and (5) but was not an authority for the proposition that Article 31(2) read with 31(2A) had not the effect of excluding Art. 19(1)(f). It is thus, clear that whatever may be the position so far as the law coming under Art. 31(1) is concerned, with regard to a law falling within Art. 31(2) in view of the clear decision of the Supreme Court in *Sitabati Devi's case*, C. A. No. 322 of 1961 (SC) it cannot be challenged on the ground that it violates Art. 19(1)(f).

25. For the above reasons we hold that it is not open to the petitioner to challenge the provisions of Section 12 of the Displaced Persons (Compensation and Rehabilitation Act) on the ground that it violates Art. 19 (1) (f) of the Constitution.

26. It was further contended that there are instances both in Hyderabad and in various other States in India where the property of an evacuee was notified under S. 12 of the Act and compensation was paid in respect of such property. It was, therefore, argued that inasmuch as no compensation is being paid to the petitioner he is discriminated against and therefore the notification violates Art. 14 of the Constitution. This point was not raised in the Writ Petition. Further no facts have been placed before us to show that compensation in similar circumstances was paid to other evacuees whose properties were notified under Section 12 of the Act. In the circumstances in the absence of any such material it is not possible for us to consider the contention based upon Article 14. It is open to the petitioner if he is

so advised to challenge the notification on the ground that it violates Art. 14 after placing all the necessary material before the Court.

27. The writ petition is, therefore, dismissed.

28. We feel that this is an extremely hard case where the petitioner's property has been notified and even though the Act provides for compensation being determined, such compensation has not been determined and paid. The Union of India also has not provided any assistance to the court in the matter of providing information as to the steps that have been taken or being taken in fixing the amount of compensation under Section 13 of the Act. In those circumstances, we consider it a fit case where the petitioner should be given some time to surrender possession of the property. The petitioner is given four months time for surrendering possession of the property from today.

29. For the reasons stated above the respondents will not be entitled to any costs in this writ petition.

VGW/D.V.C. Petition dismissed.

AIR 1969 ANDHRA PRADESH 167 (V 56 C 52)

BASI REDDY AND VAIDYA, JJ.

Adapa Vittal, Plaintiff-Appellant v. Govula Ramakistiah and others, Defendants-Respondents.

C. C. C. Appeal No. 72 of 1961 D/- 14-7-1967, against decree of Chief Judge City Civil Court, Hyderabad at Secunderabad, D/- 27-7-1961.

(A) Civil P. C. (1908), O. 21, R. 63 — Suit under — Scope of enquiry and relief.

In suits under O. 21, R. 63, C. P. C. the question that has to be gone into is the question of title and also the possession of the plaintiff. If the plaintiff fails to prove his title and his possession to the suit property on the date of attachment, he cannot get any relief in a suit under O. 21, R. 63, C. P. C. except that the attachment was without jurisdiction or absolutely void. AIR 1927 Mad 450, Dist. AIR 1959 Andh Pra 178, Foll. Case law Disc. (Para 11)

(B) Civil P. C. (1908), O. 21, R. 52; O. 40, Rule 1 — Court appointing Receiver of rents and profits of immovable property — Order 21, R. 52 does not apply — AIR 1933 Cal 417 and (1963) 67 Cal WN 916, Foll.; AIR 1925 Mad 51, Dist. (Para 14)

(C) Civil P. C. (1908), O. 21, R. 63; O. 21, R. 52; O. 39, R. 1 — Suit under O. 21, R. 63 for setting aside attachment and sale in execution — Attachment not

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resulting in any injury to plaintiff — Sale being voidable attachment not set aside — Held on facts that there was no breach of injunction order, so as to vitiate attachment.

A, B C and D were brothers. C entered into partnership with E. In suit O S 23/44 filed by E against C for dissolution of partnerships and rendition of accounts final decree was passed on 8-10-1951. The decree was not against C alone but was against joint family A filed suit for partition on 11-7-1951 being O S 8/1/51. F had obtained a valid decree against E and in execution of that decree had attached the decree in O S 23/44 and put it in execution and attached and sold certain houses. A filed objection petition on 16-1-57 under O 21 R. 58 which was dismissed. A filed suit under O 21 R. 63 for setting aside the order in his claim petition and for vacation of the attachment order. A alleged that as he was receiver on the date of attachment of properties, properties were not liable to attachment except with leave of the court. A further alleged that the attachment was illegal as it was in contravention of an injunction order against E restraining him from executing decree in O S 23/44. There was no material to show that A had sustained any injury because of the sale of the property.

Held (1) that the sale could not be set aside AIR 1958 SC 725 Expld. Case law Disc. (Paras 15 17)

(2) that there was no necessity of setting aside attachment of properties though in possession of Receiver without the leave of the Court. The sale being voidable the court could always consider the circumstances of the case as to whether the sale should be set aside. Case law Disc. (Para 18)

(3) That there was no breach of injunction order so as to vitiate the attachment made in execution proceedings as there was no injunction order against F Case law Disc. (Para 23)

(4) That a sale held without making attachment of property or without duly complying with provisions of law was not void but voidable. (Para 24)

Hence the attachment made was valid. Even assuming it was irregular as it did not result in any injury or loss to A and as sale in such cases was voidable there was no reason to set aside attachment.

(Para 27)

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Advocate General, for Appellant; M.
 Venkata Subbarao, for 1st Respondent;
 M. Suryanarayana Murthy, for 2nd Res-
 pondent; P. Ramachandra Reddy, for 4th
 Respondent.

VAIDYA, J.: This appeal arises out of
 a suit filed by the plaintiff as C. S. 18 of
 1960 in the Court of the Chief Judge, City
 Civil Court, Hyderabad against one Rama-
 krishtiah and Yellappa and the plain-
 tiff's brother Adapa Narayan.

2. The material allegations in the
 plaint are that the plaintiff, third defend-
 ant, Adapa Hanmaiah and Ramalingam
 are brothers and members of a Hindu
 joint family till 1938, when Ramalingam
 separated from the rest of the family.
 After the separation of Ramalingam, the
 family continued to be joint till July
 1940 when there was a separation in
 mess between the brothers. The plain-
 tiff's allegation is that thereafter separate
 khatahs were opened in the names of the
 three brothers representing their branch
 of families and all the amounts paid or
 expended by them used to be debited
 in their respective names. In 1942 the
 third defendant opened a shop in a part-
 nership with the 1st defendant under the
 name and style of Adapa Narayan Bom-
 bay Palakol Cloth shop borrowing monies
 from the family funds. The plaintiff and
 his brother Hanmaiah had also lent
 money to the said shop. The 1st defend-
 ant filed O. S. 23/44 in the District
 Court, Secunderabad for dissolution of
 partnership and rendition of accounts.
 The 1st defendant then alleged that the
 third defendant had entered into a part-
 nership as manager of the joint family.
 The third defendant denied this allega-
 tion in his written statement. A preli-
 minary decree was passed on 19-4-1944
 against only the third defendant and an
 arbitrator was appointed to give an award
 on the profits and on the basis of the
 award made by the arbitrator, the court
 passed the final decree on 8-10-1951.
 The allegation of the plaintiff is that in
 the arbitration proceedings, none of the
 other members of the family including
 the plaintiff was represented. The
 plaintiff had represented in O. S. 23/44

till the preliminary decree stage in his
 capacity as General Power of Attorney
 agent of the 1st defendant and not on
 behalf of the family. During the pro-
 gress of the arbitration proceedings, as
 differences arose between the three
 brothers, the plaintiff filed a suit for
 partition on 11-7-1951 being O. S. 8/1/51.

The judgment in O. S. 8/1/51 discloses
 that the joint family had entered into a
 partnership with the 1st defendant.
 In execution of the decree in O. S.
 23/44 the 1st defendant had filed
 an application for attachment of pro-
 perties and the plaintiff had filed a claim
 petition under O. 21, Rule 58, C. P. C.
 As the 1st defendant did not press his
 execution petition, the objection petition
 was also closed as not pressed. The
 second defendant who had obtained a
 decree in O. S. 101/53 on the file of the
 then Subordinate Judge, Secunderabad,
 attached the decree obtained by the 2nd
 defendant against the third defendant and
 in his capacity of attaching creditor filed
 an execution petition and attached house
 Nos. 169 and 170 at Marredpalli, Secun-
 derabad, House Nos. 52, 54, 55 and 64 at
 Trimulgherry and House Nos. 71 to 76 at
 Mettuguda, Secunderabad for the reco-
 very of the sum due under his decree.
 The plaintiff contended that the said at-
 tachment is illegal and unauthorised and
 also filed an objection petition on 16-1-57
 under Order 21, Rule 58, C. P. C. which
 was dismissed. Aggrieved by that order,
 he has filed the present suit under Order
 21, R. 63, C. P. C. praying that the order
 dated 5th July 1960 in his claim petition
 be set aside and the attachment order
 dated 13th July 1958 be vacated. In the
 alternative he claimed that the attach-
 ment in respect of 1/3 share of the plain-
 tiff be vacated. The order of the trial
 court under Order 21, R. 58, C. P. C. was
 impugned as erroneous and it was alleged
 that it was liable to be set aside on the
 following grounds:

(a) The decree in O. S. 23/44 was
 against the third defendant alone and was
 not binding on the plaintiff and in any
 event the attachment to the extent of
 plaintiff's 1/3 share in the attached pro-
 perties is improper;

(b) the observation by the court that
 the plaintiff had admitted that the part-
 nership business is of the joint family
 venture, is erroneous;

(c) the plaintiff on the date of the ap-
 plication under O. 21, Rule 58, C. P. C.
 was in possession of all the properties as
 Receiver appointed by the court in O. S.
 8/1/51 by an order dated 10-8-57;

(d) he was in actual possession of his
 1/3 share in the attached properties and
 therefore the order of attachment could
 not have been extended to his share;

(e) the attachment effected in execution was illegal as it was in contravention of an injunction order issued by the 3rd Addl. Judge, City Civil Court, Secunderabad against the 1st defendant on 14-10-58 restraining him from executing the decree in O. S. No. 23/44.

(f) as the plaintiff was Receiver on the date of the properties attached, the properties were therefore not liable to attachment except with the leave of the court which appointed him Receiver;

(g) out of the properties attached, house No. 169 Marredpalli, House Nos. 52 and 53 Trimulpherry were exclusively allotted to the plaintiff and therefore those houses were not attachable.

The 1st defendant admitted that the plaintiff, third defendant Adapa Hanumaiah and Ramalingam were all brothers; but he denied his knowledge of separation of Ramalingam from the joint family. He averred that the defendants continued to be joint till the filing of O. S. 8/51 and there was no separation of mess among the brothers till the date of the suit. He was not aware whether separate khatsas were opened in their names and that the amounts have been debited in their respective names. He categorically denied that the third defendant borrowed money from the joint family and entered into a partnership with him in his personal capacity. The averment was that the partnership was entered into by the third defendant as head and manager of the Hindu joint family and that this was done by him with the knowledge and consent of the plaintiff and the negotiations with the partnership were personally conducted by all the brothers and the plaintiff was personally conducting the business of the said firm in partnership with him.

He also denied that the suit filed by him as O. S. 23/44 was only against Adapa Narayan and the allegations in the plaint would show that it was against the joint family and that fact was never denied by the plaintiff. The consent memo filed before the preliminary decree was signed by the plaintiff and also by the Advocate representing the plaintiff's family. The plea therefore of the plaintiff that the joint family was not liable, was false and pure after thought. The Manager of the family was appointed Receiver and the plaintiff worked throughout in his place. The 1st defendant after referring to the suit O. S. 8/51 averred that the plaintiff and his brothers had claimed 1/3 share from the partnership assets. He denied that the decree in O. S. 23/44 was passed against the third defendant alone and maintained that it was against the joint family consisting of the plaintiff and his brothers and therefore binding on all of them. He averred that the plaintiff was not in possession as Receiver and that he

was not entitled to claim 1/3 share as the decree is binding on him. As regards the reasons for setting aside the attachment, he stated that those are false and untenable.

3 The defendant 2 supported defendant No. 1. He relied on the judgment in O. S. 8/51 for showing that the family remained as joint family till the filing of the partition suit. As far as he is concerned, he has stated that he had obtained a decree valid against the 1st defendant and in execution of that decree, has attached the decree in O. S. 23/44 and put it in execution. The execution proceedings taken by him are binding on all the parties and the attachment is legally valid. As far as the allegations made in para 5 of the plaint, which gives the reasons for setting aside the attachment, the second defendant denied the same and put the plaintiff to strict proof of those allegations.

4. On these pleadings the trial court framed as many as 9 issues.

1. Was the decree in O. S. 23/44 on the file of the then Dist. Judge, Secunderabad against third defendant alone in his individual capacity?

2. Were not the properties liable to attachment on the ground that the plaintiff was a Receiver of the properties attached?

3. Was the plaintiff in actual possession of his 1/3 share in the houses attached in execution of the decree in O. S. 23/44?

4. Was the attachment in E. P. 20/58 effected in violation of the injunction order dated 14-10-58 issued by the 3rd Addl. Judge, City Civil Court, Secunderabad against the first defendant?

5. Is the plaintiff estopped from denying the liability under the decree in O. S. 23/44?

6. Is the suit barred by Ss. 11 and 47 of the C. P. C.?

7. Is the court fee paid insufficient?

8. Is the suit within time?

9. To what relief is the plaintiff entitled to?

On the first issue the trial court held that the decree in O. S. 23/44 was not obtained by the 1st defendant against the third defendant alone in his individual capacity but was against the joint family. Issues 2 and 4 which raise the question of the validity of attachment because of the appointment of Receiver and the existence of an injunction order were not pressed by the learned counsel for the plaintiff in the trial court. Issue 3 was decided against the plaintiff and it was held that the plaintiff was not in actual possession of his 1/3 share in the

attached properties at the date of attachment. Under issue 5 the court held that the plaintiff was not estopped from denying the liability under the decree in O. S. 23/44. Under issue 6 which dealt with the question as to whether the suit was barred by Ss. 11 and 47, C. P. C. and issue 8 which was with respect to whether the suit was within time, were not pressed by the learned counsel for the defendants. Under issue 7 the plaintiff was directed to pay court-fee on the market value of the properties which was Rs. 1,00,000. In the result the suit was dismissed with costs.

5. In this appeal by the plaintiff, the learned Advocate General has argued before us only issues 2 and 4. He has filed an application for raising those issues as additional grounds which was allowed as not opposed by the respondents. The finding of the trial court is with respect to actual possession of the plaintiff of his 1/3 share in the houses attached. No sufficient data has been brought to our notice to assail that finding. The first contention of the learned Advocate General is that the plaintiff is entitled to file an application under O. 21, R. 58, C. P. C. and a suit under Order 21, Rule 63 as eo nomine, as he was not a party to the decree. His further contention is that in Ex. A. 1 which is the written statement filed by the third defendant in O. S. 23/44, he had clearly stated that the agreement having been come to between the plaintiff (defendant 1) and defendant (defendant 3) they were the only parties and the nature of relationship and arrangement between the defendant and his brothers and others is irrelevant for the purpose of the suit. The preliminary decree in that suit was passed on the basis of the agreement and there was no finding as to whether the third defendant represented the joint family and entered into the partnership as its manager. The decree (Ex. A. 3) in O. S. 23/44 also shows that it was only against the third defendant. He further relied on Pichappa Chettiar v. Chokalingam Pillai, AIR 1934 PC 192 in which it has been held that even in cases where the managing member of the joint family enters into a partnership with a stranger, the other members of the family do not ipso facto become partners of the business so as to clothe them with all the rights and obligations of a partner.

In such case the family as a unit does not become a partner. But only such of its members as in fact entered into contractual relations with the stranger. The partnership will be governed by the Act. In the alternative he argued that in case the plaintiff is considered to be bound by the decree, he is entitled to raise an objection taken by him under S. 47, C. P. C. and his suit may be con-

verted into an application under that section. He relied on P. Veerayya v. Y. Veeraraghavayya, AIR 1961 Andh Pra 298 wherein a Division Bench of this High Court had held that a suit brought under Order 21, R. 63, C. P. C. could be treated as a petition under Section 47, C. P. C. at the stage of second appeal especially when an application had been made in the trial court within time for conversion of the suit into a petition under Section 47, C. P. C. In the circumstances of the case, we do not find any necessity to enter into a discussion of this question. Suffice it to say that the finding of the trial court that the decree in O. S. 23/44 was not obtained against the third defendant in his individual capacity, has not been assailed before us. We are of the opinion that the plaintiff cannot succeed in the appeal; that being so, it is immaterial as to whether his suit is considered under O. 21, Rule 63, C. P. C. or the suit is converted into an application under Section 47, C. P. C.

6. The learned Advocate General contended before us that under the provisions of Order 21, Rule 63, C. P. C. the validity of attachment can be contested and it is not necessary that the scope of a suit under Order 21, Rule 63, C. P. C. should be restricted to the question as to whether the plaintiff in the suit was in possession in his own right or on behalf of somebody else other than the judgment-debtor on the date of attachment. For this purpose it is necessary to consider the provisions of Order 21, Rule 58, C. P. C. and the subsequent rules. O. 21, R. 58, C. P. C. provides that a claim or an objection can be made to the attachment of any property on the ground that such property is not liable to such attachment and that when such a claim or objection is preferred, the court shall proceed to investigate the claim or objection. Rule 59 of Order 21, C. P. C., provides that the claimant or objector must adduce evidence to show that at the date of attachment, he had some interest in or was possessed of the properties attached. Order 21, Rule 60, C. P. C. provides:

"Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in possession of the judgment-debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing

the property wholly or to such extent as it thinks fit, from attachment.

This rule lays down that the property can be released from attachment only in cases where the person filing the claim or objection proves that such property when attached, was not in possession of the judgment debtor or some persons in trust for him or claiming through him or that being in the possession of the judgment debtor at such time it was so in his possession, not on his own account or as his own property but on account of or in trust for some other person. Further if the court is satisfied that the property, at the time when it was attached, was in possession of the judgment debtor as his own property and not on account of any other person or was in possession of some other person in trust for him or claiming through him, the court shall disallow the claim under Order 21 rule 61 C P C. The question of possession of the property at the date of attachment and its return is the only material question which the court has to consider in considering the application under Order 21 Rule 58 Civil P C. Order 21, Rule 63 C. P C provides that the party against whom an order is made in a claim or objection petition, such party may institute a suit to establish the right which he claims to the property in dispute.

7 The learned Advocate-General relied on Venkatapayya v Venkatachala pathi Rao AIR 1927 Mad 450 where Devadoss J has observed at page 455

the claimant need not restrict himself to prove only his claim but can also attack the validity of the attachment proceedings, and when he filed a suit under O 21 R 63 he is certainly in no way debarred by anything contained in the Civil P C. from contesting the validity of attachment. In other words when asking for a declaration that his property is not liable to attachment, he can also show that either what was done was not attachment or that there was an invalid attachment which could not affect his right in any way.

In this case the question that was raised was that the Court had no jurisdiction as the attachment was effected by the District Munsif's Court after the receipt of the order staying the execution. It was held that the attachment proceedings after the stay order were absolutely void and then there was no attachment at all but the formality of an attachment was gone through. While considering the applicability of O 21 R. 58 the learned Judge has considered a case where the validity of attachment was questioned on the ground of jurisdiction. It is in this context that it was observed that a suit under O 21 R. 63 Civil P C. does not in any way debar the plaintiff from contesting the validity of attachment.

8. This decision cannot be taken as an authority for the proposition that the validity of attachment can be questioned in each and every case in a suit under O 21 R. 63 Civil P C. An L. P A. was preferred from the decision referred to above and was allowed. Vide Venkatachala pathi v Venkatapayya, AIR 1932 Mad 86. A Division Bench of the Madras High Court considered only the questions arising under Ss. 47 and 11 Civil P C. which had been answered in favour of the plaintiff by Devadoss, J. Their Lordships did not at all consider the question of the scope of a suit under O 21 R. 63, Civil P C. They reached the conclusion that under Ss. 47 and 11 Civil P C. a purchaser of a property after attachment in execution proceedings is bound by the decision of the executing Court though not a party to it and that decision that has become final cannot be set aside by that party. That being so we feel that the decision of Devadoss, J. has to be confined to the particular facts of the case.

The learned counsel appearing for the respondents has relied on Venkatasubba Rao v G Vigneshwaradu, AIR 1928 Mad 840 where a Division Bench of the Madras High Court was considering a case where after the dismissal of the plaintiff's claim under O 21 R. 58 Civil P C. the defendant purchased and obtained possession of the property attached and a suit under R. 63 was filed by the plaintiff for possession of the property was barred under O 2, R. 2 Civil P C. while considering the question, their Lordships have referred to Phulkumari v Ghanshyam Misra, (1908) 85 Ind App 22 (PC) and have held that a suit under O 21 Rule 63, C. P C. is really a suit to set aside the order and if that right had accrued to a party long before dispossession, it is difficult to see how a subsequent dispossession can be held to be a part of his cause of action so as to attract the provisions of O 2, R. 2, Civil P C.

9 The Calcutta High Court in Mahammad Hashim Ali Khan v Iffat Ara Hamidi Begum, AIR 1942 Cal 180 has observed that the issue that can be raised in a suit instituted under the provisions of O 21 R. 63 C P C. must in essence be of the same nature as the issue in the claim case although the ambit of enquiry of that issue would be more detailed in the suit. In the execution proceedings the judgment debtor cannot challenge the validity of the decree under execution on the ground of fraud and the claimant can only urge that the property attached is his property and not of the judgment debtor. He cannot urge that the decree is bad or even the execution is barred by time. The issue viz., whether the property at the date of the attachment was

the property of the judgment debtor or the claimant is the only issue in a suit under O. 21, R. 63, Civil P. C. is clear by the language of O. 21, R. 63, Civil P. C. itself, for that rule speaks of a suit to establish the right which he claims to the property in dispute relying on (1908) 35 Ind App 22 (PC). Their Lordships observed that a suit under O. 21, R. 63, Civil P. C. is in essence a review of the summary order passed by the executing court on the claim and is a mere continuation in a different form of the claim proceedings.

10. A Division Bench of this High Court in *M. Venkata Subbamma v. G. Raja Rathamma*, AIR 1959 Andh Pra 178 has held that in a suit under O. 21, R. 63, Civil P. C. in order to prove that the plaintiff has a right to the property in dispute and it is therefore not liable to attachment, the consideration of his title as well as possession will be relevant. The two questions cannot be separated one from the other.

11. Thus it is clear that in suits under O. 21, R. 63, C. P. C. the question that has to be gone into is the question of title and also the possession of the plaintiff. If the plaintiff fails to prove his title and his possession to the suit property on the date of attachment, he cannot get any relief in a suit under O. 21, R. 63, Civil P. C. except that the attachment was without jurisdiction or absolutely void.

12. Turning to the contention of the learned Advocate-General that as the plaintiff had been appointed as the Receiver and as the attachment had been effected without the consent of the court appointing such Receiver, the attachment is voidable, it is necessary to mention a few facts. The third defendant was appointed Receiver on 14th August 1951 for the purpose of filing suits and for taking steps to execute decrees if any. The order further relates that the plaintiff was assigned house No. 55 Trimulgherry Bazar, garages in Trimulgherry, and one house situate at Meetuguda, the rental of which amounted to Rs. 71 to realise those rentals as interim relief. It was admitted that he was collecting Rs. 37 by way of mortgage of Nirmal Ambarti Sidhanti house which would give him a sum of Rs. 105 which was roughly 1/3 of the rents according to the admission of all the parties to the partition suit. This order shows that the houses which likely to fetch 1/3 of the rental were allotted to the plaintiff's branch for maintenance and the balance to the defendants. The third defendant was succeeded by Mr. Ramanujam, Advocate as Receiver who was again succeeded by the plaintiff on 10th June 1957. While appointing the plaintiff as the Re-

ceiver a direction was given that he should collect the rental "subject to the terms and conditions of the order dated 14-8-1951". This order of 10-6-57 was carried up in revision to the High Court and in C. R. P. 1899/57 this court passed an order on 9-4-1958 directing the plaintiff to collect rents of all the joint family properties and deposit the same into court so that the parties may draw their respective shares for maintenance.

13. The first question that arises for consideration is whether the property was in the custody of any court or public officer so as to attract the provisions of O. 21, R. 52, C. P. C. The learned Advocate General relies on *Thayumana Pillai v. Ramaswami Chettiar*, 19 Mad LW 681= (AIR 1925 Mad 51) and contends that even though the Receiver was appointed only for the purposes of collecting profits and rents, it should be deemed that the property was in the custody of the court. The property which was put to sale, was in the occupation of tenants and therefore no physical possession could have been given to the Receiver. The only manner in which the property could have been taken in possession by the Court appointing the Receiver, was to direct the Receiver to collect the profits and rents from such property.

In the case cited by the learned Advocate General, a Receiver had been appointed only of the crops and not of the corpus of the property; but the learned Judges on the facts of the case reached the conclusion that the Receiver was appointed in that case for the property itself though the object of the appointment was only to collect the rents and profits of the land. This case is not clearly applicable to the facts of the case under consideration. In the instant case as the circumstances relating to the appointment of the Receiver show that it was never the intention of the Court appointing the Receiver to take the property in its custody. The question was whether during the pendency of the partition suit, some arrangements should be made for giving relief to the parties by way of interim maintenance. It is in this context that the Receiver was appointed to collect the rents from all the joint family properties. It cannot therefore be said that the court appointed the Receiver to the property itself. Further the import of the expression "custody of the Court" in O. 21, Rule 52, Civil P. C. has also to be considered in this context.

14. The learned counsel for the respondents relying on *Pratapmal Rameshwar v. Chunilal Johuri*, AIR 1933 Cal 417 says that the said Rule is not intended to apply to a case where the Court appointed a Receiver of the rents and profits of the immoveable properties, though in essence it may be said that the

court when it appoints the Receiver takes possession of the property. The above cited case was considered in *Shiva Sankar v Ajit Kumar*, (1963) 67 Cal WN 916 and it was held that where the court appoints a Receiver of the rents and profits of immovable property Order 21 Rule 52, Civil P. C. does not apply. We are in agreement with the view expressed by the Calcutta High Court. The question whether the court is in custody of the property, will have to be decided on the facts and circumstances of each case.

15 We now proceed to consider the legality of the attachment made by the Court assuming that the property was in the custody of the Court and that O. 21, R. 52, C. P. C. is applicable. It is contended that it is well settled that the property in the hands of a Receiver is exempt from judicial process except of course to the extent permitted by the appointing court. It is also contended that proceedings taken in respect of the property which is in possession and management of the Receiver appointed by the Court under Order 40 Rule 1, Civil P. C. without the leave of the court, are illegal in the sense that the party proceeding against the property without the leave of the court concerned is liable to be committed for contempt of court. Reliance for this proposition is placed on *Kanhalyalal v Dr D. R. Banaji*, AIR 1958 SC 725. In a suit instituted by the mortgagee of a plot situated in the Dist. of Yeotmal which was then situated in the Central Provinces and Berar to enforce the mortgage, a Receiver was appointed by the Bombay High Court on its original side in respect of the mortgaged property.

The land and the building were valued by the court at about Rs. 70,000. The revenue payable in respect of a part of the mortgaged property which was a plot admeasuring 191,664 sq-feet at the rate of Rs. 129 per year remained in arrears for two years viz., 36-37 and 37-38. The Sub-Divisional Officer of Yeotmal sold at auction the plot in question free from all encumbrances on 17th December 1937 without impleading or giving notice to the Receiver. At that auction the appellant before the Supreme Court purchased the property for Rs. 270 only. The sale was confirmed in his favour on 26th January 1938 but it appears that the then Receiver had sent Rs. 475 by cheque to the Sub-Divisional Officer concerned in full payment of the arrears of land revenue and thus to have the sale set aside but it was received two days after the confirmation of sale. The Receiver had made an application on 19th January 1938 to the Sub-Divisional Officer offering to pay the arrears; but it appears that the attention of the Sub-Divisional Officer was not drawn to the ap-

plication until after the confirmation of sale. The Receiver then applied for review of the order confirming the sale and the Sub-Divisional Officer allowed the application and set aside the sale.

The said order was also upheld by the higher authorities. The auction purchaser moved in revision to the Financial Commissioner who vacated the order setting aside the sale. After that, the Receiver having ultimately failed in having the sale of the valuable properties by the Revenue authorities set aside, instituted a suit out of which the said appeal arose. He prayed for a declaration that the auction sale was void on a number of grounds that no notice of demand had been sent to the Receiver; that the attachment and sale proclamation had not been effected according to law and though the Revenue Authorities were aware of the appointment of the Receiver, they did not implead the Court Receiver. The suit was contested on the preliminary ground that it was barred by the provisions of Sections 157 and 192 of the Berar Land Revenue Code of 1928, which plea found favour both with the trial court and the court of first appeal. On second appeal to the High Court at Nagpur, a single Judge allowed the appeal, which was confirmed by a Division Bench of that Court. It was contended before their Lordships of the Supreme Court that the sale without notice to the Receiver or without impleading him, was not void but only irregular and the suit was barred by the provisions of Sections 157 and 192 of the Berar Land Revenue Code. Their Lordships have observed in para 7

'So far as the Indian Courts are concerned, it is settled law that a sale held without making attachment of the property, or without duly complying with the provisions of the law relating to attachment of property, is not void but only voidable. Rule 52 of Order 21 of the Code of Civil Procedure requires that where the property is in the custody of any court or public officer, attachment shall be made by a notice to such court or officer. But the absence of such a notice would not render the sale void ab initio, because the jurisdiction of the court or the authority ordering the sale, does not depend upon the issue of the notice of attachment. It is also settled law that proceedings taken in respect of a property which is in the possession and management of a Receiver appointed by court under Order 40, Rule 1 of the Code of Civil Procedure, without the leave of that court, are illegal in the sense that the party proceeding against the property without the leave of the court concerned, is liable to be committed for contempt of the court, and that the proceedings so held, do not affect the interest in the hands of the Receiver who

holds the property for the benefit of the party who, ultimately, may be adjudged by the court to be entitled to the same." Their Lordships further observed in para 8:

"The general rule that property in custodia legis through its duly appointed Receiver is exempt from judicial process except to the extent that the leave of that court has been obtained, is based on a very sound reason of public policy, namely, that there should be no conflict of jurisdiction between different Courts. If a court has exercised its power to appoint a Receiver of a certain property, it has done so with a view to preserving the property for the benefit of the rightful owner as judicially determined. If other courts or Tribunals of co-ordinate or exclusive jurisdiction were to permit proceedings to go on independently of the Court which has placed the custody of the property in the hands of the Receiver, there was a likelihood of confusion in the administration of justice and a possible conflict of jurisdiction. The courts represent the majesty of law, and naturally therefore would not do anything to weaken the rule of law, or to permit any proceedings which may have the effect of putting any party in jeopardy for contempt of court for taking recourse to unauthorised legal proceedings. It is on that very sound principle that the rule is based. Of course, if any court which is holding the property in custodia legis through a Receiver or otherwise, is moved to grant permission for taking legal proceedings in respect of that property, the court ordinarily would grant such permission if considerations of justice require it. Courts of justice, therefore, would not be a party to any interference with that sound rule. On the other hand, all courts of justice would be only too anxious to see that property in custodia legis is not subjected to uncontrolled attack, while at the same time, protecting the rights of all persons who may have claims to the property".

The question that was then considered was whether the Berar Land Revenue Code in any way affected the general rule of law. Having reached the conclusion that the general rule of law was not so affected, their Lordships further observed:

"If the leave of the Bombay High Court had been taken to initiate proceedings under the Code, for the realisation of Government revenue, or if the Receiver had been served with the notice of demand, it would have been his bounden duty to pay up the arrears of land revenue and to continue paying Government demands in respect of the property in his charge in order to conserve it for the benefit of the parties which were before the Court in the mortgage suit. If such a

step had been taken, and if the Receiver, in spite of notice, had allowed the auction-sale to be held for non-payment of Government demands, the sale would have been valid and subject only to such proceedings as are contemplated under Sections 155 and 156 of the Code. In that case, there would have been no conflict of jurisdiction, and, therefore no question of infringing the sound principle discussed above.

But the absence of the leave of the court and of the necessary notice to the Receiver, makes all the difference between a valid and an illegal sale."

A close reading of their Lordships' pronouncement shows that the rule of law is intended so that, the interests in the hands of the Receiver who holds the property for the benefit of the party who may ultimately be adjudged by the Court to be entitled to the same, are not affected. It has also been held that the sale in such cases is not valid but illegal. From the facts of the case also it is evident that a valuable property was sold for the recovery of a paltry amount of Rs. 270 which the Receiver would have paid in case a notice had been given to him for the payment of the same. The circumstance that weighed with the Supreme Court in setting aside the sale was that the interest of the mortgagee who was entitled to recover the mortgage money by sale of mortgaged property was affected by the revenue sale especially when such sale was free from all encumbrances. If the interest of the mortgagee had not been affected, the sale would not have been set aside, because it was only voidable and not void ab initio. When considering the facts of the case before us, it cannot be said that by virtue of the sale effected, the interest of the plaintiff in the property was in any manner affected. The 2nd defendant was an attaching creditor of the decree obtained by the 1st defendant against the 3rd defendant. It is not disputed before us that the joint family consisting of the plaintiff and other brothers and the sons, were bound by that decree. In any event the joint family property was liable for the execution of the decree obtained by the 1st defendant against the 3rd defendant. That being so, it is immaterial whether that decree was put in execution by the 1st defendant or 2nd defendant. There is also no material before us to show that the plaintiff has sustained any injury because of the sale of the property. No doubt the suit is for setting aside the attachment of the property but the sale having been effected during the pendency of the proceedings, the plaintiff could have very well brought to the notice of this court as to the injury that was caused to him by such sale.

We are therefore of the opinion that in the circumstances of the case, the sale cannot be set aside.

16 Reliance was also placed by the learned Advocate-General on 19 Mad LW 681=(AIR 1925 Mad 51) Rajagopala Venkata Narasimha v Venkatalingam, 1944-1 Mad LJ 129=(AIR 1944 Mad 372) and Veerappa Chettiar v Mohamad Mytheen Mana Pillai, AIR 1963 Mad 33. A reference to 19 Mad LW 681=(AIR 1925 Mad 51) has already been made. In 1944-1 Mad LJ 129=(AIR 1944 Mad 372) the Madras High Court has held that such a sale is voidable and that the circumstances will have to be considered to declare such sale as void and one such circumstance would be whether any injustice has been done. In one of the appeals that was considered in the said judgment being A. A. O 484/42 their Lordships remanded the case to the trial court for consideration whether the sale should be set aside on the merits.

17 A Division Bench of the Madras High Court in AIR 1963 Mad 33 observed at page 35

'While we do not want to be understood to lay down a proposition that the mere fact of failure to obtain leave will in itself be a ground for setting aside such a sale we consider that the question of setting aside a sale will have to be decided on the particular facts and circumstances in each case

In view of the particular facts and circumstances of the case the learned Judges thought it reasonable and just from the stand point of the parties to set aside the sale on condition that an amount of Rs 600 with interest at 6% per annum be paid to the purchaser by the judgment debtor. As already indicated there are no circumstances brought to our notice by reason of which we may say that any injustice was caused to the plaintiff by the attachment and subsequent sale of the property. In this context it will be pertinent to note that this issue being issue 2 was not pressed by the learned counsel of the plaintiff and therefore neither any evidence was led nor any finding was given by the trial court on the merits of the case. Before us also the circumstances and facts which would enable us to find as to whether any injustice or injury was caused to the plaintiff, were not brought to our notice.

18 The learned counsel for the respondents has contended that even though no leave to proceed against the Receiver was granted by the court appointing the Receiver it can be implied in the circumstances of the case. His contention is that as the court which attached the properties and the court appointing the Receiver being the same, there was no

necessity of a formal sanction. He has relied on *Gian Chand v Gopi Chand*, AIR 1928 Lah 593 and *Somasundaram Chettiar v Parimala Kandar*, AIR 1935 Mad 697. In both these cases in view of the peculiar circumstances existing the High Courts came to the conclusion that it could not be said that the court ordering attachment was not aware of the appointment of the Receiver and therefore the sanction to attach should be implied but the facts of this case do not justify any such implication. Here the Receiver was appointed as far back as 1951 for the first time and the plaintiff was appointed Receiver in June 1957. It is not known whether the Presiding Judge who appointed the Receiver was also the Judge who ordered attachment. Where the personnel of the court have changed during the period these proceedings were pending it is very difficult to presume that the court had known of the appointment of the Receiver. We are not prepared to draw any such presumption, and also that the leave to attach was implied.

The learned counsel then submits that the leave can be granted even after the attachment has taken place because the attachment without leave is only an irregularity which can be cured. He has relied on 1944-1 Mad LJ 129=(AIR 1944 Mad 372) where it has been held that retrospective leave can be granted in the absence of any law restricting the discretion of the court in these matters. The circumstances existing in this case go to show that if an application had been made to the court appointing the Receiver for leave to attach property there is no reason why this application would not have been ordered by that court. The respondents have made an application C. M. P 365/67 in this court for the grant of such leave. The contention of the learned Advocate General is that such leave cannot be granted after the sale has been confirmed. He relies upon *G F F Foulkes v Suppan Chettiar* AIR 1945 Mad 13 for this proposition. In that case a Division Bench of the Madras High Court was considering whether the sale held without the leave of the court appointing Receiver is void or voidable and if it is voidable such irregularity can be cured by sanction granted prior to the confirmation of sale. Having held that the sale was only voidable and that the leave had been obtained before the sale was finally confirmed, they go on to observe:

"We think therefore that if the law is that an illegality can be cured by leave obtained during the pendency of the suit, the same principle should rightly be extended to the case of a sale where, as in this case, the leave has been obtained before the sale has finally been confirmed."

been permitted to continue in service after the age of 55 years after the appointing authority is satisfied that he is efficient and physically fit for further Government service. The procedure to be followed by the appointing authorities before they permit a Government servant to continue in service is outlined in the Annexure. This procedure should be followed even in case of those who were continued in service in pursuance of Government orders communicated vide Memo No. AAP.217/62-A dated 18th February, 1963.

4. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on 3 (three) months' notice without assigning any reason. This will be in addition to the provisions already contained in Rule 1 (2) of the Assam Liberalised Pension Rules to retire an Officer who has completed 30 years' qualifying service or 25 years' qualifying service as the case may be. The Government servant may also after attaining the age of 55 years voluntarily retire after giving 3 months' notice to the appointing authority.

5. The age of compulsory retirement of Grade IV staff who are at present entitled to serve up to the age of 60 years including new entrants will continue up to 60 years.

6. As regards regularisation of the period of absence of those who retired on or after the 1st December, 1962 till the date of assuming duties, a separate communication will follow.

7. These provisions will have effect from 1st of December, 1962.

8. Necessary amendments to the relevant rules will be issued in due course.

Sd. A. N. Kidwai.

Chief Secretary to the Govt. of Assam."

7. It is firstly argued by the learned Advocate-General that the memorandum being a mere executive instruction, it has no force of law and as such, it does not give a legal right to an employee. As such, no relief can be sought for by the petitioner by way of a writ petition.

8. It is true that the Supreme Court in the above case of I. N. Saksena held that the Madhya Pradesh memorandum was a mere executive instruction. But at the same time, it also held that the memorandum amounted to a general order issued under F. R. 56. This being so, it must follow that there was statutory sanction behind the executive instruction which thus had the force of law. The learned Advocate-General argues that the Madhya Pradesh memorandum can be distinguished from the Assam memorandum on account of the fact that in the Assam memorandum two condi-

tions viz., efficiency and physical fitness are laid down as conditions for the extension of the age of compulsory retirement. Hence, according to the learned Advocate-General, the Assam memorandum is not a general order and a particular order will be necessary if the age of retirement of any particular officer is to be extended up to 58 years. It is difficult to follow the line of argument of the learned Advocate-General. If the Government wanted to extend the superannuation age of a particular employee, it could have acted under F. R. 56 and issued an order in respect of that employee. It was not necessary to issue a memorandum for such a purpose. The memorandum is certainly a general order to the effect that the age-limit for compulsory retirement of all Government employees who were efficient and physically fit was raised upto 58 years. This memorandum being issued under F. R. 56 has the force of law.

9. The provisions in the memorandum with which we are concerned in this case cannot be said to be discriminatory as they do not give naked discretion to the Government to pick up somebody at their sweet will and retire him at the age of 55 years. In the case of State of Mysore v. S. R. Jayaram, reported in AIR 1968 SC 346, the validity of the last part of Rule 9 (2) of the Mysore Recruitment of Gazetted Probationers Rules, 1959 was challenged. This part of the said rule reserved to the Government the right of appointing to any particular cadre any candidate whom it considered more suitable for such a cadre. The said Rule was silent on the question as to how the Government was to find out the suitability of a candidate for a particular cadre. There was nothing in the rule for testing the suitability of a candidate for any cadre. The Supreme Court held that this part of the rule gave the Government power to say at their sweet will that a candidate was more suitable for a particular cadre and to deprive him of the opportunity to join the cadre, for which he indicated his preference. So this part of the rule was held to be violative of Articles 14 and 16 of the Constitution and was struck down. In the Assam memorandum a procedure is laid down for testing the physical fitness and efficiency of an employee who attains the age of 55 years. If he is found to be physically fit and efficient at this stage, his age of retirement must be 58 years. No arbitrary discretion is given to the Government to refuse such extension if an employee is certified to have passed the efficiency and physical fitness tests. If any provision in the memorandum was interpreted to give an unqualified discretion to "pick and sack" that provision itself would be violative of

Articles 14 and 16 of the Constitution. But although a law may not be discriminatory itself, its application may be so and in that case the application of the law must be struck down.

10 In the case of Union of India v P K. More, AIR 1962 SC 630 the appellant before the Supreme Court was an employee in a Telephone workshop under the Union of India. He was detained under the Bombay Public Security Measures Act and while he was in detention, his service was terminated. After his release he made a representation for reinstatement, but this was rejected. Thereupon the said employee filed a suit in the Bombay City Civil Court where he inter alia contended that the order terminating his service violated Articles 14 and 16 of the Constitution as he had been arbitrarily picked up and sacked. The trial Court dismissed the suit whereupon the employee appealed to the High Court. The High Court allowed the appeal and thereafter the Union of India appealed to the Supreme Court. It was contended by the respondent that the order terminating his service violated the provisions of Articles 14 and 16 of the Constitution of India. Article 14 lays down that the State shall not deny to any person equality before the law or the equal protection of the laws. Article 16 lays down that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

11. The contention of the respondent was that matters relating to employment included matters concerning termination of employment. It was argued that this Article provided that there could be no inequality of treatment in the termination of service of any employee by the Government. The Supreme Court did not decide the correctness of this interpretation of the Article as it found that the discriminatory nature of the termination of service was not established in the case.

12. In the case before us there is no doubt about the discriminatory nature of the action of the Government towards the petitioner. The petitioner has pointed out that three professors of the college namely Sri Shiba Prasad Ghose, Professor and Head of the Department of Mathematics, Sri Hiranmay Bhattacharjee, Professor in Bengali and Sri Jatindra Mohan Bhattacharjee Professor and Head of the Department of Bengali of the same college were allowed to continue in service beyond the age of 55 years. The petitioner and a couple of others were arbitrarily picked up and sacked. Thus persons similarly placed were differently treated and thereby the action of the Government violated Article 14 of the Constitu-

tion. The learned Advocate-General, however relies on Article 310 of the Constitution of India and argues that all civil posts being held at the pleasure of the Government, the Government may pick and choose any man for hostile treatment. Such a contention cannot be accepted. The exercise of the pleasure of the Government under Article 310 of the Constitution of India is made subject to other express provisions in the Constitution. Therefore, in exercise of its pleasure, the Government cannot deprive a person of his fundamental rights. Moreover as I have said above, the memorandum has the force of law and Article 13 of the Constitution of India lays down that the State shall not make any law which takes away or abuses any fundamental right.

13. It has been held by the Supreme Court in the case of L. C. Golak Nath v State of Punjab reported in AIR 1967 SC 1643 that the fundamental rights cannot be amended even by the procedure laid down in the Constitution itself for amendment of the Constitution. In this case the following observation of the Supreme Court is apposite.

"To be able to abridge or take away the Fundamental Rights which give so many assurances and guarantees a fresh Constituent Assembly must be convoked. Without such action the protection of the Fundamental Rights must remain immutable and any attempt to abridge or take them away in any other way must be regarded as revolutionary

14. Obviously the Governor's pleasure cannot abridge a Fundamental Right. In the result, the petition is allowed. The petitioner will be deemed to have continued in the service of the Government in spite of Government Order No. ECL.64/58/24 dated the 23rd December, 1965 refusing to allow the petitioner to continue in service beyond the age of 55 years. It is directed that the petitioner shall be put back in service and he will continue there till he attains the age of 58 years. The petition is allowed with costs. Hearing fee is fixed at Rs. 200/-

15 K. C. SEN, J.—I agree.
BNP/D V C. Petition allowed.

AIR 1969 ASSAM & NAGALAND 50
(V 56 C 12)

FULL BENCH

S K. DUTTA, C. J P K. GOSWAMI
AND K. C. SEN, JJ

Haji Mohammad Hassan Ali, Petitioner v Commissioner of Plains Division, Assam, Gauhati and others, Opposite Parties.

Civil Rule No 379 of 1966 D/ 20-9-1968 against order of Commr of Plains Division, Assam, D/- 13-8-1968

KL/KL/F140/68

(A) Arms Act (1959), Section 17 (3) — Cancellation of licence — Licensing authority need not give hearing before cancellation — Its mere subjective opinion about necessity of cancellation is sufficient — It does not act judicially — Approach to doctrine of judicial or quasi-judicial acts — Principles stated — (Constitution of India, Article 226) — AIR 1967 Mys 238 and AIR 1966 All 265, Dissented from.

According to the provisions in Section 17 of the new Arms Act of 1959, the licensing authority may cancel a licence if it is "satisfied" about the unfitness of a person or "deems" cancellation necessary for securing public peace or public safety. The unfitness of the licence-holder or the necessity of cancelling the licence for the security of the public peace or public safety need not actually exist. The satisfaction or opinion of the licensing authority that the licence-holder is unfit or the necessity does exist, is sufficient to enable him to cancel the licence. Where the licensing authority is of the opinion that a person is unfit to hold the licence, it is his subjective opinion. In forming it the licensing authority does not act judicially. But as the consequence of such an opinion may be serious, an appeal is provided against the order of cancellation of a licence. In that view of the matter the licensing authority may not give a hearing before cancelling the licence. AIR 1967 Mys 238 and AIR 1966 All 265, Dissented from. (Paras 18, 19)

With respect to the doctrine of judicial or quasi-judicial acts, the settled approach is that when there are two contending parties, the deciding authority *prima facie* and, in the absence of anything in the statute to the contrary, has a duty to act judicially. When there are no two parties except the authority proposing to do the act and the subject opposing it the obligation to decide judicially is still there if from the statute as a whole and other circumstances, which will naturally vary from case to case, the duty to make a judicial approach may be inferred. When the licensing authority cancels a licence under Section 17 (3) of the Arms Act (1959), there are no two parties. There is only the licensing authority and the person whose licence is cancelled. Under the new Act the licensing authority need not give a hearing before the cancellation of the licence. AIR 1967 Mys 238 and AIR 1966 All 265, Dissented from; AIR 1950 SC 222 and AIR 1959 SC 107 and AIR 1962 SC 1110, Relied on. (Para 13)

(Distinction drawn between schemes of the old Arms Act of 1878 and the new Act of 1959). (Paras 4, 14, 16, 17)

(B) Arms Act (1959), Sections 17 (3), 32 — Confiscation of Arms — Licensing authority cannot order confiscation or cancellation of licence — Confiscation can be ordered only by convicting court under Section 32. (Para 20)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 Mys 238 (V 54) =		
1967 Cri LJ 1666, Naneppa v.		
Divisional Commr., Bangalore Division		9
(1966) AIR 1966 All 265 (V 53) =		
1965 All LJ 994, Jai Narain Rai		
v. Dist. Magistrate, Azamgarh		10
(1962) AIR 1962 SC 1110 (V 49) =		
ILR (1962) 2 All 661, Board of		
High Schools and Intermediate		
Education U. P. v. Ghanshyam Das		
Gupta		12, 16
(1962) AIR 1962 Madh Pra 183		
(V 49) = 1962 Jab LJ 475,		
Ahmadnoor Roshan v. State of		
M. P.		8
(1960) AIR 1960 Madh Pra 157		
(V 47) = 1960 Cri LJ 613, Moti		
Miyani v. Commr. Indore Division,		
Indore		5
(1959) AIR 1959 SC 107 (V 46) =		
1959 SCJ 6, Radheshyam v. State		
of M. P.		19
(1956) AIR 1956 Cal 96 (V 43) =		
56 Cal WN 373, Kshirode Chandra		
Pal v. Dist. Magistrate, Howrah		
(1954) AIR 1954 Cal 157 (V 41) =		
1954 Cri LJ 445, Haji Md. Vakil		
v. Commr. of Police		6
(1954) AIR 1954 Raj 264 (V 41) =		
ILR (1954) 4 Raj 170, Kisbore		
Singh v. State of Rajasthan		5
(1950) AIR 1950 SC 222 (V 37) =		
1950 SCR 621, Province of Bombay		
v. Khushaldas		11
(1942) 1942 AC 206 = 1941-3 All		
ER 338, Liversidge v. Anderson		17

§. Chowdhury, P. C. Katak and J. M. Choudhuri, for Petitioner; G. K. Talukdar, Sr. Govt. Advocate and T. N. Singh, for Opposite Parties.

DUTTA, C. J.: This petition is directed against the order of the Deputy Commissioner, Nowgong dated 5-8-65 by which the licence of the petitioner for holding a gun was cancelled and also against the order of the Commissioner of the Plains Division, Assam dated the 13th August, 1966 confirming the same.

The petitioner's case is that he is a citizen of India and a well-to-do person. He owned and possessed one S. D. B. L. gun being gun No. 58093 under Arms Licence No. 168 of Rupahihat Police Station granted to him for the last 12 or 13 years. On 9-1-65 the petitioner deposited his gun with M/s. Meghamall and Sons, Arms Repairer, Nowgong for colouring and polishing the same. He was granted a receipt by the said firm. The petitioner was served with a notice dated 12-8-65 by the Assistant Commissioner, in charge of Arms (Respondent No. 3), Nowgong whereby he was informed that his aforesaid gun licence had been cancelled and his gun confiscated to the State forthwith as per Deputy Commissioner's order dated 5-8-65.

Thereafter the petitioner went to the office of the Deputy Commissioner, Nowgong and obtained a copy of the order dated 5-8-65 passed by the Deputy Commissioner (respondent No 2). It appeared from the said order that the Deputy Commissioner received a police report and concluded on it that the petitioner was a man of desperate character and considered him unfit to hold the gun licence. The petitioner was not informed about the contents of the police report or the grounds on which the licence was cancelled. The petitioner preferred an appeal under Section 18 (1) of the Arms Act 1959 (hereinafter called the new Act) against the order of the Deputy Commissioner before the Commissioner of Plains Division, Assam, Gauhati (respondent No 1). The Commissioner called for a report from the Deputy Commissioner from which it appeared that the Deputy Commissioner considered the fact that the petitioner was involved in a murder case at the time of cancellation of the gun licence and concluded from this fact that the petitioner was a man of desperate character.

Regarding the murder case, the petitioner submits that on 12-1-65 the Officer-in-charge of the Rupahihat Police Station registered a case on an information lodged by one Omar Ali. It appeared from the said information that on 11-1-65 at 2-30 A.M. one Fazal Ali being armed with one single barrel gun and another Nazer and few others armed with daos and daggers broke into the house of Kumed Ali and Fazal fired a gun shot at Kumed Ali causing his death. The police during investigation arrested the petitioner. But on completion of investigation, the Investigating Officer made a prayer for the discharge of the petitioner and a few others, whereupon the Additional District Magistrate Nowgong discharged them. The charge-sheet was submitted against Fazal Ali and Nazer Ali only. The Commissioner of Plains Division, Assam, respondent No 1, rejected the appeal preferred by the petitioner after hearing the arguments of his lawyer.

2. The only question that is raised in this case before us is whether the licensing authority while cancelling a licence under Section 17 (3) of the new Act must act judicially. The grievance of the petitioner is that he was not given a hearing by the Deputy Commissioner before cancelling the licence. The relevant portions of S 17 (3) of the new Act read as follows—

"17 (1)
(2)
(3) The licensing authority may,

by order in writing suspend a licence for such period as it thinks fit or revoke a licence—

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having

in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act, or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence, or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it, or

(d) if any of the conditions of the licence has been contravened, or

(e) if the holder of the licence has failed to comply with a notice under sub-sec (1) requiring him to deliver up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."

3. The above section is based on Section 18 of Act XI of 1878 (hereinafter called the old Act) which was replaced by the new Act. That Section 18 is reproduced below—

"18. Cancelling and suspension of licence.—Any licence may be cancelled or suspended—(a) by the officer by whom the same was granted, or by any authority to which he may be subordinate, or by any Magistrate of a district, or Commissioner of Police in a presidency town, within the local limits of whose jurisdiction the holder of such licence may be when, for reasons to be recorded in writing, such officer, authority, Magistrate or Commissioner deems it necessary for the security of the public peace to cancel or suspend such licence, or

(b) by any Judge or Magistrate, before whom the holder of such licence is convicted of an offence against this Act, or against the rules made under this Act, and the Central Government may, by a notification in the official Gazette cancel or suspend all or any licences throughout India or any part thereof."

4. It will appear that Section 17 of the new Act is more exhaustive than Section 18 of the old Act. The order of cancellation of the licence must be passed by the licensing authority in writing. It is also required of the said authority to record the reasons and to give a copy of the order to the licence-holder on demand unless it is against public interest. It appears that in the present case the Deputy Commissioner read the police report and came to the con-

clusion that the petitioner was a man of desperate character. Hence the police report was a part of the order of the Deputy Commissioner. Had the petitioner demanded, he would have been also entitled to get a copy of the police report on which the Deputy Commissioner's order was based. As no such demand was made, the grievance of the petitioner that he did not get a copy of the police report has no substance.

5. Now coming to the main question whether the licensing authority has to act judicially in the matter of cancellation of a licence, I find that there has been some difference of opinion between different High Courts. In *Moti Miyan v. Commissioner, Indore Division, Indore*, AIR 1960 Madh Pra 157, it was held that the decision of the competent authority under Section 17 of the Act was purely administrative. It was further held that the requirement for recording of reasons is in no way indicative of the order being quasi-judicial. In *Kishore Singh v. State of Rajasthan*, AIR 1954 Raj 264, Section 18 of the old Act was considered and it was held that when an authority exercising administrative powers under a statute acted within the four corners of the statute and did not exceed or abuse its powers, no question of the principle of natural justice arose. It was held that where the District Magistrate acted within the powers conferred on him by Section 18 of the old Act and complied with the provisions of the statute, the fact that he did not give any notice to the applicant before cancelling the licence would not invalidate the order.

6. In *Haji Md. Vakil v. Commr. of Police*, AIR 1954 Cal 157, the Calcutta High Court laid down only the following things as essential for making an order under Section 18 of the old Act. (1) The licensing authority must have reasons for which it deemed it necessary for the security of the public peace to cancel or suspend such licence. (2) The person cancelling the licence must himself record the reasons in writing. (3) The order on the face of it should show that it was necessary for the security of the public peace to cancel the licence.

7. In *Kshirode Chandra Pal v. District Magistrate Howrah*, AIR 1956 Cal 96, it was held that an order of cancellation under Section 18 of the old Act need not be on notice to the holder of the licence.

8. In *Ahmadnoor Roshan v. State of M. P.*, AIR 1962 Madh Pra 133, it was held that an order cancelling a licence under Section 18 of the old Act was an administrative order and such an order could not be assailed on the ground that the licensee had not been heard by the licensing authority.

9. On the other hand, in *Nanappa v. Divisional Commissioner, Bangalore Division*, AIR 1967 Mys 238, it was held that notwithstanding there being nothing in Sec-

tion 17 of the new Act which enjoins the Licensing Authority to afford the holder of a licence an opportunity to show cause why the licence should not be revoked, it is the duty of that authority to make the opportunity available to him. It may be noted that the Court did not give any reasons for holding this view.

10. In *Jai Narain Rai v. District Magistrate, Azamgarh*, AIR 1966 All 265, Section 18 of the old Act was considered. It was held that the finding that it was necessary for the security of the public peace to cancel the licence involved loss of the right to hold or possess the fire-arms and might, therefore, be treated as a quasi-judicial finding.

11. The doctrine of judicial or quasi-judicial approach has been explained by the Supreme Court in various cases. In the *Province of Bombay v. Khushaldas*, 1950 SCR 621 = (AIR 1950 SC 222) the majority held the view that the duty to act judicially must be laid down in the law itself. But Das, J. (as he then was) took a wider view and distinguished between two classes of cases, viz. —

(i) if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other there is a *lis et prima facie*, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) if a statutory authority has power to do any act which will prejudicially affect the subject, then although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

In other words, while the presence of two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially.

12. This view was reiterated by Das, C. J. (as he then became) speaking for the majority in *Radheshyam v. State of M. P.*, AIR 1959 SC 107. Delivering the minority judgment in the said case K. Subba Rao, J. (as he then was) held a still wider view that the duty to act judicially might not be expressly conferred but might be inferred from the provisions of the Statute. In Board

of High Schools and Intermediate Education U P v Ghanasbyam Das Gupta, AIR 1962 SC 1110, the Supreme Court adopted this view and observed as follows—

"Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially, that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute. A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively."

12. From the above decisions the doctrine of judicial or quasi-judicial approach may be said to have been settled by the Supreme Court as follows—

1 When there are two contending parties the deciding authority *prima facie* and, in the absence of anything in the statute to the contrary, has a duty to act judicially.

2 When there are no two parties except the authority proposing to do the act and the subject opposing it, the obligation to decide judicially is still there if from the statute as a whole and other circumstances, which will naturally vary from case to case, the duty to make a judicial approach may be inferred. When the licensing authority cancels a licence under Section 17 (3) of the new Act, there are no two parties. There is only the licensing authority and the person whose licence is cancelled.

14. I may now examine the scheme of the new Act. Restrictions on the possession of arms have been there since the advent of British Rule in India. The Indian Arms Act of 1878 which I have called the old Act, was a consolidation of the laws which had been previously in force and which governed the possession, sale and import etc. of arms. The object of the Arms Act was to secure the public security and maintenance of public security and public order. After independence the Government decided to follow a more liberal policy in the administration of the Arms Act and hence the Act of 1959 (called the new Act) replaced the old Act enacted over eighty years ago. In the new Act the licensing provisions were liberalised but the overall necessity of public security and maintenance of public order was kept in view. Section 14 (1) (b) (3) of the Act empowers

the licensing authority to refuse to grant a licence to a person if the licensing authority has reason to believe such person "to be for any reason unfit for a licence under the Act". This discretion is controlled in two ways viz (a) the licensing authority has to record in writing the reasons for refusal (vide Section 14 (3)), (b) an appeal lies against the order of refusal (vide Rule 55 of the Arms Rules 1962). Under Proviso (u) to Rule 51 the licensing authority may require the personal attendance of the applicant.

15. From the above provisions it is clear that the licensing authority need not give a hearing before refusing the grant of a licence. It may require the personal presence of the applicant if it so desires.

16. Under Section 17 (3) of the new Act the licensing authority can cancel a licence. Under sub-section (5) of the said section, it must record in writing the reasons therefor. Under Section 18 an appeal lies against the order of cancellation. It is significant that there was no provision for appeal against an order of cancellation of licence under the old Act. This new provision is a safe-guard against any arbitrary exercise of discretion in the matter of cancellation of a licence by the licensing authority. It may be noted that in the case of AIR 1962 SC 1110 (supra) the Court observed that the decision of the Examination Committee which cancelled the examination results of certain students, might have far-reaching consequence in an extreme case and blast the career of a young student. It may, however, be pointed out that the Regulations under which the Committee acted, did not provide for any appeal and consequently the decisions of the Committee even in matters of serious consequence would have been final. Hence, in such circumstances, it was only fair that the Committee gave an opportunity to the students concerned to defend themselves.

17. Under clause (a) of Section 17 of the new Act the licensing authority may cancel a licence if it is satisfied that the person holding the licence is for "any reason unfit for a licence". Again under clause (b) of the said section the licensing authority may cancel a licence if it "deems it necessary for the security of the public peace or for public safety". The satisfaction or opinion of the licensing authority to be formed will be naturally his subjective opinion. The provision does not lay down an objective condition precedent. The distinction between subjective opinion and objective opinion is illustrated by Lord Atkin in *Liversidge's case* (1942) AC 206, as follows:

"If it is a condition to the exercise of powers by A that X has a right of way or Y has a broken ankle, the authority is charged with determining these facts and it must ascertain judicially whether the conditions are fulfilled or not. If on the other hand, the condition is that the authority

thinks or is of opinion that X has a right of way or Y has a broken ankle, the condition is a purely subjective condition and the act cannot be a judicial act, as the existence of the condition is incapable of being determined by a third party by application of any rule of law or procedure."

18. According to the provisions in Section 17, mentioned above, the licensing authority may cancel a licence if it is "satisfied" about the unfitness of a person or "deems" cancellation necessary for securing public peace or public safety. Here the unfitness of the licence-holder or the necessity of cancelling the licence for the security of the public peace or public safety need not actually exist. The satisfaction or opinion of the licensing authority that the licence-holder is unfit or the necessity does exist, is sufficient to enable him to cancel the licence. The licensing authority in the case before us is of the opinion that the petitioner is unfit to hold the licence. This is his subjective opinion. It is not shown that this opinion is mala fide or capricious. In forming it the licensing authority does not act judicially. But as the consequence of such an opinion may be serious, an appeal is provided against the order of cancellation of a licence.

19. In the above view of the matter, the contention that the licensing authority must give a hearing before cancelling the licence has no substance. The petition is dismissed, but we make no order as to cost.

20. Regarding the order confiscating the gun, there is no provision in the Arms Act for such confiscation on the cancellation of a licence. Confiscation can be ordered only by a convicting Court under Section 32 of the Arms Act.

21. The Government Advocate, however, has given us an assurance that the gun will be sold at a reasonable price to a person holding a licence and the sale proceeds will be paid to the petitioner.

22. P. K. GOSWAMI J.: I agree.

23. K. C. SEN J.: I agree.

HGP/D.V.C. Order accordingly.

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(V 56 C 13)

P. K. GOSWAMI AND M. C. PATHAK, JJ.
Silchar Electric Supply Ltd., Petitioner
v. Secretary to the Govt. of Assam, Power
(Electricity), Mines and Minerals Dept.,
Shillong and others, Respondents.

Civil Rule No. 71 of 1968, D/- 20-9-1968.

(A) Electricity Act (1910), S. 4 — Re-
vocation or amendment of license — Left
to subjective satisfaction of State Govern-
ment — Action is administrative and not

judicial or quasi-judicial — Grounds of re-
vocation of license under S. 4 (1) (a) cannot
be reviewed by Court — (Constitution of
India, Art. 226).

The language and the scheme of S. 4,
Electricity Act make it clear that the legis-
lature has deliberately left the matter of re-
vocation and amendment of license to the
subjective satisfaction of the State Govern-
ment. The grounds on which the license
may be revoked are laid down in sub-sec-
tion (1). But the authority to form the opi-
nion is the State Government. When the
State Government forms an opinion under
Section 4 (1) of the Act, there is no judicial
process involved and the order must be
held to be administrative and not quasi-
judicial. When the legislature has left it to
the authority concerned to form an opinion
on certain matters, the grounds for the for-
mation of the opinion, or the correctness of
the opinion so formed by the authority con-
cerned, do not fall for consideration for re-
view at the hands of the Courts so long as
the authority has acted honestly and there
were materials available before it, on the
basis of which such an opinion could be
formed. The mere circumstance that there
is a provision like sub-section (3) introduced
into S. 4 of the Act, does not, in any manner
alter the position. AIR 1965 Ker 253,
Foll. 1891 AC 666, Rel. on. Case law
Ref. to. (Paras 11, 14)

(B) Electricity Act (1910), S. 4 (1) and
(3) — Notice to show cause why peti-
tioner's license should not be revoked —
Cause shown by petitioner containing suffi-
cient material on which Government could
form its opinion to revoke license — Order
of cancellation of license under S. 4 (1)
passed without giving personal hearing or
time to produce documents in support of
objections — There is sufficient compliance
with S. 4 (3) — No violation of principles
of natural justice — (Constitution of India,
Art. 226). (Para 16)

Cases Referred: Chronological Paras
(1965) AIR 1965 Ker 253 (V 52) =

ILR (1965) 1 Ker 578, Narayanan
Sankaran Mooss v. State of Kerala

(1964) AIR 1964 SC 1536 (V 51) = 10, 11
(1964) 7 SCR 103, Mitho Shahani
v. Union of India 10

(1962) AIR 1962 SC 1110 (V 49) =
ILR (1962) 2 All 681, Board of
High School and Intermediate Edu-
cation U. P. Allahabad v. Ghan-
sham Das Gupta 10

(1962) AIR 1962 SC 1217 (V 49) =
ILR (1963) 1 All 1, Board of Re-
venue U. P. Allahabad v. Vidyawati 10

(1961) AIR 1961 SC 1381 (V 48) =
(1962) 1 SCR 422, Swadeshi Cotton
Mills Co. Ltd. v. State Industrial
Tribunal U. P. 10

(1960) AIR 1960 SC 468 (V 47) =
(1960) 2 SCR 609, Mineral Develop-
ment Ltd. v. State of Bihar 10

- (1960) AIR 1960 SC 606 (V 47) =
1960-2 SCR 775, Shivji Nathubhai
v Union of India 10
(1959) AIR 1959 SC 107 (V 46) =
1959 SCR 1440, Radheshyam Khare
v State of Madhya Pradesh 11
(1950) AIR 1950 SC 222 (V 37) =
1950 SCR 621, Province of Bombay
v Khushaldas S Advani 11
(1949) AIR 1949 PC 136 (V 36) =
76 Ind App 57, Hubli Electricity
Co Ltd. v Province of Bombay 10
(1891) 1891 AC 666 = 61 LJQB 62,
Allcroft v Lord Bishop of London
Lichon 10, 14
S K Chose J P Bhattacharjee and S N.
Medhi, for Petitioner B C Barua, Advo-
cate General, C K Talukdar Sr Govt Ad-
vocate for Respondents

PATHAK, J : By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 16-10-67 to show cause against the revocation of the Silchar Electric Licence, 1928 and the order of revocation dated 26th March 1968 which was communicated by a telegram dated 26-3-1968. The show-cause notice is annexure II to the petition and the telegram conveying the Government's Order is annexure IV to the petition.

2 The revocation order dated 26-3-1968 which was published in the Assam Gazette, Extraordinary, dated 27th March, 1968, is as follows —

Government of Assam
Orders by the Governor
Power (Electricity), Mines and Minerals
Department Notifications

The 26th March 1968

No PEL. 68/61/423 — Whereas the Governor of Assam is of opinion that it is required in the public interest to revoke the licence of the Silchar Supply Ltd.,

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 4 of the Indian Electricity Act, 1910, the Governor of Assam after fulfilling the requirements as laid down in sub-section (3) of the said section is pleased to revoke the Silchar Electric Licence, 1928 due to the following grounds —

(1) failed for more than ten years to maintain adequate plant and machinery required for regular, constant and sufficient supply of electrical energy for all purposes,

(2) failed for more than ten years to meet the demand for power in his licensed area,

(3) failed to maintain stand by generating sets to avoid hardship to the consumers as per terms of licence,

(4) failed to maintain continuous supply for 24 hours to all consumers as per terms of licence,

(5) failed to take speedily the bulk supply from the Assam State Electricity Board in spite of all helps offered by the Board, which could have eased the situation,

(6) failed habitually to report the failure of supply

And whereas the prolonged defaults of the licensee in complying with the barest needs of the Silchar town indicate that the licensee is not able financially or otherwise, fully and efficiently to discharge the duties and obligations imposed on him by his licence

T S Gill,
Secy to the Govt of Assam,
Power (Electricity)

Mines and Minerals Department

In pursuance of the above order, another order under Section 5 (1) of the Indian Electricity Act, 1910, hereinafter called 'the Act' was passed by the Government on 26th March 1968, which is as follows

The 26th March 1968

No PEL. 68/61/424 — Whereas the Governor of Assam has been pleased to revoke the licence of the Silchar Electric Supply Ltd., hereinafter referred to as the "Licensee", under sub-section (1) of Section 4 of the Indian Electricity Act, 1910,

Now, therefore, in pursuance of sub-section (1) of Section 5 of the aforementioned Act, the Governor of Assam is pleased to serve the notice of revocation upon the licensee fixing the 1st April, 1968 as the date on which the revocation shall take effect and that the licensee shall sell the undertaking to the Assam State Electricity Board who shall purchase the undertaking at the market value to be determined in accordance with Section 7-A of the aforementioned Act.

T S Gill
Secy to the Govt. of Assam,
Power (Electricity), Mines and
Minerals Deptt

This order was also published in the Assam Gazette, extraordinary dated 27th March, 1968. The said two orders which have been in fact challenged in this writ petition have not been made annexures to the petition. This may perhaps be due to the fact that the petitioner obtained the rule on 29-3-1968 before it received the Gazette notification. Since the petition is mainly against these two orders, the petitioner ought to have filed copies of the said two orders in Court subsequently even and it was not proper for the petitioner to wait till the date of hearing of the petition for production of the said two orders. It was also not proper for the Respondents in not annexing the copies of the said orders to their affidavit in opposition. Anyway at the time of hearing the rule, a copy of the Gazette Notification containing the above two orders was produced before us.

3 The petitioner company was granted by the Government of Assam "The Silchar Electric Licence, 1928" under the provisions of the Indian Electricity Act, 1910 on terms and conditions mentioned in the said licence, a copy of which has been annexed as annexure I to the petition.

4. The petitioner's case in brief is that in accordance with the terms and conditions of the licence, it duly deposited the security money of Rs. 5000/- within the time prescribed and at the initial stage installed two generating sets of 128 K. W. only and after laying transmission, distribution and service lines for supply of electrical energy within the licensed area, it started supplying electrical energy to the consumers in accordance with the directions of the authorities issued from time to time. During the course of the last 10 years, the petitioner company installed three generating sets from time to time in order to cope with the sudden and unexpected increased demand for power due to the influx of refugees from East Pakistan in the town of Silchar. Out of the aforesaid three generating sets, one was 250 K. W. set in D. C. and the other two sets were in A. C. As the Assam State Electricity Board did not favour the extension of D. C. system, the petitioner company made arrangement for the purchase of a third bigger A. C. generating set and approached the Government for the import of the said third set, but the Assam State Electricity Board did not recommend the import of the said set on the ground that power from Umiam would be available in the Cachar area earlier than one year's time, and therefore the petitioner under those circumstances could not and did not take further steps for the purchase of any more sets.

The petitioner Company as desired by the Assam State Electricity Board in their letter dated 12-6-64 submitted application dated 23-6-64 for obtaining bulk supply from the Assam State Electricity Board, but it did not get the first grid connection earlier than 15-7-67. That the petitioner company all along rendered prompt and efficient service to the consumers who in general were fully satisfied with the service of the company and it never failed to discharge its duties and obligations to the licensees. Thereafter the authorities of the State Government requested the petitioner company to hand over the undertaking to the Government and a discussion in that regard was held at Silchar with the Minister-in-charge of Industries, Power (Electricity, etc.), Assam and during the course of the said discussion, the petitioner company agreed to hand over the undertaking to the Government on terms and conditions to be mutually agreed upon. The petitioner company passed necessary resolution for handing over the undertaking and informed the Government about the said decision of the company on 5-10-67. Thereafter the petitioner company received on 20-10-67 the notice dated 16-10-67 issued by the Government, asking the petitioner to show cause as to why the Electric Licence of the petitioner company should not be revoked under Section 4 (1) of the Act. The show

cause notice is annexure II to the petition which is in the following terms:

"Whereas in the opinion of the Governor of Assam the licensee, viz., the Silchar Electric Supply Limited has—

(i) failed for more than ten years to maintain adequate plant and machinery required for regular, constant and sufficient supply of electrical energy for all purposes;

(ii) failed for more than ten years to meet the demand for power in his licensed area;

(iii) failed to maintain standby generating set to avoid hardship to consumers in case of breakdown;

(iv) failed to maintain continuous supply for 24 hours to all consumers as per terms of license;

(v) failed to take speedily the bulk supply from the Assam State Electricity Board in spite of all helps offered by the Board which could have eased the situation;

(vi) failed habitually to report the failures of supply;

And whereas the prolonged defaults of the licensee in complying with the barest needs of the Silchar town indicate that the licensee is not able financially or otherwise, fully and efficiently to discharge the duties and obligations imposed on him by his license;

Now, therefore, in pursuance of sub-section (3) of Section 4 of the Indian Electricity Act, 1910, the licensee is hereby called upon to show cause within 3 months from the date of issue of this notice, why his license should not be revoked under sub-section (1) of Section 4 of the Indian Electricity Act, 1910."

5. On receipt of the said notice, the petitioner company showed cause within the time prescribed therein contending inter alia that the grounds alleged for revocation of the licence were absolutely baseless and had no connection whatever with facts. A copy of the objection filed by the petitioner company has been annexed as annexure III to the petition. Thereafter the petitioner company received on 18-12-67 a telegram dated 16-12-67 by the Power Department of the State Government whereby the petitioner company was requested to be present at Shillong on 20-12-67 for discussion with the Chairman of the Assam State Electricity Board in connection with the taking over of the Silchar Electrical undertaking. The Manager of the petitioner company accordingly reached Shillong on the due date for discussion and during the discussion it was pointed out on behalf of the petitioner company that discussion for taking over the undertaking on terms mutually agreed upon and the proceedings for revocation could not proceed simultaneously and that the show cause notice issued for revocation of the licence should first be withdrawn so as to enable the company to have further discussion for handing over the undertaking on the basis of the terms and conditions al-

ready submitted to the Government. Under the circumstances, no further discussion could be held for handing over the undertaking on the basis of the mutual understanding and agreement.

6 Thereafter the petitioner company received a telegram dated 26-3-1968 from the State Government whereby the petitioner company was informed that revocation notice under Section 5 of the Indian Electricity Act, 1910 had been issued on that date fixing 1st April, 1968 as the date of revocation. In the said telegram, it was further mentioned that the State Electricity Board would be taking necessary action. The revocation notice said to have been sent by registered post had not reached the petitioner company till then. A copy of the said telegram dated 26-3-68 is annexed as annexure IV to the petition. On receiving the said telegram, the petitioner company moved the writ petition and obtained the Rule on 29-3-1968 from this Court.

7 An affidavit has been filed on behalf of the Respondents 1, 2 and 3 sworn by the Joint Secretary to the Government of Assam in the Power (Electricity), Mines and Minerals Department, Shillong. The case of the respondents is that the petitioner company failed to maintain the adequate supply of power to the consumers as required under the licence and failed to take any effective steps for improvement of the power supply to the consumers. Regular complaints were received from the consumers including the Silchar Bar Association and the Silchar Municipal Board, copies of which are annexed as Annexures C, B and B-1 to the affidavit in opposition, regarding the inadequacy of supply and frequent failure of supply of electricity by the petitioner company. Accordingly the Senior Electrical Inspector visited Silchar Electric Supply Company in 1959 and after due inspection of the same he submitted his report giving detailed accounts about the failure of the company to maintain the supply of electricity. A copy of the said report is annexed as Annexure A to the affidavit in opposition. The petitioner company failed to maintain supply of power as required under the conditions of the licence to the consumers and there was considerable public dissatisfaction and complaint. In order to help the petitioner company in making necessary improvement the Government decided that the company might be given some financial assistance by the Assam Financial Corporation in order to make the necessary improvement and accordingly the petitioner company was given a total sum of Rs 5 lakhs in two instalments in 1962 and 1966 but in spite of the said financial help the company failed to make the necessary improvement and also failed to meet the growing demands for electricity by the consumers. That the Minister in-charge of Power (Electricity) during his visit to Silchar in the month of August 1967 was apprised by the

public in general of the unsatisfactory condition of power supply by the petitioner company and the Minister took the opportunity to discuss the matter with the representatives of the petitioner company with a view to obtain first hand knowledge about the complaints made to him vis-a-vis the working of the petitioner company. That as the petitioner company utterly failed to maintain the power supply in the licensed area and also failed to make any improvement the Government considered the whole matter and came to the conclusion that since the company was neither able to make the proper and adequate supply nor was willing to make any improvement the licence of the petitioner should be revoked in the best interest of the public and the undertaking should be taken over by the Assam State Electricity Board. Accordingly a notice under Section 4 (3) of the Act was issued to show cause as to why the licence should not be revoked under the provisions of sub-section (1) of Section 4 of the Act. That the petitioner submitted its reply to the show cause notice which was duly considered by the Government but the explanations given in the said statement were not satisfactory and the same could not be accepted and as a result the Government took the decision to revoke the licence and the impugned orders were passed.

8. Mr Ghose, the learned counsel for the petitioner has submitted that the Government when it exercises its jurisdiction under Section 4 (1) of the Act it exercises quasi-judicial functions and it must give reasons for the conclusions that have been arrived at by it for revoking the licence and reasonable opportunity should be given to the party against whom such action is taken. His further contention is that the opinion formed by the State Government under Section 4 (1) of the Act on the basis of which action was taken is an objective one which could be reviewed by this Court under Article 226 of the Constitution. The learned counsel has submitted that there is a mandatory provision in sub-section (3) of Sec 4, making it obligatory on the part of the Government to issue a notice to the licensee in the manner provided thereunder and to give him an opportunity to show cause. There is also a further check provided in Section 4 (1) of the Act imposing an obligation on the part of the State Government to consult the State Electricity Board before revoking the licence. The learned counsel has submitted that the Government in the instant case has not complied with the statutory requirements of sub-sections (1) and (3) of Section 4 of the Act.

9 The first point that falls for determination in this case is whether the State Government exercises quasi-judicial functions in its action by way of revocation of the licence under Section 4 (1) (a) of the Act and whether the grounds for this action can be reviewed by this Court.

10. In the case of Narayanan Sankaran Mooss v. State of Kerala, AIR 1965 Ker 253 the same and similar points regarding the validity and interpretation of Sections 4 and 5 of the Indian Electricity Act (Act IX of 1910) arose for determination. In that case, as in the case before us, the learned counsel for the petitioner relied on the decisions of the Supreme Court in the cases of Mineral Development Ltd. v. State of Bihar, AIR 1960 SC 468; Shivji Nathubhai v. Union of India, AIR 1960 SC 606; Board of High School and Intermediate Education, U. P. Allahabad v. Ghanshyam Das Gupta, AIR 1962 SC 1110; and Board of Revenue, U. P. Allahabad v. Vidyawati, AIR 1962 SC 1217. The learned Advocate General appearing in that case relied on the decisions in Hubli Electricity Co. Ltd. v. Province of Bombay, AIR 1949 PC 136; Mithoo Shahani v. Union of India, AIR 1964 SC 1536; Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal, U. P., AIR 1961 SC 1381 and Allcroft v. Lord Bishop of London Lichon, (1891) 1891 AC 666. The learned Advocate General of Assam appearing for the Respondents in the instant case has also relied on the said decisions.

11. After considering the above mentioned cases in details, Vaidialingam, J. (as he then was), who delivered the Court's judgment in AIR 1965 Ker 253 observed as follows:

"These decisions clearly lay down, in our view, that when the Legislature has left it to the authority concerned to form an opinion on certain matters, the grounds for the formation of the opinion, or the correctness of the opinion so formed by the authority concerned, do not fall for consideration for review at the hands of the Courts so long as the authority has acted honestly and there were materials available before it, on the basis of which such an opinion could be formed."

After considering the Supreme Court's decision in the case of Province of Bombay v. Khushaldas S. Advani, AIR 1950 SC 222 and in the case of Radheshyam Khare v. State of Madhya Pradesh, AIR 1959 SC 107 the Kerala High Court in the said judgment held that "the mere circumstance that there is a provision like sub-section (3) introduced into Section 4 of the Act, does not, in our opinion, in any manner alter the position namely that in taking action under Section 4 (1) (a) of the Act the Government is essentially discharging only an administrative act and not a judicial or quasi-judicial act."

12. We are in respectful agreement with the above views expressed in the said decision of the Kerala High Court.

13. Section 4 of the Act runs thus:—

"4. Revocation or Amendment of Licences.

(1) The State Government may, if in its opinion the public interest so requires and

after consulting the State Electricity Board revoke a licence in any of the following cases, namely:—

(a) Where the licensee, in the opinion of the State Government, makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act;

(b) where the licensee breaks any of the terms of conditions of his license the breach of which is expressly declared by such license to render it liable to revocation;

(c) where the licensee fails, within the period fixed in this behalf by his license or any longer period which the State Government may substitute therefor by order under Section 4A, sub-section (1) and before exercising any of the powers conferred on him thereby in relation to the execution of works,—

(i) to show, to the satisfaction of the State Government, that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his license, or

(ii) to make the deposit or furnish the security required by his license;

(d) where in the opinion of the State Government the financial position of the licensee is such that he is unable, fully and efficiently to discharge the duties and obligations imposed on him by his license.

(e) where a licensee, in the opinion of the State Government, has made default in complying with any direction issued under Section 22A.

(2) Where in its opinion the public interest so permits, the State Government may, on the application or with the consent of the licensee, and after consulting the State Electricity Board, and the Central Government where that Government is interested, and if the licensee is not a local authority, after consulting also the local authority, if any, concerned, revoke a license as to the whole or any part of the area of supply upon such terms and conditions as it thinks fit.

(3) No license shall be revoked under sub-section (1) unless the State Government has given to the licensee not less than three months' notice, in writing, stating the grounds on which it is proposed to revoke the license and has considered any cause shown by the licensee within the period of that notice, against the proposed revocation.

(4) Where the State Government might under sub-section (1) revoke a license it may instead of revoking the license permit to remain in force subject to such further terms and conditions as it thinks fit to impose and any further terms or conditions so imposed shall be binding upon, and be observed by, the licensee, and shall be of like force and effect as if they were contained in the license."

14. In sub-section (1) the words 'if in its opinion the public interest so requires' appear. In clause (a) to sub-section (1) the

words 'in the opinion of the State Government' appear. Clause (c) (i) of sub-section (1) of Section 4 puts an obligation on the licensee to satisfy the State Government that he is in a position to fully and efficiently discharge the duties and obligations imposed on him by his license. In Cls. (d) and (e) of sub-section (1) the words 'in the opinion of the State Government' appear. In sub-section (2) also the words 'where in its opinion the public interest so permits, the State Government may appear. On a consideration of the language and the scheme of the section, it is clear that the legislature has deliberately left the matter of revocation and amendment of license to the subjective satisfaction of the State Government. The grounds on which the license may be revoked are laid down in sub-section (1). But the authority to form the opinion is the State Government. In the case of (1891) 1891 AG 668, the House of Lords has unanimously taken the view that when once jurisdiction has been given to an authority to form an opinion, the grounds for the formation of the opinion so formed cannot certainly be canvassed before the Courts. On a consideration of the law on the point, we are clearly of the opinion that when the State Government forms an opinion under section 4 (1) of the Act, there is no judicial process involved and the order must be held to be administrative and not quasi-judicial.

15. The next point urged by Mr. Ghose, the learned counsel for the petitioner, is that in the objection the petitioner prayed for allowing time to produce documents in support of its contentions made in the objection and also prayed for allowing its lawyer to argue the case before the Government and since this was not allowed the cause shown by the petitioner was not considered by the Government as required under sub-section (3) of Section 4 of the Act. The learned counsel's submission is that when the petitioner was not given time to substantiate his contentions raised in the objection by producing the documents etc. it cannot be said that the Government complied with the provisions of sub-section (3) which imposes a duty on the Government to consider the cause shown by the licensee.

16. The learned Advocate General of Assam appearing on behalf of the respondents, submits that on a perusal of the cause shown by the petitioner which is annexure III to the petition, it will appear that it is in fact admitted that there has been prolonged defaults of the licensee in complying with the various needs of Silchar town which indicate that the licensee was not able financially or otherwise fully or efficiently to discharge the duties and obligations imposed on him by his license. The learned Advocate General placed before us the cause shown by the petitioner which is Annexure III to the petition and on a

perusal of the same it cannot be said that in forming the opinion in the instant case the Government had no materials before them. From the admitted position in the cause shown by the petitioner also the Government may form the opinion and there may not be any necessity for giving a personal hearing in this respect. In the circumstances, we hold that in passing the order under Section 4 (1) of the Act, the State Government has complied with the requirements of sub-section (3) of Section 4 and in fact there has been no violation of the general principles of natural justice required to be followed in the facts and circumstances of the case.

17. The learned counsel for the petitioner also submitted that at one stage the Government required the petitioner to discuss with the Chairman of the Assam State Electricity Board in connection with the taking over of the Silchar Electrical undertaking after issuing the show cause notice. But without waiting to have the full discussion in the matter, the Government passed the order of revocation and as such the order was mala fide. We have already referred to the complaints made by the Silchar Municipal Board and Silchar Bar Association regarding the failure on the part of the petitioner to make regular and adequate supply of power in Silchar town. We have also referred to the report submitted by the Senior Electrical Inspector. After having considered all these matters and having given the petitioner-company an opportunity to discuss the matter with the Chairman of the Assam State Electricity Board regarding taking over of the Silchar Electrical undertaking, and after giving due consideration to the cause shown, the Government formed its opinion. In the circumstances, the petitioner's allegation that the order was mala fide has no substance.

18. Lastly, the learned counsel faintly argued that there was no consultation with the Assam State Electricity Board as required under sub-section (1) of Section 4. This ground has not been taken in the petition. Moreover, from the petition itself in paragraph 12 it is found that the petitioner at the request of the State Government had discussion with the Chairman of the Assam State Electricity Board in connection with the taking over of the Silchar Electrical undertaking and the Manager of the plaintiff-company made his submissions in this regard before them. In the order dated 26-3-1968 passed under sub-section (1) of Section 5, it is found that the Assam State Electricity Board has been directed to purchase the undertaking at the market value to be determined in accordance with Section 7A of the Act. As the petitioner did not specifically raise this objection of lack of consultation with the Assam State Electricity Board, it is submitted by the learned Advocate General, that they had no opportunity to place facts in this respect in their

affidavit and the Government may be permitted to file an affidavit swearing to the fact that there was in fact consultation with the Assam State Electricity Board. As pointed out earlier, the Assam State Electricity Board came into the picture at several stages, it had been consulted regarding the taking over of the petitioner's electrical undertaking and it has also been directed to purchase the petitioner's undertaking in accordance with law, and from all those facts and circumstances we are of the opinion that there has been substantial consultation with the Assam State Electricity Board as required under sub-section (1) in the instant case.

19. In the circumstances, we hold that this petition has no substance and it is dismissed with costs. The rule is discharged and the stay order is vacated. Advocate's Fee: Rs. 250.

20. P. K. GOSWAMI, J.: I agree.

KSB Rule discharged.

AIR 1969 ASSAM AND NAGALAND 61
(V 56 C 14)

P. K. GOSWAMI AND M. C. PATHAK, JJ.

Premnath Das, Petitioner v. State of Assam and others, Opposite Parties.

Civil Rule No. 103 of 1968, D/- 4-9-1968.

(A) Panchayats — Assam Panchayat Act (24 of 1959), Section 3 (1) and (2), Provisos — Assam Panchayat (Constitution) (Amendment) Rules (1964), Rules 87, 88 — Power of State Government under Section 3 (1) and (2) respecting creation of Gaon Sabha and addition to or subtraction from area of Gaon Sabha — Independent of provisos to Section 3 (2) — Government passing orders under Section 3 (1) and (2), on being moved by Gaon Sabha — Orders cannot be objected on ground of non-compliance with procedure under Rules 87, 88.

The provisos to Section 3 (2) relate to establishment of Gaon Sabhas on the initiative of a Gaon Sabha which has already been declared by the State Government. The existence of this right in the Gaon Sabha, and for the matter of that in the people, does not affect the power of the State Government under Section 3 (1) to declare any area to be a Gaon Sabha or under Section 3 (2) to add to or subtract from any area from the jurisdiction of a Gaon Sabha and this power is independent of the right of Gaon Sabha and both can co-exist together without any violence to the scheme and the purpose of the Act. These two rights conferred on the State Government as well as on the Gaon Sabha are mutually exclusive and one does not interfere with the other. When the in-

itiative is taken by the people, a procedure has been laid down under Rules 87 and 88 and these have got to be followed before the Government is in a position to declare and constitute a Gaon Sabha in conformity with the wishes of the people. Even when the right conferred under the provisos is exercised by the Gaon Sabha and the State Government takes a decision in the matter, it is again the State Government which will be required to issue an appropriate notification under Section 3 (1) or (2) of the Act, as is applicable to a particular case.

(Para 6)

Where the State Government, on being moved by the Gaon Sabha, passed orders in exercise of powers under Section 3 (1) and (2), the orders are valid and no serious objection can be taken by Gaon Sabha on the ground that the formalities laid down under Rules 88 and 87 have not been complied with because at some earlier stage the Gaon Sabha itself had moved in the matter.

(Paras 6, 10)

(B) Panchayats — Assam Panchayat Act (24 of 1959), Section 3 (1) and (2), Provisos — Scope of provisos to Section 3 (2) — Provisos are not exception to Section 3 (1) and (2) — Powers of Government under Section 3 (1) and (2) are independent of provisos — Provisos may be considered as independent provisions.

Provisos in Section 3 relating to establishment of a Gaon Sabha not having a continuous operation in the same field as sub-sections (1) and (2) of the said section, which deal with declaration and some other subject, may be considered even an independent provisions which could be given effect to *pari passu* with the main enactment. They provide a right which is not there but for these specific provisions. In that sense, they cannot be said to be an exception to Section 3 (1) or 3 (2) at all, but they are only auxiliary provisions which give an additional right to the Gaon Sabha to move the State Government for reconstitution of Gaon Sabha, which power the State Government undoubtedly has independently of such a move from the Gaon Sabha. Further, the expression "at any time" which appears in sub-section (2) of Section 3 is also clearly relatable to an unabridged power located in the Government without reference to and de hors the conditions laid down under the provisos. AIR 1965 SC 1296, Foll.; AIR 1959 SC 718, Explained; 1909 AC 57 and 1909 AC 253, Ref. to.

(Paras 8, 9)

(C) Evidence Act (1872), Section 115 — Estoppel — Assam Panchayat Act (24 of 1959), Section 3 (1) and (2), Provisos — Gaon Sabha created by State Government recommending creation of another Gaon Sabha out of its area — Is estopped from challenging creation thereof by State Government. (Obiter).

(Para 10)

Cases Referred	Chronological	Paras
(1965) AIR 1965 SC 1296 (V 52) = (1965) 1 SCR 276, State of Rajasthan v Leela Jain		8
(1959) AIR 1959 SC 713 (V 46) = (1959) Supp (2) SCR 256, Commr. of I-T, Mysore, Travancore-Cochin and Coorg Bangalore v The Indo Mercantile Bank Ltd. etc		7
(1944) AIR 1944 PC 71 (V 31) = (1944) 2 Mad LJ 25, Madras and Southern Maharashtra Railway Co v Bezawada Municipality		7
(1909) 1909 AG 57 = 78 LJKB 124, Local Govt. Board v South Stoneham Union		8
(1909) 1909 AG 253 = 78 LJKB 647, Rhondda Urban District Council v Taff Vale Railway Co		8
J G Medhi and G Bhattacharjee, for Petitioner, C K Talukdar, Sr Govt. Advocate, J P Bhattacharjee and D K. Talukdar, for Opp Party No 3		

GOSWAMI, J.—This application under Article 226 of the Constitution of India is at the instance of the petitioner, who is the President of the Bahari Gaon Panchayat, and is directed against two orders of the State Government, each dated 12th March, 1968, passed under Section 3 (1) and (2) of the Assam Panchayat Act, 1959 (Assam Act XXIV of 1959), hereinafter called 'the Act'.

2. The petitioner's case is that the Government of Assam by a notification dated 2nd March, 1960 declared the area consisting of the villages Bahari, Nij Bahari and Kallah to be the area of the Bahari Gaon Sabha under Section 3 (1) of the Act, and accordingly the Bahari Gaon Panchayat was duly elected and constituted and has been functioning according to law. He states that the territorial jurisdiction of the Bahari Gaon Sabha covers an area of about 3968 Bighas and its population exceeds five thousand. He further states that Bahari Grazing Reserve is an integral part of the Bahari village and is within the territorial jurisdiction of the Bahari Gaon Sabha as already notified in 1960. The Government of Assam by a notification dated 12th March 1968 carved out about 239 Bighas of the Bahari Grazing Reserve, since de-reserved for the purpose of a Bazar, from the existing territorial jurisdiction of the Bahari Gaon Sabha and reconstituted a new Gaon Sabha for this area. The petitioner claims that the said reconstitution is in violation of the provisions of Section 3 of the Act and Rule 88 of the Assam Panchayat (Constitution) (Amendment) Rules, 1964, hereinafter called 'the Rules'. He submits that the procedure laid down under Rule 88 has not been followed in reconstituting the Gaon Sabha, and, as such, the orders of the Government are illegal and inoperative in law.

3. In the counter affidavit by the Government it is claimed that the Government was satisfied on public demand and in the interest of general public that there should be a separate Gaon Sabha for the rehabilitated area and, as such in exercise of its powers under Section 3 (1) and (2) of the Act, it constituted a new Gaon Sabha. It is claimed that the grazing reserve was de-reserved and people from a neighbouring village Tarabari, which was eroded away by the Brahmaputra, had to be rehabilitated in this de-reserved area and the Government thought it fit to constitute the same as a new Gaon Sabha.

4. The non applicants Nos 3 to 12, who were not originally impleaded in this proceeding, intervened and as they are members of the new Gaon Sabha which has been constituted under the impugned notifications and have already taken their oath of office on 27th May, 1968, as required under the law, they have been allowed to be added as parties under orders of this Court. These non applicants bring out certain revealing things in their affidavit. They state that resolutions were passed on 29th December, 1968 in the meeting of the Bahari Gaon Panchayat under the Presidentship of the present petitioner for the establishment of two Gaon Sabhas out of the area of the present Gaon Sabha, one for the population of the Bahari Grazing Reserve and the other for the remaining area of the existing Bahari Gaon Sabha and that resolutions were also passed by the Chenga Anchalik Panchayat and Barpeta Mahkuma Parishad approving of the above demand of Bahari Gaon Sabha situated within the territorial jurisdiction of the aforesaid Anchalik Panchayat and Mahkuma Parishad. Further, the petitioner as the President of the Bahari Gaon Panchayat sent letter dated 30-12-63 to the Director of Panchayat, Assam, informing about the above resolutions which have been filed as Annexures I and II to their counter affidavit. They, therefore, deny that the reconstitution of the new Gaon Sabha by the impugned notification was against the will and the opposition of the Gaon Panchayat and the villagers in general. It is sufficient to state that there is no repudiation by the petitioner to this part of the affidavit by the non-applicants.

5. Now that the facts are briefly noted, we may look at the notifications. The first notification is dated 2nd March 1960, which may be set out.

"No RDD 189/60/4.—In exercise of the powers conferred under sub-section (2) of Section 3 of the Assam Panchayat Act, 1959 (Assam Act XXIV of 1959) the Governor of Assam is pleased to declare the names and territorial jurisdiction of the following Gaon Sabha falling within Chenga Anchalik Panchayat in Barpeta Sub-Division as detailed below:

Name of the
Gaon Sabha

Territorial
jurisdiction.

4. Bahari

1. Bahari
2. Nij-Bahari
3. Kaltali"

The other notification came on 12th March, 1968, which may be read:

No. PDA.5/64/389.— In partial modification of Notification No. RDD.169/60/4, dated the 2nd March, 1960, the Governor of Assam in exercise of the powers conferred by sub-section (2) of Section 3 of the Assam Panchayat Act, 1959 (Assam Act XXIV of 1959), is pleased to declare the territorial jurisdiction of the Bahari Gaon Sabha appearing against item 4, within Chenga Anchalik Panchayat in Barpeta sub-Division as detailed below:

Name of Gaon
Sabha.

Territorial
Jurisdiction.

4. Bahari

1. Bahari
2. Nij-Bahari
3. Kaltali

• • • • •

There is also another notification of the same date, which read with the Corrigendum dated 8-4-68, stands as follows:

"No. PDA.5/64/341.— In exercise of the powers conferred by sub-section (1) read with sub-section (2) of Section 3 of the Assam Panchayat Act, 1959 (Assam Act XXIV of 1959), the Governor of Assam is pleased to declare the name and territorial jurisdiction of the following Gaon Sabha within Chenga Anchalik Panchayat and to add the following item after item 23 of the Notification No. RDD.169/60/4, dated the 2nd March, 1960, namely:—

Name of Gaon
Sabha.

Territorial
Jurisdiction.

24. Bahari Reserve

Bahari Grazing
Reserve — since
de-reserved.

• • • • •

6. Dr. Medhi, the learned counsel for the petitioner, submits that once the Bahari Gaon Sabha had been constituted in 1960, it is not open to the State Government without complying with the formalities laid down under Rule 88 to reconstitute the same and declare another new Gaon Sabha out of the original area. In order to appreciate this submission we have to read Section 3 of the Act:

"3. (1) The State Government may, by notification declare any area to be a Gaon Sabha area for the purpose of this Act.

(2) The State Government shall declare the name and territorial jurisdiction of each Gaon Sabha under sub-section (1) and may at any time, by notification, include any area in and exclude any area from, the territorial jurisdiction of the Gaon Sabha:

Provided that in a Gaon Sabha area whose population exceeds five thousand

such Gaon Sabha shall have the right to establish itself into one or more Gaon Sabhas after eliciting opinion in the manner as prescribed:

Provided further that where such establishment affects any contiguous Gaon Sabha, the opinion of such Gaon Sabha shall also be taken in the manner prescribed:

Provided also that where the establishment of a Gaon Sabha concerns more than one village the State Government shall consider the opinion of the villagers concerned in the manner prescribed, before establishing such Gaon Sabha."

It is clear from Section 3 (1) that the State Government has power under this provision to declare any area to be a Gaon Sabha area for the purpose of this Act. Under sub-section (2), it has also the power not only to declare the name and territorial jurisdiction of the Gaon Sabha declared under sub-section (1), but has also a reservation of another power to include any area in and exclude any area from the territorial jurisdiction of such a Gaon Sabha. It is in exercise of the powers conferred by sub-sections (1) and (2) of Section 3 of the Act that the impugned notifications have been claimed to be made. There are three provisos to sub-section (2). The first proviso grants a right to a Gaon Sabha, whose population exceeds five thousand, to establish itself into one or more Gaon Sabhas after eliciting opinion in accordance with Rule 88. The second proviso also relates to the establishment of such a Gaon Sabha as is mentioned in the first proviso. The words "such establishment", mentioned in the second proviso, clearly lead to that conclusion. Rule 88 has reference to the first and the second provisos of sub-section (2) and may be set out:

"88. Establishment of more than one Gaon Sabha in a Gaon Sabha area having population exceeding five thousand.— When the members of a Gaon Sabha having in its area population exceeding five thousand desire to establish more than one Gaon Sabha they shall send a written petition to the Magistrate signed by at least one-tenth of total members. The Magistrate shall, as soon as possible after receipt of such petition, direct the President of the Gaon Sabha to convene a meeting of the Gaon Sabha for the purpose. The President shall convene such meeting within 15 days from the date of receipt of notice of the Magistrate according to the provisions of the Act and shall place the matter before the meeting for their consideration and decision by a resolution. The President shall record the number of members present in such meeting and those favouring establishment of more than one Gaon Sabha. If a resolution favouring establishment of more than one Gaon Sabha is passed by at least two-thirds majority in such meeting, where at least one-half of the total members is present,

the President shall forward the resolution with minutes of the meeting in original to the Magistrate. The Magistrate shall forward such resolution to the State Government embodying concrete proposals with names, boundaries, population, etc., for establishment of such number of Gaon Sabhas as can reasonably be established for decision and for issuing necessary notifications declaring name and territorial jurisdiction of each of such Gaon Sabha.

Provided that if the Magistrate is of opinion that such establishment of more than one Gaon Sabha may affect any contiguous Gaon Sabha, he shall direct the President of such contiguous Gaon Sabha to convene a meeting thereof at such time and place as the Magistrate may specify in this behalf and the President shall thereupon convene a meeting of the contiguous Gaon Sabha and ascertain its views on the proposed establishment by two-thirds majority in case its area stands to be affected thereby and by simple majority, in any other case, provided that in such meeting not less than one-half of its total members shall be present."

It is clear, therefore, that when a Gaon Sabha has a population exceeding five thousand, such Gaon Sabha has a right to form one or two more Gaon Sabhas in accordance with the procedure laid down under Rule 88 to give effect to the first and the second provisos to sub-section (2) of Section 3 of the Act. The third proviso to sub-section (2) of Section 3 has to be read with Rule 87 and we may now read that Rule—

"87 Consideration of opinion of the Villagers in case of grouping of more than one village— When a group of more than one contiguous village is to be declared as a Gaon Sabha under the last proviso of sub-section (2) of Section 3 of the Act the Magistrate shall by calling meetings of adult persons or otherwise, ascertain the opinion of the villagers concerned regarding such grouping and shall forward the same with his own comments to the State Government whose decision thereon shall be final."

The above rule is made in order to give effect to the third proviso. All these provisos relate to establishment of Gaon Sabhas on the initiative of a Gaon Sabha which has already been declared by the State Government. When the initiative is taken by the people, a procedure has been laid down under Rules 87 and 88 and these have got to be followed before the Government is in a position to declare and constitute a Gaon Sabha in conformity with the wishes of the people. The existence of this right in the Gaon Sabha, and for the matter of that in the people does not affect the power of the State Government under Section 3 (1) to declare any area to be a Gaon Sabha or under Section 3 (2) to add to or subtract

from any area from the jurisdiction of a Gaon Sabha. The power conferred by sub-sections (1) and (2) of Section 3 is independent of the right given to the Gaon Sabha in that behalf and these two rights can co-exist together without any violence to the scheme and the purpose of the Act. These two rights conferred on the State Government as well as on the Gaon Sabha are naturally exclusive and one does not interfere with the other. Even when the right conferred under the provisos is exercised by the Gaon Sabha and the State Government takes a decision in the matter, it is again the State Government which will be required to issue an appropriate notification under Section 3 (1) or (2) of the Act, as is applicable to a particular case.

7 Dr. Medhi strenuously contended that the provisos are exceptions in this case and to the extent the provisos are applicable, the State Government becomes incompetent to make the impugned orders. In this context he relies on a decision of the Supreme Court in the case of the Commissioner of Income-tax, Mysore, Travancore-Cochin and Coorg, Bangalore v. The Indo Mercantile Bank Ltd., etc., AIR 1959 SC 713, and draws our attention to the following passage at p. 718

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

In the same decision we have also the following observations

"The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso, would fall within the main enactment, ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment."

"It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso."

We also find in this decision an observation of the Privy Council in AIR 1944 PC 71 at p. 73, Madras and Southern Maharashtra Railway Co v. Bezwada Municipality, laying down the sphere of a proviso as follows

"The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it

persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the right of a transferee for consideration who has no notice of the contract or of the part-performance thereof."

The defendant who was the appellant before the Privy Council alleged that the plaintiff-minor was the transferor under the contract in right and was, therefore, debarred from enforcing any right with respect to the property of which the defendant transferee had taken possession. The question, therefore, arose whether the plaintiff was transferor within the meaning of Section 53-A. A simple reading of the section would go to show that the word "transferor" for the purposes of that section refers to "the person contracting the transfer for consideration any immoveable property by writing signed by him or on his behalf". The point before the Privy Council was whether the plaintiff-minor came under the description of "any person contracting to transfer by writing signed by him or on his behalf". It was contended, as is clear from the arguments of Sir Herbert Cunliffe summarised at page 118 of the Report, (i) the minor-plaintiff had transferred nothing because in actual fact his guardian had entered into the contract, nor was the transfer "on his behalf", because Section 53A was framed on the hypothesis that the person who is acting is acting for somebody who is competent to act for himself; & (ii) the minor could not transfer the property since the statute postulated the existence of a valid contract, & therefore, to say that the minor could enter into a valid contract would be a contradiction in terms as the minor's contract was void in view of (1903) ILR 30 Cal 539=30 Ind App 114 (PC) already referred to. It was on these two grounds that the learned counsel in that case argued that the defendant was not protected by Section 53-A.

13. Both these objections have been directly met in the judgment of their Lordships. The first objection was met by the following observations:

"Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of November 29, 1935, on behalf of the respondent for the purpose of discharging his father's debts, and that, if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu Law".

Reverting again to the subject after a few lines, their Lordships observed:

"The position of a guardian under the Hindu law was considered by their Lord-

ships' Board in (1856) 6 Moo Ind App 393 412 (PC), where the following passage is to be found:

"They consider that the acts of the Ranees cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her."

"Thus the act of the mother and guardian in entering into the contract of sale in the present case was an act done on behalf of the minor appellant".

Dealing with the second objection, their Lordships approved of the statement of the law in this respect by Pollock and Mulla in their Indian Contract and Specific Relief Acts, 7th Edition, page 70, which was to the following effect:

"A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the 'Judicial Committee.....' It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Judicial Committee, that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, if it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all". Then their Lordships proceeded to state:

"In the present case neither of the two conditions mentioned is wanting, having regard to the findings in the courts in India. It would appear, therefore, that the contract in the present case was binding on the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, and not his mother, was the owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother".

Having come to that conclusion, their Lordships held that the respondent-infant-plaintiff was the person who most aptly answered the description of the words "the transferor" in the sense in which those words are used in S. 53-A. In view of this Privy Council decision, the old paragraph with regard to specific performance which appeared at page 70 in Pollock and Mulla's Indian Contract and Specific Relief Acts, 7th Edition, was suitably recast in the later edition. viz,

the 8th Edition published in 1957 and has not taken the form in which it has been quoted earlier in the Judgment. The learned authors have pointed out that the guardian of a minor, unless competent to do so has no power to bind the minor by a contract for the purchase or sale of immoveable property and the minor is, therefore, not entitled to the specific performance of the contract. For this proposition, reliance was placed on the Privy Council ruling in (1912) ILR 39 Cal 232 (PC). After quoting the pronouncement of their Lordships, the learned authors added.

"It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate, where the guardian or manager, as under Hindu Law, is competent to alienate property. In such a case it has been held by the Privy Council that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and further, if it is for the benefit of the minor"

It will be seen that this statement of the law is based on the Privy Council decision in 75 Ind App 115=(AIR 1948 PC 95) quoted above. The case directly involved the determination of the validity of the guardian's contract to sell in case of necessity and is, therefore, authority for the proposition as stated by Pollock and Mulla in their Indian Contract and Specific Relief Acts, 8th Edition, page 81. In such a case, it is obvious, the doctrine of Mutuality is irrelevant because the contract to sell was by one competent to contract on behalf of the minor, and, therefore, though *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) was cited in the arguments, their Lordships did not refer to it in their judgment.

14. After the above Privy Council decision in 75 Ind App 115=(AIR 1948 PC 95) the point arose before Viswanath Sastri J in *Ramalingam v Balanambal*, AIR 1951 Mad 431. That was a case where a guardian mother of a Hindu minor had entered into a contract for the sale of the minor's immoveable property for purposes considered under Hindu Law as necessary. Principally relying on the Privy Council decision in 75 Ind App 115=(AIR 1948 PC 95) it was held that the minor was bound by the contract and such a contract could be enforced against him. When reference was made to *Mir Sarwarjan's case* (1912) ILR 39 Cal 232 (PC) the learned Judge doubted whether *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) was still applicable after their Lordships had decided 75 Ind App 115=(AIR 1948 PC 95) in 1948. He

observed that the artificial doctrine of mutuality as developed in English decisions was not applicable to cases of Hindu minors properly represented by their guardians, and then stated as follows at page 433

"Yet their Lordships in 75 Ind App 115=(AIR 1948 PC 95)upheld the contention that a guardian's contract for sale of the immoveable property of the ward was specifically enforceable, if the contract was beneficial to the minor. Principles laid down for the protection of benefit of minors had been applied in this country to their prejudice by invoking this artificial doctrine of mutuality. If the guardian has made an advantageous contract for the sale or lease of the property of the ward there is no reason why the ward should be disabled from enforcing it against the other party to the contract. I submit that the doctrine of 'mutuality', illogical in form and in substance unjust, has now been discarded by the very tribunal which was responsible for its introduction in India and it need no longer cast its spell on Indian Courts and stultify contracts of sale entered into by a guardian on behalf of his ward for the latter's interest or benefit....."

The case before the learned Judge was not in respect of a contract for purchase on behalf of the minor. But it appears from the judgment that it would really make no difference once the doctrine of mutuality is discarded.

15. We have then a case of our own High Court in *Gujoba Tulsiaram v Nilkanth Kesheo*, 59 Bom LR 1123=(AIR 1958 Bom 202). There again, it was a suit for the specific performance of a contract to sell minor's property. This Court relying upon the Privy Council decision in 75 Ind App 115=(AIR 1948 PC 95) held that the contract to sell could be enforced specifically against a minor. In the course of the judgment, Mudholkar, J as he then was, referred to a passage at page 107 in the 4th Edition of Iyer and Anand's Law of Specific Relief which referred to the views of Viswanath Sastri, J in AIR 1951 Mad 431 and opined that the true test for validity and enforceability of a guardian's contract of sale on behalf of a minor was not the existence of mutuality in the contract but whether it was by a competent guardian and for legal necessity or benefit of the minor's estate. This view of the learned authors was approved by Mudholkar, J. I have not been referred to any other judgment of this court which takes a contrary view.

16. The point once again came before the Madras High Court before a Full Bench in *Sitaram v Venkatarama*, ILR (1956) Mad 99=(AIR 1956 Mad 261) (FB). In that case two Hindu brothers of whom one was minor and the other acting for

him, though not his legal guardian, purchased properties on 29th November 1933. Contemporaneously, they entered into an agreement to reconvey the properties to the vendors after attainment of majority by the minor on any day between 1st and 30th June 1947. This agreement to reconvey was also entered into by the elder brother acting for himself and on behalf of the minor. The benefit of the reconveyance agreement was transferred to the plaintiffs and the plaintiffs brought a suit for the performance of the reconveyance against the brothers. The minor brother, who had attained majority, pleaded that the reconveyance agreement would not be binding upon him as his guardian elder brother was neither his *de jure* guardian nor the manager of the joint family, and secondly that agreement imposed onerous obligation on him and for want of mutuality was not enforceable against him. The court by a majority held that contracts entered into on behalf of a minor by his guardian or manager of his estate can be specifically enforced by or against the minor if the contract is one which is within the competence of the guardian or manager who had entered into it on behalf of the minor so as to bind him by it and if it is also for the benefit of the minor. This presupposed specific performance of a contract against the minor also. The ground put forward was that the minor could not repudiate the liability to reconvey at the same time retaining to himself the advantage gained by the purchase. The sale-deed and the agreement to reconvey formed part of one transaction and should be read and interpreted together. Since the minor had accepted the title and ratified the sale-deed, he could not be allowed to repudiate the essential pre-requisite of the sale in his favour, viz, the agreement to reconvey. Incidentally, however, in the majority judgment delivered by Govinda Menon J., reference was made to *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) and to the comments thereon by Viswanath Sastri, J. in *Ramalingam's case*, AIR 1951 Mad 431. Since *Ramalingam's case*, AIR 1951 Mad 431 was decided principally on the Privy Council decision in 75 Ind App 115: (AIR 1948 PC 95) the learned Judge considered the Privy Council case also and attempted to show that *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) was still good law in its application to contracts for the purchase of immoveable property on behalf of a minor. The learned Judge sought to put an interpretation on the decision of 75 Ind App 115=(AIR 1948 PC 95) which with great respect to the learned Judge, I am unable to accept. Certain assumptions were made which to me appear to be unwarranted. The first assumption was that a concession was made before the Privy

Council that the agreement to sell without a part performance of it under the provision of Section 53-A of the Transfer of Property Act could not be valid. With respect, there is no such concession. What was conceded by counsel for the appellants was that their appeal would fail unless the appellants were entitled to the protection afforded by Section 53-A. That was an elementary concession, because it does not require much of an argument to show that if the appellant-purchaser to whom the title in the property had not been transferred was not able to get the protection of Section 53-A by reason of the part performance of the contract, he had no answer to the suit of the respondent-plaintiff who had sued on his title. From the assumption above made, the learned Judge proceeded to observe that there was no observation of the Privy Council which laid down that an executory contract entered into by a guardian on behalf of a minor can be specifically enforced against the minor on his attaining majority. I have already shown that the decision of the Privy Council directly involved the consideration of the question whether a contract in writing was a valid and enforceable contract. If it was not a valid and enforceable contract, the purchaser's part performance under Section 53-A of the contract by taking possession of the property would not protect him. There is also no warrant for the observation, viz.,

"what is stated is that part-performance under Section 53-A of the Transfer of Property Act is on the same footing as the completed sale by the guardian which would be binding on the minor if it is for necessity or benefit of the minor's estate".

I do not think, as the learned Judge has again emphasised, that the Privy Council decision could be understood in the sense that a contract of sale of the property by guardian of a minor which is partly performed should be put on the same footing as a completed sale. I am, therefore, unable to agree with the observations made by the learned Judge with a view to salvage the principle of mutuality as laid down in *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC).

17. The correct view, with great respect, has been taken by Full Bench of the Andhra Pradesh High Court presided over by Subba Rao C. J., as he then was, in *Surya Prakasam v. Gangaraju*, AIR 1956 Andh 33 (FB) which I will have occasion to discuss at a later stage in greater detail hereafter.

18. It was contended by Mr. Chitale on behalf of the respondent that the Privy Council decision in 75 Ind App 115=(AIR 1948 PC 95) may at the very best support the view that a minor's contract for sale for legal necessity is enforceable against

him, but there was no reason to extend the principle of that decision to the case of a minor's contract to purchase though for necessity or the benefit of the estate, as the point is directly governed by the Privy Council case in *Mir Sarwarjan's case* (1912) ILR 39 Cal 232 (PC). In that case it was pointed out that the agreement to purchase was made by a manager or guardian and it was also held that the contract was beneficial to the minor. Even so the Privy Council held that the contract was not enforceable. Since that decision is neither considered nor overruled, counsel submitted, by the later decision of the Privy Council in 75 Ind App 115=(AIR 1948 PC 95) it would be binding on this court on the footing that it still continues to be good law. When dealing with this question, a few considerations may be relevant. In the first place, *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) was principally based on the doctrine of mutuality. It must be seen that that doctrine has now been considerably shaken by the decision in 75 Ind App 115=(AIR 1948 PC 95) because the case clearly establishes that a contract by a guardian on behalf of a minor to sell immovable property for necessity or for the benefit of the estate is a valid contract which does not attract the application of the doctrine of mutuality. The doctrine of mutuality was invoked because the minor's contract under the Indian Contract Act was a void contract, but when it is clear that a minor's contract entered into by a guardian for legal necessity or for the benefit of the estate is a valid contract, the doctrine of mutuality has no place. The reason is that the want of capacity of the minor has been supplied by the guardian, and, therefore, the contract which would have been otherwise void has now become valid, provided of course the guardian acts within his authority permitted by Hindu Law. This proposition would as much apply to a contract for purchase as to a contract for sale. Therefore on principle, if *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) cannot be invoked in order to defeat a contract of sale of the property of a minor it cannot be invoked to defeat a contract for purchase on behalf of the minor provided the guardian is acting within his authority. Secondly I have already pointed out that the principle of *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) was extended by our High Courts to contracts of sales on behalf of minors by their guardian, because on principle there was no distinction between the two. Conversely therefore if the law now is that the minor's contract for sale entered into by his guardian is enforceable by or against him, the contract for purchase on behalf of the minor is equally enforceable. Thirdly, there is no principle of

law which prevents a Hindu minor from being a transferee of property. It has been held that if a deed of sale has been executed in favour of a minor and no part of the consideration remains to be executed by him, he can sue for possession of the property on the basis of his valid title under the deed of sale. (See for example *Ulfat Bai v. Gauri Shankar*, (1911) ILR 33 All 657). If the transaction is bona fide and for the benefit of the minor, one finds it difficult to hold that a contract to purchase is incapable of specific performance. Cases are conceivable where purchase of immovable property would become necessary or beneficial to the estate of the minor. A concrete case may be where the minor's house is destroyed by fire and the guardian contracts to purchase a new house for the residence of the minor. If the minor possesses a large estate and is in possession of cash requiring investment, I do not see why the guardian may not enter into a contract to purchase a house subject to a good title being made out by the vendor. The purchase being for the necessity, a completed transfer would give the minor absolute title. I do not see on what principle a contract to purchase under the circumstances is not enforceable. The paramount consideration in *Mir Sarwarjan's case* (1912) ILR 39 Cal 232 (PC) for refusing to enforce the contract for purchase on behalf of the minor was that the contract would impose a personal obligation on the minor and this the guardian should not be permitted to do. But that solicitude can no longer avail the Hindu minor whose guardian can not only contract to sell but even sell the minor's property and create obligations binding on the minor under Section 55 of the Transfer of Property Act. Under Section 55 of the Transfer of Property Act, the seller is bound — (a) to disclose to the buyer any material defect in the property; (b) to produce to the buyer his documents of title for examination; (c) to answer to the best of his information all relevant questions relating to the property or the title thereto; (d) to execute a proper conveyance when the price is tendered; (e) to take care of the property between the date of the contract of sale and the delivery of the property; (f) to give to the buyer possession of the property; (g) He is also deemed to contract with the buyer that he has title to the property and so on and so forth. All these obligations are undertaken in a sale of minor's immovable property and if such obligations really do not come in the way of the guardian alienating the property of the minor for reasons of necessity I do not see how a contract for the purchase on behalf of the minor which imposes much less onerous liabilities on him, can be regarded as a

bar to specific enforcement. As pointed out by Ayyangar J. delivering the judgment of the Bench in *Annammalai Chetty Joint Firm, Palni v. Muthuswami*, AIR 1939 Mad 538 at p. 542 the personal liability arising out of the contract of the guardian is the liability of the minor's estate only. The learned Judge observed:

".....It is scarcely necessary to add that the liability of the estate though personal, in the English law sense of the word, is not personal in the sense that the person of the minor after majority can be arrested in execution. A personal liability arising out of the contract of the guardian is a liability of the minor's estate only"

If for the breach of the statutory covenants involved in a sale a minor's estate is made liable, there is no principle on which his estate may not be made liable for a breach of the contract to purchase immoveable property. However, when considering this question, one must never lose sight of the fact that the guardian is a competent guardian, that the transaction is justified on the ground of necessity or benefit to the estate, and lastly, that it is for the benefit of the minor. Besides when a party comes to the court for specific performance of the contract, the court is bound to consider whether it would be equitable and just from the minor's point of view that the contract should be enforced against him.

19. I now turn to the Full Bench decision in AIR 1956 Andh 33 (FB) referred to above. In that case, there was one contract entered into by a guardian of a Hindu minor which embodied both an agreement to sell the minor's property and to purchase it after the minor had attained majority. The other parties to the agreement brought a suit for the specific performance of this contract as in the meantime the guardian had sold the property to somebody else subsequent to the above agreement. So the question arose whether a contract entered into by a guardian of a Hindu minor for sale or for purchase of immoveable property was specifically enforceable against the minor, and, that question was referred to the Full Bench in view of the observations made by Viswanath Sastri, J. in AIR 1951 Mad 431 already referred to. The opinion of the Full Bench was delivered by the learned Chief Justice. The whole question was reviewed in detail, and they have deduced principles with which, with great respect, I find entirely in agreement. The principles and points made out may be stated as follows:

(1) A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. A guardian,

therefore, steps in to supplement the minor's defective capacity;

(2) Capacity is the creation of law, whereas authority is derived from (nature of) the act of parties;

(3) The limit and extent of the guardian's capacity (authority) are conditioned by Hindu law. They can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor;

(4) Even the personal liability arising out of the guardian's contract is a liability of the minor's estate only;

(5) Since the guardian under the Hindu law has the legal competency to enter into a contract on behalf of the minor for necessity or for the benefit of the estate, the contract is valid from the time of its inception, and since either party can enforce the contract, the test of mutuality is satisfied;

(6) There cannot be any essential distinction between a contract of sale and contract of purchase. The difference is only one of degree. There is no difference in principle between the case of purchase by a guardian and that of a case of a sale by a guardian, because both depend for their validity on the competency of the guardian acting within the scope of his power under Hindu law;

(7) An agreement to convey or purchase is only a preliminary step in completing a transaction of sale or purchase as the case may be. Without negotiations and without any agreement, oral or in writing, rarely is a sale-deed executed and registered. To hold that guardian can execute a sale-deed in respect of a specific property but he cannot legally enter into an agreement to convey or purchase the same is incongruous and illogical;

(8) Contracts to sell or purchase property are transactions closely connected with dealings in immoveable property by a guardian giving rise to obligations annexed to that property. They cannot be equated with contracts of loans imposing personal obligations on the minor.

(9) The courts following the decision in *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) had held that a contract of sale or purchase entered into by a guardian on behalf of a minor could not be enforced against the minor on the ground of mutuality. That view is no longer sound in view of the later Privy Council decision in 75 Ind App 115=(AIR 1930 PC 95) which, in clear and unambiguous terms, rules otherwise.

20. The last conclusion seems to be inevitable on the authority. I have not been referred to any judgment of the Supreme Court or of this Court subsequent to the Privy Council decision in

75 Ind App 115=(AIR 1948 PC 85) taking a contrary view or even doubting it. I would, therefore, hold that a contract to purchase immoveable property by a competent guardian acting within his authority on behalf of a minor is specifically enforceable by or against the minor.

21. Mr Chitale contended that even if this be the final conclusion on the point of law involved, the same should not be applied where the guardian is a de facto guardian. I do not think I can accept this submission. A Full Bench of this High Court in *Tulsidas v Raisingji*, 34 Bom LR 1483=(AIR 1933 Bom 15) (FB) has held that under Hindu law a de facto guardian of a minor can validly sell the property of a minor to a third person for legal necessity, because there is no difference in respect of the powers of a de jure guardian and a de facto guardian with regard to the dealings of the minor and in regard to minor's property. In *Hunoomandarsauda* case, (1854-57) 6 Moo Ind App 393 (PC) the lady who was a natural guardian and a de jure manager was treated as if she was a de facto manager, and still it was held that she had the necessary authority to alienate the minor's property for necessity or for the benefit of the estate. If the de facto guardian has power to alienate the property of his ward for reasons of necessity or benefit, he would equally have the authority to purchase immoveable property for the minor for the same reasons. It was next contended by Mr Chitale that when a de jure guardian is living and is under no disability, the de facto guardian has no right to alienate the minor's property. He contended that in the present case, Namdeo was living, and it was not shown that he was under any disability, and, therefore, the mother could not be the proper guardian who could purchase. I have not been referred to any reported decision which holds that a de facto guardian's authority is thus circumscribed. I have already held that the minor is living with the mother and the mother is looking after his affairs and not the father. In the present case, the mother actually intervened to save the property from being sold by the revenue authorities for the recovery of the taqaul loan. Namdev did not lift a little finger. Obviously, his mother was acting in the best interest of her infant son, while the father was not, and, therefore, the mere fact that he was living at the date would not in any way diminish the authority of a de facto guardian which is rendered to her by reason of the special status of de facto guardianship. Once it is held that she is the de facto guardian, her authority flows from that particular status, and if that authority is used by her within the limits prescribed by Hindu law, her contracts must be upheld.

22. Finally Mr Chitale contended that a contract to purchase immoveable property cannot be regarded as one for the benefit of the estate. As to whether a transaction is for the benefit of the estate or not is essentially a question of fact. This court in *Hemraj v Nathu*, 37 Bom LR 427=(AIR 1935 Bom 295) (FB) has held that under Hindu law the manager of a minor is not entitled to sell the minor's property merely for the purpose of enhancing the value of the property of the minor or for increasing the minor's income, and the question whether the same is for the benefit of the estate involves the consideration of something more than merely whether the purchase price paid is a good price. It also involves the further question, what is to be done with the purchase-money. In that case a narrow strip of land belonging to a minor was sandwiched between two pieces of land belonging to the defendant. The defendant was anxious to purchase this narrow strip, and, therefore, he paid a sum of Rs. 900 for purchasing that narrow strip although ordinarily the value of that strip would have been just Rs. 600. Obviously there was no necessity for the sale. Some evidence was produced at the time of the hearing to show that the amount realised by sale, that is Rs. 900, was invested in the family business. No evidence, however, was given to show whether the interest thus acquired in the business by the minor was worth more than Rs. 600. It was pointed out that to sell a piece of land at a very good price would not be beneficial if the purchase money was to be invested in insolvent business. However, the learned Chief Justice held that the manager of a minor was not entitled to sell the minor's property merely for the purpose of enhancing the value of the property of the minor or for increasing the minor's income. At the same time he was not inclined to hold that no transaction could be for the benefit of the minor which was not of a character to protect or preserve the property of the minor. Where it is for that purpose, it would be obviously for the benefit of the estate.

23. Mr. Walawalkar contends that the present transaction, in reality, is merely for the preservation and protection of the ancestral property in which the minor had interest by birth. After the disposal of the property by the father, the minor's mother in order to get a written agreement from the defendant to reconvey the same paid nearly Rs. 500 which were due on account of the taqaul loan. The defendant also acknowledged in the written statement that he was anxious all the time that there should be no deprivation or loss to the estate of the minor. This postulated that if the property was lost to the family, the minor's interest would

suffer. The agreement also refers to an agreement to reconvey from the very beginning. So this is a case in which the motive of the mother was preservation of the ancestral property of the minor which otherwise would be lost for ever. I may further point out that six acres of good land was purported to be sold for just Rs. 1500. My conclusion, therefore, is that this agreement to purchase was for the benefit of the estate, and, therefore, it is enforceable at the instance of the minor.

24. In the result, I must hold that the contract of purchase is enforceable at the instance of the minor-plaintiff. The orders of the lower Courts are, therefore, set aside, and it is directed that the defendant do execute a sale-deed in favour of the plaintiff of the property in suit. The plaintiff is directed to deposit the amount of Rs. 1500 in court within one month of the receipt of this record by the trial court. The defendant shall execute the sale-deed within one month of the date of the deposit or such time as the court may extend for the purposes of the deposit. If the sale-deed is not executed by the defendant, the court shall cause the sale-deed to be executed at the cost of the defendant. The plaintiff shall get his costs from the defendant throughout and the defendant shall bear his own costs.

MVJ/D.V.C.

Order accordingly.

AIR 1969 BOMBAY 151 (V 56 C 27) NATHWANI, J.

Sir Dinshaw Manekji Petit, Petitioner v. G. B. Badkas and others, Respondents.

Arbitration Petn. No. 62 of 1967, D/- 25-1-1968.

Defence of India Act (1939), S. 19(1)(g) and (e) and Rules under Section — Interpretation of—Operative portion of Cl. (1) (e) of the section excludes application of other laws to "arbitrations" under the section — Exclusion is not confined to only provisions relating to actual assessment of amount of compensation — "Law for the time being in force", indicate indefinite future and not only law in force at time of passing of the Act — Section 19 and rules thereunder form a complete code for determining compensation by arbitration under S. 19 and no other law was to affect these provisions — Arbitration Act (1940) falls within the expression and does not apply to award made under S. 19 — Section 14 of Arbitration Act being inconsistent with provisions of S. 19, does not apply to award under S. 19, by reason of exception in S. 46, Arbitration Act — Award under S. 19 cannot be set aside under Arbitra-

tion Act — Court has no jurisdiction to entertain application under S. 14(2), Arbitration Act in respect of an award under S. 19 — Arbitration Act (1940), Ss. 14(2), 46, 17. AIR 1954 Cal 41 held obiter and Dissented from.

Clause (g) of S. 19(1), Defence of India Act, provides that save as provided, in the section nothing in any law shall apply to "arbitrations" under the said section. In other words, the operative part of clause (g) excludes the application of other laws to "arbitrations" under the said section. Clause (g) does not say that nothing in any law shall apply to principles for fixing the actual amount of compensation under S. 19. Section 19(1) itself provides that when any action is taken of the nature described in Section 299(2) of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner and in accordance with the principles, thereafter set out i.e. in clauses (a) to (g). Whereas clause (e) of S. 19(1) lays down the manner of the determination of the amount of compensation, clauses (b), (c), (d), (f) and (g) deal with other matters for determining such compensation by arbitration. (Para 7)

Further, the opening words in clause (g), viz. "save as provided in this section and in any rules made thereunder", indicate that the scope of the provisions of law that are not applicable to arbitrations under S. 19 is not restricted only to the principles for fixing the actual amount of compensation but extends also to all matters referred to in the section and the rules made thereunder. The law which is not to apply to arbitrations under the said S. 19(1)(g) covers all matters relating to arbitrations referred to in S. 19 and rules made thereunder and is not restricted merely to the manner of determining the amount of compensation laid down in the said clause (e) of S. 19(1).

(Para 7)

Apart from the literal meaning, construing the words "the law for the time being" in clause (g) of S. 19, they are capable of reasonably bearing the only meaning as referring not only to law in force at the time of the passing of the Defence of India Act but also to any other law that may be passed subsequently and which is in force at the time when the question of the applicability of such law to arbitrations held under the said section arises. (Para 8)

It is clear from the provisions of Section 19, and the rules made thereunder, that the legislature intended to make a complete code for determining compensation by arbitration under S. 19 and no other law was to affect the provisions of that code. It is true that in S. 19 or the rules made thereunder there is no provision to the effect that an award will be

enforceable as a decree of a Civil Court. It may however, be that such a provision was considered unnecessary in view of the fact that as it is the Government who has to pay the amount of compensation and that too in the discharge of their constitutional liability to do so it was considered that they would comply with the award or in case of an appeal, with the decision of the High Court and no occasion would arise for a party to enforce the terms of the award for payment of compensation against the Government. In any event omission of such a provision in S 19 and rules thereunder does not detract from their constituting a complete code so far as determination of the amount of compensation by arbitration is concerned as a person to whom compensation is awarded by an award made under the said section can enforce the award by filing a suit to recover the amount of compensation and since 1950 even by filing a petition for a writ of Mandamus under Art. 226 of the Constitution.

(Para 12)

The words "law for the time being in force in S 19(1)(g) refer to any law bearing upon the subject of arbitration which is in force at the time when the question of applicability of that law to arbitration under S 19 of the Defence of India Act arises and covers any such law which came into force even after the passing of the Defence of India Act. The construction that the words refer only to law in force at the time when the Defence of India Act came into force, is opposed to the well known rule of construction that Court should avoid a construction which would render any part or words of the statute redundant. The Arbitration Act therefore falls within the ambit of the said words law for the time being in force in S 19(1)(g) and its provisions including S 14(2) do not apply to an award made under the said S 19 AIR 1954 Cal 41 held obiter and dissented from AIR 1956 Cal 71 Ref.

(Paras 13 and 18)

Section 46 of the Arbitration Act, so far as it is material lays down that the provisions of the Arbitration Act, shall apply to every arbitration under any other enactment for the time being in force except in so far as the Arbitration Act is inconsistent with the other enactment or with any rules made thereunder. Even if the application of the Arbitration Act to arbitrations under S 19 of the Defence of India Act is not excluded by clause (g) of the said S 19(1) S 14(2) of the Arbitration Act being inconsistent with the provisions of the said Section 19 and rules made thereunder by reason of the exception in S 46 of the Arbitration Act does not apply to an award made under the said S 19 (Section 19 and the relevant Rules under the section and the

relevant provisions of the Arbitration Act (1940) considered) (Paras 19 21 to 25)

Apart from the rules framed under S 19 a party has no right to have an award under S 19 set aside under the Arbitration Act. Under Section 17 of the Arbitration Act, a Court may set aside an award after it is filed in Court. But the provisions of S 17 of the Arbitration Act, in so far as it empowers the Court to set aside an award, are inconsistent with the provisions of S 19(1)(e) of the Defence of India Act and the Rules 9 and 13 made under that section. (Para 26)

In order to render any provisions of the Arbitration Act inconsistent with any other enactment providing for arbitration within the meaning of S 46 of the Arbitration Act, the whole scheme of the latter enactment is material and may be looked at to see whether it creates thereby a special self contained code for arbitration and thus by necessary implication excludes the jurisdiction of Civil Court under the Arbitration Act as being inconsistent with the said scheme of the other enactment. The whole scheme and object of S 19 of the Defence of India Act and the rules thereunder is to create a special forum by way of arbitration including an appeal to the High Court for determining the amount of compensation in respect of compulsory acquisition of property by Government and to exclude the jurisdiction of the Civil Court under the Arbitration Act. AIR 1943 Cal 255 and AIR 1943 Bom 341. Relied on. (Para 27)

Thus the provisions of Sections 14(2) and 17 of the Arbitration Act being wholly inconsistent with the provisions of Section 19 and the rules made thereunder do not apply to arbitration under S 19 (Paras 28, 29)

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G. A. Thakker with R. J. Bhatt, for
 Petitioner; H. M. Seervai, Advocate Ge-
 neral with T. Andhyarujina, (for Nos.
 2 and 3) and Kenia (for Nos. 4 to 7), for
 Respondents.

JUDGMENT: This is an application
 under Section 14(2) of the Arbitration
 Act, 1940, for an order directing the first
 Respondent, who was appointed an arbitra-
 tor under S. 19 of the Defence of
 India Act, 1939, to file in the Court an
 award made by him on 12th August 1967.

2. The first Respondent did not appear
 at the hearing of the application. The
 learned Advocate General, however, who
 appeared for Respondents Nos. 2 and 3,
 raised a preliminary objection to the
 maintainability of the present petition.
 He submitted that the Court has no juris-
 diction to order the first Respondent to
 file the Award for two reasons, firstly,
 S. 19(1)(g) of the Defence of India Act
 excludes the operation of the Arbitra-
 tion Act to arbitration held under
 Section 19 of the Defence of India
 Act, and secondly, even assuming that
 the Arbitration Act applies to such
 arbitrations, by reason of Section 46 of the
 said Act, the provisions of Section 14(2),
 being inconsistent with the provisions
 of the said Section 19 and rules made
 thereunder, will not apply to an award
 made under the said Section 19. Mr.
 Thakker, the learned Counsel for the
 petitioner, disputed the validity of both
 these contentions and maintained that
 the present application was competent
 under Section 14(2) of the Arbitration
 Act.

3. The facts of the case are not in dis-
 pute. The petitioner and others were at
 all material times the trustees of a trust
 created by the late Sir Dinshaw Manekji
 Petit (2nd Baronet) under a declaration
 of trust dated 17th January 1931, and as
 such were owners/lessees of a property
 situate at Tardeo. Malabar Hill Division
 (hereinafter referred to as the Petit
 Mills Estate). The petitioner is the sole
 surviving trustee of the said trust. Res-
 pondents Nos. 4 to 7 as the Trustees of
 Indenture of Settlement dated 29th March
 1923, were the lessors, and the petitioner
 and other trustees of the said trust dated
 17th January 1931 the lessees of a portion
 of the Petit Mills Estate admeasuring
 about 64,000 square yards. By an order
 dated 1st April 1942, issued by the Col-
 lector of Bombay, under Rule 79 of the

Defence of India Rules the Petit Mills
 Estate was requisitioned. Subsequently,
 however, by another order dated 28th
 October 1942, issued by the Collector of
 Bombay under Rule 75A of the Defence
 of India Rules the Petit Mills Estate was
 acquired. The Collector of Bombay of-
 fered and the trustees of the said trust
 dated 17th January 1931 accepted under
 protest and without prejudice to their
 rights and contentions a sum of Rupees
 22,49,770 as compensation for the acqui-
 sition of the Petit Mills Estate. The trust-
 ees thereafter filed a suit in this Court,
 being suit No. 1669 of 1945, against the
 Dominion of India and the then province
 of Bombay for a declaration that they
 were the owners of the suit lands and for
 possession and other reliefs. The said
 suit was dismissed and thereupon an ap-
 peal was filed by the trustees, which ap-
 peal was also dismissed by the Appel-
 late Court. The trustees then filed an
 appeal to the Supreme Court of India,
 being Appeal No. 241 of 1955. By a
 Consent Order obtained on 14th Septem-
 ber 1960 disposing of the said appeal in
 the Supreme Court it was inter alia,
 provided that the Government of Maha-
 rashtra should pay to the Trustees as
 solatium 15 per cent of the said sum of
 Rs. 22,49,770 and that the amount of
 compensation, if any, payable to the
 Trustees as fair market value of the said
 property over and above the said sum
 of Rs. 22,49,770 should be determined
 by arbitration as and in the manner pro-
 vided by Section 19 of the Defence of
 India Act and the rules made thereunder,
 and that in the event of the trustees
 being awarded any compensation as fair
 market value of the said property in
 excess of the said sum of Rs. 22,49,770
 the Government of Maharashtra should
 pay to the Petitioner such additional
 compensation as also further amount
 equal to 15 per cent of the additional
 amount of compensation so awarded.

4. Accordingly the Government of
 Maharashtra paid to the Trustees the
 solatium after deducting costs, and also
 appointed the first respondent as an
 arbitrator to determine the amount of
 further compensation, if any, payable to
 the trustees. The first respondent made
 and published his award on 12th August
 1967 and gave notice thereof to the
 parties on the same day. It is not dis-
 puted that by his Award the first res-
 pondent has disallowed the entire claim
 of the petitioner for compensation in ex-
 cess of the said sum of Rs. 22, 49, 770
 and for further amount by way of
 solatium. The petitioner by his At-
 torney's telegram dated 8th September
 1967 requested the first Respondent to
 file his Award in this Court. As the first
 respondent did not do so, the petitioner
 as the sole surviving trustee of the said

trust has filed this petition on 11th September 1967 for directing the first Respondent to file or cause to be filed the Award in this Court. The first respondent did not file his appearance and remained absent. On behalf of respondents Nos. 2 and 3, however an affidavit in reply was filed on 24th November 1967 by oee Shriram V Harsha. Under Secretary to the Government of Maharashtra, contending that S. 14(2) of the Arbitration Act did not apply to the said Award made under S 19 of the Defence of India Act, 1939. Though the Petitioner applied for time for filing an affidavit in rejoinder no such affidavit was filed.

5. The learned Advocate General in support of his preliminary objection that clause (g) of Section 19(1) of the Defence of India Act excludes the application of the Arbitration Act submitted that the words "law for the time being in force" used in the said clause (g) refer not only to laws that were in operation at the time of the passing of the Defence of India Act, but also to law that may be passed in future thereafter and is in force at the time when the question of applicability of such to arbitration under the said section 19 arises, and, therefore, even though the Arbitration Act came into force after the passing of the Defence of India Act, i.e. on 1st July 1940, it falls within the purview of the said words in Section 19(1)(g) with the result that the Arbitration Act does not apply to arbitrations under the said S 19. The learned Advocate General also invited my attention to a decision of the Calcutta High Court, in *East India Film Studios v P K. Mukherjee*, AIR 1954 Cal 41 wherein the said words "law for the time being" in Section 19 (1) (g) have been construed by Bose, J as referring only to law actually in existence at the time of the passing of the said Defence of India Act. The learned Advocate General, however submitted that the observations in *Calcutta case* in regard to the construction of the said words were obiter and that, in any event, the learned Judge had overlooked important matters of context in construing the said words. Mr Thakker for the petitioner on the other hand, submitted that the said clause (g) of Section 19(1) does not exclude the application of Arbitration Act to arbitrations under Section 19 of the Defence of India Act and raised a two-fold argument. Firstly, he argued that on a proper construction of Section 19(1)(g) the provisions of any other law which are not to apply thereunder are only those which relate to the assessment or fixation by an arbitration of the actual amount of compensation to be paid by the Government for compulsory acquisition of property but no law in so far as it relates to other matters relating to such arbitration is excluded, and as the Arbitration Act relates to matters other than

the fixing of the amount of compensation, it is not excluded by the said clause (g) of Section 19(1) and that if he were right in his submission on the true scope of Section 19(1) the question of construing the said words "law for the time being in force" in clause (g) would not arise inasmuch as it would not then matter in the present case whether the said words referred only to law in existence at the time of coming into force of the Defence of India Act or whether they covered also other law which came into force subsequently. Secondly, in the alternative, he argued that on a proper construction the said words "law for the time being in force" refer only to the law actually in existence on 29th September 1939, when the Defence of India Act came into operation, and as the Arbitration Act came into force subsequently on 1st July 1940, the Arbitration Act does not fall within the ambit of the said words. In support of his construction of the said words he strongly relied on the case of AIR 1954 Cal 41 and submitted that the decision therein was not obiter and that this Court should follow the same as laying down the correct law.

6. In order to appreciate these rival contentions it is necessary to set out fully Section 19 of the Defence of India Act. Section 19 runs as follows—

19(1) "Where under Section 19A or by or under any rule made under this Act any action is taken of the nature described in sub-section (2) of Section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles hereinafter set out, that is to say—

(a) Where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement.

(b) Where no such agreement can be reached, the Central Government shall appoint as an arbitrator a person qualified under sub-section (3) of Section 220 of the abovementioned Act for appointment as a Judge of a High Court.

(c) The Central Government may, in any particular case, nominate a person having expert knowledge as to the nature of the property acquired, to assist the arbitrator and where such nomination is made, the person to be compensated may also nominate an assessor for the said purpose.

(d) At the commencement of the proceeding before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinion is a fair amount of compensation.

(e) The arbitrator in making his award shall have regard to—

- (i) the provisions of sub-section (1) of S. 23 of the Land Acquisition Act, 1894 so far as the same can be applicable; and
 (ii) Whether the acquisition is of a permanent or temporary character:

Provided that where any property requisitioned under any rule made under this Act is subsequently acquired under Section 19A or any such rule the arbitrator in any proceedings in connection with such acquisition shall, for the purposes of the provisions of the said S. 23, take into consideration the market value of the property at the date of its requisition as aforesaid and not at the date of its subsequent acquisition.

(f) An appeal shall lie to the High Court against an award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rules made by the Central Government.

(g) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section.

(2) The Central Government may make rules for the purpose of carrying into effect the provisions of this section.

(3) In particular and without prejudice to the generality of the foregoing powers such rules may prescribe:

(a) the procedure to be followed in arbitrations under this section.

(b) the principles to be followed in apportioning the costs of proceedings before the arbitrator and on appeal.

(c) the maximum amount of an award against which no appeal shall lie".

7. The first question to be considered is whether the Arbitration Act applies to arbitrations under Section 19 of the Defence of India Act, and the answer thereto depends upon the true scope and meaning of clause (g) of the said section 19(1). The said clause (g) provides that save as provided therein, nothing in any law shall apply to "arbitrations" under the said section 19. In other words, the operative part of the said clause (g) excludes the application of other laws to "arbitrations" under the said section. Now, Mr. Thakker's first contention in this behalf was that the provisions of law excluded by the said Cl. (g) are only those which relate to the actual assessment of the amount of compensation for acquisition of property and none others, i.e. only those referred to in S. 19(1)(e), with the result that other provisions of law relating to arbitration apply to arbitrations held under the said Section 19. In my opinion, there is no merit whatsoever in this contention and must be rejected as being opposed to the language of the said clause (g) itself. The said Clause (g) in terms provides that nothing in any law shall apply to "arbitrations" under the

said Section 19. It does not say that nothing in any law shall apply to principles for fixing the actual amount of compensation under the said Section 19. The said Section 19(1) itself provides that when any action is taken of the nature described in Section 299(2) of the Government of India, Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner and in accordance with the principles, thereafter set out, i.e. in clauses (a) to (g). Whereas clause (e) of the said Section 19(1) lays down the manner of the determination of the amount of compensation, clauses (b), (c), (d), (f) and (g) deal with other matters for determining such compensation by arbitration. Thus, the said clause (b) provides for an appointment of arbitrator by the Central Government and for qualifications of such arbitrator, sub-clause (c) empowers the Government and the person to be compensated to nominate person to assist the arbitrator, sub-clause (d) deals with statements by the Government and the person to be compensated about what in their respective opinion is the fair amount of compensation and sub-clause (f) provides for an appeal to the High Court against the award of an arbitrator except in cases where the amount thereof does not exceed the prescribed amount. Sub-section (2) of Section 19 empowers the Central Government to make rules for the purpose of carrying into effect the provisions of Section 19 and sub-clause (a) of Section 19(3) provides that such rules may prescribe the procedure to be followed in arbitrations under this section. Further the opening words in clause (g), viz. "save as provided in this section and in any rules made thereunder", indicate that the scope of the provisions of law that are not applicable to arbitrations under the said Section 19 is not restrained (restricted ?) only to the principle for fixing the actual amount of compensation but extends also to all matters referred to in the said Section 19 and the rules made thereunder. Lastly, as already stated, the manner of fixing the amount of compensation is provided for in clause (e) of Section 19(1) which requires an arbitrator to make his award having regard to (i) the provisions of sub-section (1) of Section 23 of the Land Acquisition Act, 1894, so far as the same can be applicable and (ii) whether the acquisition is of a permanent or temporary character. If in enacting the said clause (g) of Section 19(1) the legislature only intended that the manner of determining the amount of compensation laid down in Section 19(1)(e) should not be affected by any other law the same could well have been stated in the said clause (e) itself. I, therefore, hold that the law which is not to apply to arbitration under

the said Section 19(1)(g) covers all matters relating to arbitrations referred to in the said Section 19 and rules made thereunder and is not restricted merely to the manner of determining the amount of compensation laid down in the said clause (e) of Section 19(1).

8. Coming next to the meaning to be attributed to the words "law for the time being in force," in the said clause (g) the learned Advocate General contended that the natural import of the words "for the time being" indicate indefinite future state of thing and in support cited a passage from Stroud's Judicial Dictionary, (3rd Edition) Vol. IV page 3030, which is as follows

"The phrase 'for the time being' may, according to its context, mean the time present, or denote a single period of time, but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time (Ellison v Thomas) (1861) 31 LJ Ch 867 and (1862) 32 LJ Ch 32 Coles v Pack, (1869) LR 5 CP 65 See also Re Gunter's Settlement Trusts, (1949) Ch 502"

He, therefore, submitted that in their ordinary sense the said words "law for the time being in force" refer not only to law in force at the time of the passing of the Defence of India Act, but also to any other law that may be passed subsequently, and which is in force at the time when the question of the applicability of such law to arbitrations held under the said Section 19 arises. There was some argument before me whether the said words in their general sense bear the meaning given in Stroud's Judicial Dictionary. Mr. Thakker for the petitioner argued that the two cases, viz., (1861) 31 LJCh 867 and (1862) 32 LJCh 32 and (1869) 5 CP 65 cited by Stroud do not bear out the said meaning and relying on the decision of the Calcutta High Court in East India Film Studios v P. K. Mukherjee submitted that the said words had to be construed according to their context, and that in the present case the said words so construed refer only to law in force at the time when the Defence of India Act came into force. It is, however, not necessary to consider the cases cited in Stroud's Judicial Dictionary, as in my opinion, apart from the literal meaning construing the said words "for the time being" in clause (g) according to their context they are capable of reasonably bearing the only meaning sought to be placed thereon by the learned Advocate General.

9. Turning then to the context, as the said words "for the time being" in Section 19(1)(g), qualify the words "law in force" the learned Advocate General

stressed the scheme and purpose of the said Section 19 and rules made thereunder and submitted that the Legislature intended to provide thereunder a complete self-contained code for determining compensation by arbitration in respect of compulsory acquisition of property made by or on behalf of the Central Government. Section 299(2) of the Government of India Act, 1935 (corresponding to Article 31(2) of the Constitution of India) cast a constitutional obligation for payment of compensation for compulsory acquisition of property. The said Section 19 recognizes and affirms the said obligation to pay compensation and provides that the amount of such compensation shall be determined in the manner, and in accordance with the principles set out therein, and empowers the Central Government to make rules inter alia prescribing the procedure to be followed in arbitration for carrying into effect the provisions of the said section. Now, the provisions of various clauses of section 19(1) have been summarised above, but in this context the provisions of sub-clause (f) are of special relevance. They provide for an appeal to the High Court against an award except in cases where the amount thereof does not exceed the prescribed limit.

10. In pursuance of the powers entrusted to the Provincial Governments to make rules under Section 19(2)(3) the then Government of Bombay made certain rules on 21st July 1943. Rule 2 of the said Rules provides that when the amount of compensation cannot be fixed by agreement, the person to be compensated may submit an application to the Provincial Government for a reference to the arbitration for determining the amount of compensation payable to him. Rule 3 deals with the statement regarding compensation and particulars of property acquired, to be stated in the application. Rule 4 provides that on receipt of the application, the Provincial Government may make enquiries and then refer it to an arbitrator to be appointed under S 19(1)(b) of the said Act. Rule 5 deals with the fixation of the date, time and place for holding an inquiry by the arbitrator. Rules 6 and 7 provide for the hearing to be given by the arbitrator to the parties and their legal advisers. Rule 8 provides that the arbitrator shall after hearing the parties and holding enquiries, if any, make an award within 60 days from the date of reference and forward a copy of the award to the parties concerned. Rule 9 provides that subject to any appeal made to the High Court the award shall be final and binding on the parties. Rule 10 originally provided that the maximum amount of award against which no appeal shall lie shall be Rupees

5,000, subsequently, however, on 19th June 1944, the rule was amended and the limit of maximum amount raised to Rs. 25,000. Rule 11 refers to the period of limitation within which an appeal is to be filed against the award. Rule 12 provides for costs of the award. Rule 13 provides that save as otherwise provided in the foregoing rules or in Section 19 of the said Act the procedure to be followed in arbitration under these rules shall be in accordance so far as may be with the provisions of Sections 13(1), (C), (D), (E), 14(1), 27, 28(1), 30(a) and (c), Sections 41(a), 42 and 43 of the Arbitration Act, provided that (a) reference to Court in clause (a) of Section 41 and where it occurs for the first time in Section 43(1) shall be construed as reference to the arbitrator. I shall later deal in detail with the provisions of the said Rules 9 and 13 in connection with the alternative argument of the learned Advocate General about the scheme of Section 19 and rules made thereunder being inconsistent with the Arbitration Act. But at this stage reference is made to the contents of the said rules in the context of the argument that by the said Section 19 and the rules to be made thereunder the legislature intended to lay down a complete code for determining compensation by arbitrator in respect of compulsory acquisition of property.

11. In this connection it is also important to notice the opening words of Section 19(1)(g), viz. "save as provided in this section and in any rules made thereunder". These words show that further action by way of making rules is contemplated and by such rules any other provisions of law relating to arbitration for the time being in force if thought proper may be applied with or without modifications to arbitrations under the said Section 19.

12. In my opinion, it is clear from the provisions of section 19, and the said rules made thereunder, that the legislature intended to make a complete code for determining compensation by arbitration under section 19 and no other law was to affect the provisions of that Code. It is true that in the said Section 19 or the rules made thereunder there is no provision to the effect that an award will be enforceable as a decree of a Civil Court. It may, however be that such a provision was considered unnecessary in view of the fact that as it is the Government who has to pay the amount of compensation and that too in the discharge of their constitutional liability to do so, it was considered that they would comply, with the award, or in case of an appeal, with the decision of the High Court and no occasion would arise for a party to enforce the terms of the award for payment of compensation against the

Government. In any event omission of such a provision in the said Section 19 and rules thereunder, in my opinion, does not detract from their constituting a complete code so far as determination of the amount of compensation by arbitration is concerned as it was not disputed before me that a person to whom compensation is awarded by an award made under the said Section 19, can enforce the award by filing a suit to recover the amount of compensation and since 1950 even by filing a petition for a Writ of Mandamus under Art. 226 of the Constitution.

13. The learned Advocate General by way of context also referred to the legislative history of the law of arbitration. At the time of passing of the Defence of India Act in 1939 there was no law of arbitration applicable to statutory arbitrations. Prior thereto law of arbitration was substantially contained in two enactments, viz., the Indian Arbitration Act (IX of 1899) and the Second Schedule to the Code of Civil Procedure, 1908. The operation of the Act of 1899 was limited to the Presidency towns and was liable to be extended to other areas by appropriate Provincial Government. Its scope was confined to arbitration by agreement without intervention of the Court. The second schedule to the Civil Procedure Code dealt with arbitration outside the operation and scope of the Act of 1899 and related in most parts to arbitrations in suits, though arbitrations without the intervention of the Court was also briefly provided for. A bill to consolidate and amend the law relating to arbitrations was published in the Government of India Gazette Part V, pages 129 onwards on 26th July 1939. Sub-section (3) of the said bill stated that the Indian Arbitration Act, 1940, would come into force on 1st July 1940, and it did in fact come into force on that day. Section 46 of the Arbitration Act for the first time made applicable other provisions of the Indian Arbitration Act, 1940, to statutory arbitrations to the extent mentioned therein. The learned Advocate General, therefore contended that as at the time of coming into force of the Defence of India Act on 29th September 1939 there were in force the said two enactments relating to arbitrations neither of which applied to arbitrations under Section 19 of the Defence of India Act, it would be futile to construe the said words "law for the time being in force" as referring to law in force at the time of passing of Defence of India Act, viz. the said two enactments. Further at the time of the passing of the Defence of India Act, 1939 the legislature could not have been unaware of the said Bill to consolidate and

amend the law relating to arbitrations which was to come into force on 1st July 1940, and whereby the provision was made for the first time by Section 46 thereof for applying the other provisions of the Arbitration Act to statutory arbitrations to the extent mentioned therein. It was submitted that in view of the said legislative history the said words "law for the time being in force" should be construed as covering law, which came into force subsequently, i.e., after the passing of the Defence of India Act. Mr. Thakker for the Petitioner on the other hand, merely contented himself by saying that the said clause (g) was enacted only out of abundant caution and the provision so made should not prevent the Court from construing the said words "law for the time being in force", as referring only to law in force at the time when the Defence of India Act came into force. In my opinion the legislative history of arbitration law supports learned Advocate General's construction of the said words, and petitioner's contention is untenable also on the ground that it is opposed to the well-known rule of construction that Court should avoid a construction which would render any part or words of the statute redundant.

14. As regards the case of AIR 1954 Cal 41 the Advocate General submitted that the decision of the learned Judge on the construction of the said words "law for the time being in force" was obiter and that in any event the said decision was not correct inasmuch as the learned Judge overlooked the aforesaid legislative history referred to by him. He also drew my attention to another subsequent case of the Calcutta High Court in *Karnaphuli Jute Mills Ltd. v. Union of India*, AIR 1956 Cal 71 where a contrary view to that in the first case is expressed, viz., the Arbitration Act does not apply to arbitrations under Section 19 of the Defence of India Act or the rules thereunder. He, however, candidly stated that in the second Calcutta case no mention of the earlier Calcutta case was made nor any reasons given in support of the said view and therefore the subsequent Calcutta case could not be said to have affected the authority of the earlier case. On the other hand Mr. Thakker for the petitioner in support of his contention has mainly relied upon the case of AIR 1954 Cal 41. In my opinion, in AIR 1954 Cal 41 the question of applicability of Arbitration Act to arbitrations under Section 19 of the Defence of India Act did not arise in such a manner as to require a decision thereof by the learned Judge and therefore the said decision is obiter. Even otherwise the said decision is not binding on this Court. As, however, the judgment of the learned Judge is a considered one and as Mr.

Thakker strongly relied on the said decision in support of his contention, I think it necessary to deal with the same in detail.

15. The facts in the Calcutta case were as follows: In 1942 certain property of the petitioner was requisitioned by the Government of West Bengal under Defence of India Act. By an order made on 20th June 1944 a reference to arbitration was made under S 19 of the Defence of India Act for determining compensation to be paid to the petitioner. By an order made on 27th February 1950 one J. C. Majumdar Additional District Judge, Alipur was appointed as arbitrator by the Government of West Bengal. While Mr. Majumdar was proceeding with the Arbitration his authority as arbitrator was revoked or cancelled by an Order made by the Government on 24th November 1951.

16. The petitioner made a representation to the Government for revoking the said order but the Government refused to do so, and by an order made on 22nd December 1951, respondent No 4 was appointed as an arbitrator in place of Mr. Majumdar. The petitioner, therefore, filed an application under Art. 226 of the Constitution for an appropriate writ directing the respondents Nos. 1 and 2 to withdraw or cancel the said order dated 24th November 1951 revoking the appointment of the said arbitrator. On behalf of the Government it was denied that the authority of Mr. Majumdar as arbitrator was revoked as alleged and it was pointed out that respondent No 4 was appointed as arbitrator inasmuch as he was appointed Additional District and Sessions Judge in place of Mr. Majumdar. The learned Judge held that in the circumstances of the case there was no provision for revocation of the authority of an arbitrator in S 19, or the rules made thereunder. It appears to me that the decision in the case, with respect to the learned Judge, could have been rested on the above ground and the impugned Order dated 22-12-1951 held as bad as having been made without jurisdiction and it was unnecessary to raise the further question whether the Arbitration Act, 1940 applied to arbitrations under S 19 of the Defence of India Act, and, if so, whether the authority of Mr. Majumdar to act as an arbitrator could only be revoked or cancelled by Court under S 5 of the Arbitration Act. The learned Judge, however, raised the question whether the Arbitration Act fell within the purview of the expression "law for the time being in force" in S 19 (1) (a) of the Defence of India Act, and accepted the following proposition viz:—

"It appears from these decisions, that the expression (is for the time being) may

refer either to a particular point of time or to several periods of time and the interpretation that is to be adopted in any particular case must depend upon the context in which the expression occurs." (Para 16)

The learned Judge, however, instead of considering the context in which the said expression is used proceeded to give his decision as follows:—

"It appears to me that the words have reference only to the laws which were actually in existence at the time the Defence of India Act came into force".

17. The learned Judge, however, added that:—

"The intention was to keep the arbitration under the Defence of India Act unaffected by any other law having any bearing upon the subject. In other words, the object of the framers of the Defence of India Act was to make S. 19 of the Act a self-contained code so far as arbitrations for assessment of compensation in respect of requisitioned lands were concerned".

18. The learned Judge referring to the rules made under S. 19 also observed that they indicated that the said S. 19 was intended to be a complete code by itself. Later on, still, he categorically observed that:—

"The rules, by their exhaustive treatment of the possible situations with regard to an arbitration have tried to make S. 19 as complete a code as possible".

Now with respect, I agree with the learned Judge that the object of S. 19 and the rules thereunder is to make a complete self-contained code for arbitration for determining compensation and to keep the arbitration under the said S. 19 unaffected by any other law having any bearing upon the subject. But in view of the said object of legislature, it would follow that not only the law bearing upon the subject in force at the time of passing of the Defence of India Act but such law that comes into force even subsequently should not apply to arbitrations under the said S. 19. In my opinion again with respect, the decision of the learned Judge is in conflict with his own conclusion that the object and purpose of the legislature in enacting the said Section 19 and the rules thereunder is to provide a complete, self-contained code. Further, the attention of the learned Judge does not seem to have been drawn to the legislative history of arbitration law. Again the learned Judge gave the expression "for the time being in force" occurring in Section 46 of the Arbitration Act, the same meaning which he gave to the said expression in Section 19 (1) (g), with the result that the said Section 46 would apply to arbitrations under those laws only which were already in force

at the time when the Arbitration Act came into operation, i. e. on 1st July 1940, and not to arbitrations under laws which came into force subsequently. In my opinion, however, such a construction is untenable as no principle can be suggested on the basis of which the legislature could have drawn such a distinction between laws made before and after the Arbitration Act for applying the provisions thereof to such laws. If the legislature had intended to refer in Section 19 (1) (g) of the Defence of India Act or in Section 46 of the Arbitration Act to law in force only at the time of coming into force the Defence of India Act or the Arbitration Act, it could have easily expressed that intention by using the word "now" therein instead of the words "for the time being". For all these reasons, I am unable to agree with the interpretation put up by the learned Judge on the said words "law for the time being" in Section 19(1) (g). All the above considerations lead me to the conclusion that the said words "law for the time being in force" in Section 19(1)(g) refer to any law bearing upon the subject of arbitration which is in force at the time when the question of applicability of that law to arbitration under Section 19 of the Defence of India Act arises and covers any such law which came into force even after the passing of the Defence of India Act. The Arbitration Act therefore falls within the ambit of the said words "law for the time being in force" in Section 19 (1)(g) and its provisions do not apply to an award made under the said S. 19.

19. Assuming that I am wrong in the view I have taken, I proceed to consider the alternative argument of the learned Advocate General that even if the application of the Arbitration Act to arbitrations under Section 19 of the Defence of India Act is not excluded by clause (g) of the said Section 19 (1), Section 14(2) of the Arbitration Act is inconsistent with the provisions of the said section 19 and rules made thereunder, and therefore, by reason of the exception in Section 46 of the Arbitration Act it does not apply to an award made under the said Section 19.

20. In order to appreciate this contention it is necessary to consider the effect and inter-action of some of the provisions of Arbitration Act and of the said section 19 and rules made thereunder.

21. Section 46 of the Arbitration Act, so far as it is material lays down that the provisions of the Arbitration Act, shall apply to every Arbitration under any other enactment for the time being in force, except in so far as the Arbitration Act is inconsistent with the other enactment or with any rules made thereunder. Section 14(2) of the Arbitration Act, so far

as it is material, provides that the Arbitrator shall, if so directed by the Court cause the award or a signed copy of it to be filed in Court and the Court shall thereupon give notice to the parties of the filing of award. After an award is filed in Court under the said section 14 (2), the Court is seized of the matter and may modify it under Section 15 or remit it to the arbitrator for reconsideration under Section 16, or may set it aside under S 17 on any one or more of the grounds set out in Section 30 of the said Act.

22 Sections 17 and 30 of the Arbitration Act are material and are as follows —
Section 17 Judgment in terms of award.

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made after refusing it, proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award"

Section 30 'An Award shall not be set aside except on one or more of the following grounds namely—

(a) that an arbitrator or umpire has misconducted himself or the proceedings

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35,

(c) that an award has been improperly procured or is otherwise invalid"

Reference is already made to the provisions of Section 19 of the Defence of India Act and the rules made thereunder, but in this context the provisions of Section 19(1)(e) and Rules 9, 10 and 13 of the said Rules are important. The said Section 19(1)(e) provides for an appeal to the High Court against an award except where the amount thereof does not exceed an amount prescribed by rules. Rule 9 is as follows

'Subject to any appeal made to the High Court the award shall be final and binding on the parties concerned and the persons if any claiming under them"

Rule 10 provides a sum of Rs. 25,000 as the maximum amount of an award against which no appeal shall lie.

23 Rule 13 runs as follows.

'Save as otherwise provided in the foregoing rules or in Section 19 of the said Act the procedure to be followed in arbitration under these rules shall be in accordance so far as may be with the provisions of clauses (a) and (c) to (e) of Section 13, sub-section (1) of Section 14,

Section 27, sub-section (1) of Section 28, clauses (a) and (c) of Section 30 clause (a) of Section 41, Section 42 and Section 43 of the Arbitration Act, 1940 Provided that (a) reference to court in clause (a) of Section 41 and where it occurs for the first time in sub-section (1) of Section 43 shall be construed as reference to the arbitrator and (b) reference to Court in sub-section (1) of Section 28 shall be construed as reference to the Provincial Government".

It would be noticed that clauses (a) and (c) to (e) of Section 13 of the Arbitration Act enumerate the various powers an arbitrator has in relation to an arbitration proceeding before him.

23A. Section 14(1) requires an arbitrator to sign an award after he has made it and give notice thereof to the parties. Section 27 empowers an arbitrator to make an interim award. Section 28(1) empowers the Court only to enlarge time for making an award. Clauses (a) and (c) of Section 30 are already set out hereinabove. Clause (a) of Section 41 applies the provisions of Civil Procedure Code, 1908 to all proceedings before the Court, and to all appeals under the Arbitration Act. Section 42 deals with the service of notice by party or arbitrator. Section 43 empowers the Court to issue process for appearance before arbitrator. The above provisions of Arbitration Act are expressly made applicable by the said Rule 13 to arbitrations held under Section 19 of Defence of India Act, but the important thing to observe about the said Rule 13 is the proviso thereto whereby the reference to Court in clause (a) of Section 41 and where it occurs for the first time in Section 43(1) is to be construed as reference to the arbitrator and the reference to Court in Section 28(1) is to be construed as reference to the Provincial Government.

24. The learned Advocate General submitted that the provisions of Sections 14(2), 15, 16 and 17 of the Arbitration Act are wholly inconsistent with, and therefore excluded by, the provisions of Section 19(1)(e) of the Defence of India Act and the said Rules 9 and 13 made under the said Section 19. In this context, he also reiterated his argument that the scheme and purpose of the said Section 19 and the rules made thereunder is to provide a separate complete code to determine by arbitration the amount of compensation for compulsory acquisition of property and stressed that under the scheme so framed the jurisdiction of civil Court is completely ousted except by way of an appeal to the High Court. He strongly relied on the provisions of the said Rule 9 whereby an award is made final subject only to an appeal to the High Court where the amount of the

Award exceeded the prescribed limit and contended that the said Rule 9 by necessary implication excluded the jurisdiction of the Court under the Arbitration Act to modify, or to remit for reconsideration or to set aside, an award. He further argued that though the said Rule 13 extends the provisions of clauses (a) and (c) of Section 30 of the Arbitration Act to arbitrations under the said Section 19 and confers a power on a party to have an award set aside on any of the grounds mentioned in the said clauses (a) and (c) of Section 30, the said rule is to be read with the provisions of Rule 9, and so read a party has a right to set aside an award on any of the said grounds only in an appeal against the award to the High Court and not otherwise. In other words, he contended that the combined effect of the said Rules 9 and 13 is to enlarge the powers of the High Court as an appellate Court under Section 19(1)(e) of the Defence of India Act to set aside an award on any of the grounds mentioned in the said clauses (a) and (c) of Section 30. Mr. Thakker for the petitioner conceded that in a case where an appeal lies against an award the right to set it aside on any one or more of the grounds mentioned in the said clauses (a) and (c) of Section 30 can be exercised only by way of an appeal and not by way of resorting to the machinery laid down in the Arbitration Act. He, however, contended that even in a case where no appeal lies against an award by reason of the amount thereof not exceeding the prescribed limit either party has a right under the said Rule 13 to have an award set aside on any of the grounds mentioned in the said clauses (a) and (c) of Section 30, and for that purpose a party has a right under the said Section 14(2) to apply to the Court for directing an arbitrator to file his Award in Court. He argued that the Court should construe the said Rules 9 and 13 in such a manner as to avoid repugnancy between the said rules and unless the provisions of the said rules are reconciled by construing them as contended for by him grave injustice would be done to a party in a case where no appeal lies, even though the arbitrator who is a nominee of Government was guilty of grave misconduct like bribery, and had deliberately awarded an amount against which no appeal lies. He further contended that omission to include Section 14(2) in the said Rule 13 was not material as a right to approach a Court under Section 14(2) was merely incidental to the right of a party under the said Rule 13 to have an award set aside on any of the grounds mentioned in the said clauses (a) and (c) of Section 30. He submitted that if the said Rules 9 and 13 were construed in the aforesaid manner, there could be no

inconsistency between the said rules and Section 14(2) of the Arbitration Act. In support of his contention Mr. Thakker called in aid certain rules of construction of statutes, viz. that whenever it is sought to establish that there is repugnancy between two competing statutes there is always a presumption in favour of the validity of both statutes and therefore endeavour has to be made to reconcile the two and that the exclusion of Civil Court will not be lightly inferred unless such exclusion is explicitly expressed or clearly implied, and cited three cases of this Court, namely: (1) Abdul Majid Haji Mahomed v. P. R. Nayak, 53 Bom LR 621=(AIR 1951 Bom 440) (2) Shivaji Bhara & Co. v. Kanji Vasanji, 51 Bom LR 515=(AIR 1949 Bom 337) and (3) M/s. Khimji Poonja & Co v. N. Ramanlal & Co., 62 Bom LR 277=(AIR 1960 Bom 532).

25. In my opinion, there is no substance in Mr. Thakker's contention. In the first place the language of the said Rules 9 and 13 is plain and admits of but one meaning and therefore the task of interpreting and reconciling the provisions of the said rules can hardly be said to arise. At the outset it is important to observe the opening words of Rule 13, viz; "Save as otherwise provided in the foregoing rules or in Section 19 of the said Act". It is therefore, obvious that the said Rule 13 which applies to arbitrations under the said Section 19 the provisions, inter alia, of clauses (a) and (c) of Section 30 of the Arbitration Act expressly saves the provisions of Rule 9, which make an award final and binding on the parties subject to an appeal to the High Court. The provisions of the said rule 9 therefore prevail over those of the said rule 13 and the right to have an award set aside can be exercised by a party only in consonance with the provisions of Rule 9 i. e. by way of an appeal to the High Court when an appeal lies. As already noted the said rule 13 by applying the provisions of Section 41(a) of the Arbitration Act to arbitration proceedings under the said Section 19 has provided that the Civil Procedure Code shall apply to all appeals under the said Section 19. The High Court as a Court of Appeal under Section 19(1)(f) can exercise only such powers as are confided to it under Civil Procedure Code and the grounds of appeal must be as arise from the pleadings and evidence and therefore the High Court as such appellate Court cannot go into questions of misconduct, like bribery, on the part of an arbitrator. The combined effect of Rules 9 and 13 is therefore to enlarge the grounds of appeal by allowing a party to have an award set aside on any grounds mentioned in clauses (a) and (c) of Section 30 of the Arbitration Act. If, however, the amount of an Award does not exceed the prescribed

limit no appeal lies and the award becomes final and binding on the parties, and in such a case there is no right to a party under the said Rule 13 to have an award set aside on any of the grounds mentioned in clauses (a) and (c) of Section 30.

26. The next question is whether apart from the said rules framed under Section 19 of the Defence of India Act, a party has a right to have an award set aside under the Arbitration Act. Now under Section 17 of the Arbitration Act, a Court may set aside an award after it is filed in Court. Therefore, the question is whether the provisions of S 17 of the Arbitration Act, in so far as it empowers to set aside an award, are inconsistent with the provisions of Section 19(1)(e) of the Defence of India Act and the said Rules 9 and 13 as contended for by respondents Nos 2 and 3. In this connection, reference is already made to the proviso to the said Rule 13 whereby the reference to Court in Section 28(1) clause (1) of Section 41 and Section 43(1) of the Arbitration Act is substituted by reference to the Provincial Government or the Arbitrator as therein mentioned. It would also be seen that the said Rule 13 does not apply to arbitrations under Section 19 of the Defence of India Act, the provisions of clause (b) of Section 13, Section 14(2) and (3) and clause (b) of Section 30 of the Arbitration Act and thus excludes the jurisdiction of the Court in matters covered by the said provisions of the Arbitration Act. Lastly, in this context, the learned Advocate General emphasised the scheme and object of Section 19 of the Defence of India Act and the rules framed thereunder. I have already expressed my view that the legislature by enacting the said Section 19 and for providing for making rules thereunder intended to provide a complete separate code for arbitration under the said Section 19. In this connection I may refer to the following two cases cited by the learned Advocate General in support of his contention, viz. (i) Nandakishore Goswami v Bally Co-operative Credit Society, AIR 1943 Cal 255 and (ii) G. I. P. Rly Employees Co-operative Bank Ltd v Bhukanj Merwanji, 45 Bom LR 676 = (AIR 1943 Bom 341). In AIR 1943 Cal 255 the respondent society had commenced two separate execution proceedings on the basis of two awards obtained against the appellants under Rule 22 of the rules framed under Section 43 of the Co-operative Societies Act (Act II of 1912). The appellants raised a contention that in view of the provisions of Section 46 of the Arbitration Act, it was necessary for the respondent society to get a judgment and decree upon the award under Section 17 of the Arbitration Act before it could be enforced as a

decree. Mukherjee J. referred to the provisions of sub-rules (1) to (6) of Rule 22 framed under Section 43 of the Co-operative Societies Act. The said sub-rules (1) to (6) laid down the mode of appointing arbitrator and the entire procedure to be followed down to the stage where the award became final and conclusive. Sub-rule (5) gave an aggrieved party a right to appeal against the award of the arbitrator to the Registrar himself. The learned Judge found that the whole scheme of the said provisions was to oust the jurisdiction of the Civil Court through the arbitration proceedings and that the machinery and the procedure indicated by the said provisions was totally inconsistent with the provisions contained in Chapter II of the Arbitration Act. In the other case of 45 Bom LR 676 = (AIR 1943 Bom 341) the Petitioner was a company registered under the Bombay Co-operative Societies Act (Bombay Act VII) of 1935. The respondent was an employee of the petitioner company. The petitioner company at first suspended and later terminated respondent's service. A dispute arose between the parties and the respondent approached the Registrar of Co-operative Societies and after some correspondence the dispute was referred to arbitration under Section 54 of the Bombay Co-operative Societies Act. As the petitioner contended that there was no dispute touching the business of the petitioner company and as the respondent declined to withdraw the proceedings before the Registrar, the petitioner company filed an application under Section 33 of the Arbitration Act wherein it contended that by reason of Section 46 of the Arbitration Act, the provisions with regard to arbitration in the Bombay Co-operative Societies Act became an arbitration agreement within the meaning of Section 33 of the Arbitration Act, and that it was open to the petitioner company to challenge the validity of such agreement under Section 33. Chagla J. (as he then was) considered the provisions of Sections 54, 54A, and 56 and 57 of the Bombay Co-operative Societies Act with regard to arbitration and observed that the Bombay Co-operative Societies Act set up a special Court with a special jurisdiction and with special powers to try matters referred to in Section 54 and proceeded to consider whether there was anything in the Arbitration Act which was inconsistent with the provisions of the said sections of the Bombay Co-operative Societies Act which would not entitle the petitioner company to present a petition for a declaration that the Arbitration agreement was invalid. His Lordship held that looking to the scheme of the said sections dealing with arbitration it was clear that all matters relating to the

arbitration proceedings were to be determined by the authorities set up by the Bombay Co-operative Societies Act and the question of the validity of the Award referred to in Section 33 of the Arbitration Act was to be decided by the Special Court set up under the Bombay Co-operative Societies Act, and not by this Court as provided in Section 33 of the Arbitration Act.

27. As regards these two cases Mr. Thakker for the petitioner contended that they did not support the contention of the learned Advocate General as the decisions in these cases rested on the respective provisions of the Co-operative Societies Acts set out therein. No particular provisions of rules under the said Act were, however, pointed out which could distinguish these cases from the present case. In my view, the ratio of these two cases apply to the present case. In these cases, the question of application of the provisions of Arbitration Act to the statutory arbitrations by reason of Section 46 of the said Act arose and the decisions show that in order to render any provisions of the Arbitration Act inconsistent with any other enactment providing for arbitration within the meaning of Section 46 of the Arbitration Act the whole scheme of the latter enactment is material and may be looked at to see whether it creates thereby a special self-contained code for arbitration and thus by necessary implication excludes the jurisdiction of Civil Court under the Arbitration Act as being inconsistent with the said scheme of the other enactment. In my view the whole scheme and object of Section 19 of the Defence of India Act and the rules thereunder is to create a special forum by way of arbitration including an appeal to the High Court for determining the amount of compensation in respect of compulsory acquisition of property by Government and to exclude the jurisdiction of the Civil Court under the Arbitration Act.

28. For these reasons I hold that the provisions of Ss. 14 (2) and 17 of the Arbitration Act are wholly inconsistent with the provisions of Section 19 and the rules made thereunder. As regards the authorities cited by Mr. Thakker it is not necessary to consider them as Section 46 of the Arbitration Act itself provides that other provisions of the said Act to the extent that they are inconsistent with other statutory provisions relating to arbitration will not apply to such statutory arbitration, and no question of construction by way of reconciling the provisions of two separate Acts or of saving the jurisdiction of civil Court arise in the present case. As regards the misconduct of an arbitrator in the illustrative case given by Mr. Thakker, it need only be said that the arbitrator is to be pre-

sumed to perform his duty properly, and that in any event, the argument based on ground of injustice in a conceivable case is of no avail in construing the said Rules 9 and 13 and Sections 14(2) and 17 of the Arbitration Act which are not at all ambiguous.

29. In the result the respondents Nos. 2 and 3 succeed in their preliminary objection that the Court has no jurisdiction to entertain this application under Section 14(2) of the Arbitration Act. The petition is, therefore, dismissed with costs. The petitioner will pay taxed costs to respondents Nos. 2 and 3; two counsel allowed. As respondents Nos. 4 to 7 are not concerned with the present dispute between the petitioner and respondents Nos. 2 and 3 and yet at the hearing supported respondents Nos. 2 and 3 they shall bear their own costs.

R.G.D.

Petition dismissed.

AIR 1969 BOMBAY 163 (V 56 C 28)

NAIN J.

Deviprasad Khandelwal & Sons, Petitioners v. Union of India, Respondents.

Civil Award No. 6 of 1963, D/- 14-10-1967.

(A) Contract Act (1872), Ss. 10, 7 — Contract to purchase several tons of iron scrap belonging to Government — Contract is concluded on acceptance of purchaser's tender — Condition for payment of price for approximate quantity, in advance does not make contract conditional — Absence of express condition for payment for excess or refund for less quantity on actual weightment — Doctrine of implied terms can be invoked.

Where in compliance to the tender issued by Government for sale of several tons of iron hoops, a person offers to purchase the same & he is informed that his offer is accepted by the Government, the contract becomes concluded. It cannot be said that the confirmation letter from the Government does not amount to unconditional acceptance of the tender as it calls upon him to pay for an approximate quantity without actually ascertaining the quantity. Even when the person offered to purchase the whole lot irrespective of whether on actual weightment it was found less or exceeding the approximated quantity, and the confirmation letter offered delivery for quantity not exceeding approximated quantity, the confirmation letter concludes the contract. (Para 11)

It is not possible to sell quantities of iron and steel, whether prime material or scrap, correct to the last ounce. Iron and steel as well as scrap is always in big piece and the weight can always be ap-

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proximate and not exact. Therefore, it may reasonably be expected that if on actual weighment the goods are found to be less than the approximated quantity the excess price paid is to be refunded, and if the goods are found to be more the seller will call upon the buyer to pay the balance of the price and to take delivery of the excess goods. Such terms are to be taken as implied in terms of contract when such terms are neither contrary to nor inconsistent with the express terms of the contract. (Para 12)

It is a matter of common experience that no perfect contract can be made, because the parties to it may not at the stage of making it, envisage or provide for all the contingencies that may arise. Several times the parties to a contract may either through forgetfulness or through bad drafting fail to incorporate into the contract terms which, had they adverted to the situation, they would certainly have inserted to complete the contract. In such cases, in order to give efficacy to the contract, the Court can imply into a contract terms which the parties have not themselves expressly inserted. It is true that it is not the function of the court to make contracts for the parties, but only to interpret contracts already made. Nevertheless, in certain circumstances, the Court can imply terms. (Para 12)

(B) Constitution of India Art. 299 — Contract under — Formal document not necessary — Contract contained in correspondence made by and with duly authorised person on behalf of President of India is valid.

Article 299 nowhere requires that a contract made on behalf of the Union of India should be contained in any formal document. It is enough if the contract is contained in correspondence. All that Article 299 requires is that the contract shall be expressed to be made by the President of India, and shall be executed on behalf of the President by a duly authorised person. AIR 1963 SC 1685 Foll. (Para 14)

Where the Deputy Director of Food who is duly authorised, issues tender and letter of acceptance which are expressed to have been issued and written respectively on behalf of the President of India and the letter of the petitioners containing the offer is addressed to the President of India, the provisions of Article 299 are sufficiently complied with. (Para 14)

(C) Iron and Steel Control Order (1956) Cl. 27(2) proviso — Scrap hoops held by Regional Director Ministry of Food — Fixation of its selling price by Iron and Steel Controller at much higher rate than controlled price is valid.

In case of scrap held by a railway or a Government Department or Govern-

ment Corporation, the Controller has power to fix a special price for any specified stock, by virtue of proviso to cl. 27(2). Hence the order passed by the Iron and Steel Controller under the proviso fixing the price of scrap held by Regional Director Ministry of Food, at much higher rate than the controlled price fixed by him under the Scrap Price Circular No 5 of 1957 is valid and does not violate the provisions of the Essential Commodities Act (1955) (Para 15)

(D) Civil P. C. (1908), Preamble — Interpretation of Statutes — Principles

It is a well settled principle of interpretation that as long as an authority has the power to do a thing it does not matter if he purports to do it by reference to a wrong provision of law. The order made can always be justified by reference to the correct provision of law empowering the authority making the order to make such order. (Para 16)

(E) Iron and Steel Control Order (1956) Cl. 27(2) proviso — Fixation under, of special selling price — Order not containing explicit direction that general selling price fixed under Circular No 5 of 1957 is inapplicable — Validity of order is unaffected by such omission. (Para 17)

(F) Iron and Steel Control Order (1956) Cl. 27 and proviso to sub-clause (2) of Cl. 27 — Words 'prices and maximum prices are used synonymously under Cl. 27 — Steel Controller is entitled under proviso to Cl. 27(2) to fix selling price of specified stock. (Para 18)

(G) Iron and Steel Control Order (1956) Cl. 27(2), proviso — Interpretation, of — Fixation of special selling price — Possible only in respect of specified stock held by Government Department or Corporation and not by other person — Price not attached to specified stock.

The proviso to Cl. 27(2) clearly indicates that a special selling price has to be fixed for a stock held by a Government Department or Corporation, and not by any other person. The moment such goods pass to a buyer they cease to be held by a railway or Government department or Corporation. It may be that the effect of such interpretation would be that the buyer from a Government Department or Corporation would have to sell the goods at a loss. But then the buyer is at liberty not to purchase the goods or to avail of Cl. 27(2) for getting appropriate selling price fixed for himself. But proviso to cl. 27(2) cannot be interpreted to mean that the price must be attached to a specified stock without reference to who holds such stock or that it must attach to all subsequent sales of the said specified stock. (Para 19)

(H) Iron and Steel Control Order (1956), Cl. 27 (2), proviso — Fixation of special selling price at much higher rate than controlled rate — Vires of proviso not challenged — Order made in pursuance of proviso does not violate Art. 14 of Constitution — (Constitution of India, Art. 14). (Para 21)

(I) Iron and Steel Control Order (1956), Cl. 27(2), proviso — Fixation of higher selling price than controlled price of specified iron scrap — Purchase at such price at calculated risk — Failure of purchaser to get special price fixed for resell — Compulsorily selling it at loss — Order does not contravene Art. 19(1)(g) of Constitution — (Constitution of India, Article 19(1)(g)).

Where a person takes calculated risk to purchase iron scrap from Government at much higher price than the controlled price and having failed in getting a special reselling price fixed, is required to resell the goods at a loss, it cannot be said that his right to disposal of property is restricted. Hence there is no contravention of Article 19. Moreover when he has not paid for and obtained delivery of goods and the question of resale has not arisen, even assuming that protection of Art. 19 is available to him, the order passed by the Controller cannot be set aside on that ground. (Paras 21, 22)

(J) Iron and Steel Control Order (1956), Cl. 27(1)(2) proviso — Fixation of special selling price for specified stock of iron scrap under Cl. 27(2) proviso — Does not amount to amendment, variation or rescission of general price fixed under cl. 27(1) by notification of Circular No. 5 of 1957 — Approval of Central Government and publication in Gazette of India is not necessary — S. 21, General Clauses Act (1897) is inapplicable. (Para 23)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1685 (V 50), Union of India v. A. L. Rallia Ram	14
(1963) AIR 1963 Bom 157 (V 50)=65 Bom LR 29, Vallabh Pitti v. Narsidas Govindram Kallani	3
(1962) AIR 1962 SC 1810 (V 49)=(1963) 3 SCR 183, Khardah Co. Ltd. v. Raymon & Co.	3

S. D. Parekh with F. S. Nariman, for Petitioners; P. M. Mukhi, for Respondents.

JUDGMENT: This is a petition under Sections 33 and 5 of the Arbitration Act, 1940, challenging the existence and, in the alternative, the validity of an arbitration agreement and, in case the existence and validity of the said arbitration agreement are established, to have the effect thereof determined, and for leave of the Court to revoke the authority of the arbitrator appointed under the said arbitration agreement.

2. The facts leading to this petition briefly stated are that on or about 4th of August 1958, the Regional Director (Food), Western Region, Bombay, Government of India, Ministry of Food, issued a tender notice on behalf of the President of India, inviting tenders for purchase of approximately 244 tons of used iron hoops (scrap released from gunny bales) lying in the Government of India godowns at Thana Street, Bombay 9 on the terms and conditions of sale set out in Appendix 'A' to the tender notice. The goods were described in Appendix 'C' to the said tender notice. On 18th August 1958 the petitioners submitted a tender offering to purchase the said goods at the rate of Rs. 607 per ton. The tender was accompanied by a letter of that date addressed to the President of India through the said Regional Director, (Food). The said letter stated that the petitioners had thoroughly read and understood the terms and conditions contained in the tender and the Appendices thereto and agreed to abide by them. The petitioners enclosed a cheque for Rs. 15,000 as earnest money along with the said tender in terms of clause 6 of the tender notice. It appears that on the same day, namely, 18th August 1958, the petitioners addressed a letter to the Iron and Steel Controller at Calcutta, stating that the Regional Director (Food), Bombay had invited tenders for about 244 tons of used iron hoops (released from gunny bales) and that the petitioners understood that the controlled maximum price chargeable for the said goods was Rs. 335 per ton. They requested the Iron and Steel Controller to confirm if the petitioners' contention was right and whether the Regional Director (Food), could charge price higher than the controlled price. The reference to controlled price appears to have been to the price fixed on 3rd August 1957 by Scrap Price Circular No. 5 of 1957, issued by the office of the Iron and Steel Controller. From the said letter of 18th August 1958 addressed to the Iron and Steel Controller and from the subsequent correspondence and events, it appears that while in the tender the petitioners offered to buy the said scrap at the price of Rs. 607 per ton, they had mental reservations about the price, and hoped to get the price reduced to the controlled price fixed under clause 27(1) of the Iron and Steel Control Order, 1956, whatever that price was at the relevant time, and there is no dispute about the fact that the said price was much less than Rs. 607 per ton. The price of Rs. 607 per ton was the highest offer pursuant to the tender notice. However, as the price of Rs. 607 per ton was in excess of the controlled price fixed under clause 27(1),

the Regional Director (Food), Bombay, approached the Iron and Steel Controller with a request to fix special price for the said 244 tons of iron hoops described in Appendix 'C' to the tender notice under clause 27(2), and by an order dated 4th September 1958, addressed by the Iron and Steel Controller to the Regional Director (Food), Bombay, the Iron and Steel Controller fixed the special selling price of the said goods by the Government of India at Rs. 607 per ton, purporting to be in exercise of the power vested in the Iron and Steel Controller under sub-clause (2) of clause 27 of the Iron and Steel Control Order 1956. Thereafter by his letter of 25th September 1958 addressed to the petitioners, the Regional Director (Food), Bombay, stated that the petitioners' tender dated 18th August 1958, wherein the petitioners had offered to purchase the stock of approximately 244 tons of iron hoops lying at the Government of India godowns, Thana Street, Bombay 9 at Rs. 607 per ton had been accepted by the Government subject to the terms and conditions of the tender. In the second para of the said letter, the Regional Director (Food), Bombay, stated that a special selling price of Rs. 607 per ton for the said lot of iron hoops had been fixed by the Iron and Steel Controller in his letter dated 4th September, 1958. In the subsequent paragraphs of the said letter the Regional Director (Food), Bombay, has outlined a procedure for the performance of the contract. The said procedure is the subject matter of controversy, and the petitioners contend that these are fresh terms not already contained in the terms and conditions of the tender and, therefore, the said letter contains a counter offer which the petitioners have at no time unconditionally accepted and, therefore, there is no concluded contract. This letter was replied to by the petitioners by their letter of 30th September 1958, in which they stated that they understood from paragraph 2 of the letter of the Regional Director (Food) Bombay, that the disposal of the materials in question fell under the Iron and Steel Control Order 1956, and the price was governed by "Schedule V". They requested the Regional Director (Food), Bombay, to furnish to them copies of correspondence exchanged with the Iron and Steel Controller in connection with the price fixation. They further stated that as regards the price, in view of the fact that the price was controlled, the controlled price applicable according to the Iron and Steel Control Order, 1956, would be applicable. In one of the paragraphs of the said letter, they said, "We however, accept the order". The contention of the respondents is that the letter of the Regi-

onal Director (Food), Bombay, dated 25th September, 1958, in its first paragraph contained an unconditional acceptance of the tender. The second paragraph sets out the controlled price specially fixed by the Iron and Steel Controller for the said goods and the subsequent paragraphs outline a procedure for performance of the contract which was in accordance with the contract. In the alternative, their contention is that even if it be held that the third and the subsequent paragraphs of the said letter contained new terms and, therefore, the letter of 25th September, 1958, contained a counter offer, the petitioners' letter of 30th September, 1958 contained an unconditional acceptance of the counter offer and the contract was, in any event, concluded. However, these are matters in controversy. I shall deal with them later. It appears that thereafter the petitioners failed to pay the sum of Rs. 1,33,108 demanded in the letter dated 25th September, 1958, by the Regional Director (Food), Bombay within one week of the acceptance of the tender. The Government forfeited the earnest money of the petitioners and proceeded to resell the goods and, ultimately, on 31st October 1960 they sold the said goods through Govt. auctioneers at the rate of Rs. 360 per ton and realised a sum of Rs. 87,840. The respondents then claimed from the petitioners as and by way of damages a sum of Rs. 99,064, being the difference between the contract price of Rs. 1,48,108 and the market price prevalent on the date of the breach, namely Rs. 49,044. Alternatively, the respondents claimed from the petitioners a sum of Rs. 80,268 being the difference between the contract price of Rs. 1,48,108 and the actual resale price of Rs. 87,840. As the petitioners failed to pay the amount of damages, the respondents appointed one V. Ramaswami Iyer as the sole arbitrator to decide the disputes between the petitioners and the respondents, pursuant to clause 12 of the terms and conditions of sale which contained the arbitration agreement. Before the arbitrator the petitioners appear to have taken the contention that there was no concluded contract. On 12th December 1962 the said arbitrator gave a direction that as the petitioners challenged the existence and validity of the arbitration agreement, they were directed to apply to the Court under Section 33 of the Arbitration Act, 1940, within a month. Accordingly on 18th January 1963 the petitioners filed this petition.

3. When the petition came up for hearing, my learned brother K. K. Desai J. thought that there was a conflict between the decision of the Bombay High Court in Vallabh Pitti v Narsidas Govindram Kallani, 65 Bom LR 29=(AIR 1963 Bom 157) and the decision of the Supreme

Court in *Khardah Co. Ltd. v. Raymon & Co.*, reported in AIR 1962 SC 1810 and he referred the matter to a Division Bench of this Court for resolving the said conflict. On 13th February 1967 a Division Bench of this Court consisting of Patel and Thakker JJ. held that notwithstanding the contentions of the respondents taken in paragraph 17 of the affidavit dated 29th March 1963 of Mr. C. L. Rath in reply to the petition to the effect that the arbitrator alone was competent to decide the question of existence and validity of the arbitration agreement, a Judge of this Court sitting alone was competent to decide, the question of existence and validity of the arbitration agreement. The petition was sent back to be disposed of by a single Judge of this Court in accordance with law. The matter then came up for hearing before Mr. Justice Thakker on 18th of July 1967, when the petitioners sought and were granted leave to amend the petition by addition of a plea that the contract containing the arbitration agreement was not made in accordance with Article 299 of the Constitution of India, inasmuch as the said contract was neither expressed to be made by the President of India, nor was made in the name of the President of India and was, therefore, null, void and unenforceable in law. After the said amendment was allowed and carried out, the matter again appeared before me, and during the hearing of the petition, the petitioners applied for a further amendment of the petition to the effect that, in the alternative to their contention that there was no concluded contract or that the said contract was illegal and void, they should be granted leave to revoke the authority of the arbitrator appointed under clause 12 of the contract contained in the terms and conditions of sale. I allowed the said amendment for reasons set out in my order of 27th September 1967. The matter then proceeded to hearing.

4. The contentions raised by the petitioners are fully set out in the petition and briefly summarised are that there was no concluded contract in fact between the petitioner and the respondents. In the alternative, the petitioners contend that the Regional Director (Food), Bombay, was not a person directed or authorised by the President of India to enter into contracts of the nature of Ex. B (collectively) to the petition and that in any case, the said contract was not expressed to be made by the President of India or in his name, and therefore, the contract contravened the provisions of Article 229 of the Constitution of India and was, therefore null and void and unenforceable. The petitioners have also challenged the legality and validity of the contract containing the arbitration agreement on the ground that the sale of iron

hoops was at a price in excess of the price for such goods notified under clause 27 (1) of the Iron and Steel Control Order 1956. The petitioners have further challenged the validity of the order of the Iron and Steel Controller dated 4th September 1958 fixing the special selling price of the Government for these goods at Rs. 607 per ton on the grounds: (a) that such fixation cannot be made, except by a notification published in the Gazette of India, (b) that such fixation cannot be made without the approval of the Central Government, (c) that the Order of 4th September 1958 does not, as required by the proviso to sub-clause (2) of clause 27, direct that the maximum prices fixed under sub-clause (1) or (2) shall not apply to the stock in question, (d) that the said order purports to fix the price at which the said goods are permitted to be sold, and not the maximum price, and clause 27 authorised only fixation of maximum price, (e) that the said order of 4th September 1958 contravenes the provisions of Article 14 of the Constitution of India as it denies to the petitioners equality before the law, and (f) that the order of 4th September 1958 contravenes the provisions of Article 19(1)(f) and (g) of the Constitution of India, as it takes away the petitioners' right to dispose of property or the right to carry on trade or business. With regard to the contravention of Art. 19(1)(f), the contention of the petitioners is that as the petitioners would, under the contract in question, acquire the said scrap at the price of Rs. 607 per ton, which was a special selling price of the Government, they would be compelled under the Scrap Price Circular to sell the same goods at the price of Rs. 335 per ton and thus be put to loss, and this in effect took away their right to dispose of property.

5. The petitioners also contend that the contract of sale is illegal on the further ground that under the contract they were required to pay the price of Rupees 1,48,108 for the entire lot of goods described in Appendix 'C' to the tender notice, that the contract nowhere stated that if on actual weighment the goods were found to be less than 244 tons, any part of the price would be refunded to them, and that the letter of 25th September 1958 required them to pay the said sum and on receipt of the said amount a delivery order for a quantity not exceeding 244 tons would be issued to them. Their contention is that they were required to pay the price not for 244 tons but even if the goods were found to weigh less, and as such the price being charged to them was even in excess of the price of Rs. 607 per ton. Their contention is that under sub-clause (4) of clause 27 of the Iron and Steel Control Order, no person shall sell or offer to

sell or otherwise dispose of, and no person shall acquire any scrap at prices in excess of those notified or fixed by the Controller under this clause. Breach of this provision is made an offence under the provisions of the Essential Commodities Act, 1955. The object of the contract of sale was, therefore, forbidden by law or would defeat the provisions of law and was, therefore, unlawful and the contract of sale was, therefore, void under Section 23 of the Indian Contract Act. The petitioners further contend that the challenge to the existence and validity of the contract containing the arbitration agreement was outside the scope of the arbitration agreement contained in clause 12 of the terms and conditions of sale and the arbitrator had, therefore, no jurisdiction to decide such questions and in any case the challenge raised difficult questions of law which should be settled by a Court rather than be referred to a lay arbitrator and the Court should, therefore, not give effect to the arbitration agreement. The petitioners further contend that, in any event, because of these difficult questions of law they should be granted leave to revoke the authority of the arbitrator appointed under clause 12 of the terms and conditions of sale. The respondents have filed an affidavit dated 29th March 1963 of Mr C L Rathu, Deputy Director of Food, Bombay, in reply to the petition which sets out the contentions of the respondents in reply to the contentions of the petitioners and deny the tenability and validity of the said contentions.

6. Arising from the aforesaid contentions, the following issues were framed.

(1) Whether the petitioners should be granted leave to revoke the authority of the arbitrator appointed in pursuance of the arbitration clause (set out in Para 5 of the petition) as alleged in paragraph 8 of the petition?

(2) Whether the arbitration agreement being clause 12 mentioned in paragraph 5 of the petition does not apply to all the disputes and differences between the parties as alleged in paragraph 8 of the petition?

(3) Whether there is no concluded contract between the parties and therefore no valid arbitration agreement as alleged in paragraph 9 of the petition?

(4) Whether the contract and therefore the arbitration agreement is unenforceable by reason of being in contravention of Article 299 of the Constitution as alleged in paragraph 9 (dd) of the Petition?

(5) Whether the order dated 4th September 1958 Ex. "C" to the petition is illegal, void and without jurisdiction and therefore the contract and the arbitration

agreement are also illegal and void as alleged in paragraph 10 of the petition?

(6) Whether the contract and arbitration agreement are illegal as alleged in paragraph 12 of the petition?

(7) To what relief or reliefs the petitioners are entitled?

(8) Generally?

7. At the outset, Mr. Parekh, appearing for the petitioners invited me not to decide the questions as to whether there was a concluded contract between the parties and if there was a concluded contract, whether the same was legal and valid, but in view of what he described as difficult questions of law arising from the contentions of the petitioners to grant them leave to revoke the authority of the arbitrator appointed in pursuance of the arbitration clause on the assumption that there was a concluded contract and that the same was valid. He said that this would put an end to arbitration proceedings and would drive the respondents to a suit. In case I decided not to grant leave to revoke the authority of the arbitrator I may go into the question whether the arbitration clause applied in respect of the disputes and differences between the parties relating to the factum and existence of the alleged contract, Ex. B (collectively) to the petition or relating to the validity or legality of the order dated 4th September, 1958 of the Iron and Steel Controller Ex. C to the petition, and if I came to the conclusion that the arbitrator was not competent or had no jurisdiction to decide the said questions, I may merely so declare without deciding these questions myself and the arbitration proceedings would come to an end and the respondents would again be driven to a suit. His contention was that even if I decided the questions of existence or validity of the contract containing the arbitration agreement and, therefore, of the arbitration agreement, and incidentally the validity of the order of the Iron and Steel Controller dated 4th September 1958 these questions would not be res judicata, and if an award was made against his clients, they would be entitled to re-agitate the said questions in a petition to set aside the said order. I, however, did not accept the invitation of Mr. Parekh to proceed in the manner indicated and I have heard the parties on all the issues.

8. On the question whether there is or is not a concluded contract between the parties and, therefore, whether there is or is not a valid arbitration agreement between them (because the arbitration agreement is contained in the contract itself) the contentions of the petitioners are that the letter dated 25th September 1958 of the Regional Director (Food)

Bombay did not unconditionally accept the entire offer as contained in the petitioners' tender dated 18th August 1958. The petitioners contend that in the said tender of 18th September 1958 they offered to buy the entire quantity of the said goods lying at the said godown irrespective of the fact whether the weight of the goods was more or less than 244 tons, whereas the Regional Director (Food), Bombay, by his letter of 25th September 1958, stated that the respondents would deliver a quantity of the said goods, not exceeding 244 tons. They say, this was not an unconditional acceptance of their offer of 18th August 1958, but was a counter offer which again has not been unconditionally accepted by the petitioners in their letter of 30th September 1958, because in that letter the petitioners have imposed conditions as to price being controlled price. They, therefore, say that there was no consensus ad idem between the parties with respect to all the terms of the proposed contract and there was, therefore, no concluded contract. In order to appreciate this contention, it is necessary to consider the tender notice and the terms and conditions of sale which are contained in Appendix 'A' thereto. As the terms and conditions of sale reproduce some of the paragraphs of the tender notice, it is not necessary to set out any paragraph of the tender notice. Terms 1, 2, 3, 4, 6 and 12 of the terms and conditions of sale are as follows:

"1. Government do not guarantee to make any definite quantity or quality of Iron Hoops available to the buyer. The quotation will be per ton as shown in Appendix 'C' on the basis of 'As is and where is' and the tenderer will be deemed to have satisfied himself fully before quoting as to the condition, quality or quantity of the stocks vide para 3 of the tender notice.

2. The Iron Hoops are sold in the same condition as they lie. They shall be removed by the buyer within fifteen working days from the date of issue of release order or such other period as may be decided by the Regional Director (Food), Bombay, with all the defects, if any, and notwithstanding any errors or misstatements of description, measurement, quantity, weight, enumeration or otherwise and without any objection on the part of the buyer and no claim shall lie against Government for compensation nor shall an allowance be made on account of any such faults, misstatements, or errors, although the same may be of a considerable nature. In particular, the description of goods may be identical or similar to the description of the goods in some previous sale by tender or auction but no reliance should be placed on any such description. The buyer should satisfy himself thoroughly as to what is offered for sale before

submitting his tender and may inspect the goods prior to tendering and shall be deemed (whether or not such inspection shall have in fact taken place) to have had notice of all defects and faults and any errors and misstatements as aforesaid which he might have discovered on inspection and shall not be entitled to any compensation on account thereof. Nor shall the buyer be entitled to claim or recover from the Government any compensation by way of damages or otherwise if the goods sold are not available by reason of not being at the specified place.

3. The successful tenderer/tenderers after the acceptance of his/their tender will be required to deposit the balance amount within seven days from the date of issue of the acceptance letter and to remove the stocks allotted to him/them within fifteen days from the date of issue of Release/Delivery order or such other period as may be decided upon by the Regional Director (Food), Bombay.

4. The delivery of the Iron Hoops will be given by the Government after the buyer presents a Demand Draft or a deposit, at call Receipt issued by a Scheduled Bank in favour of the Regional Director (Food) Western Region, Bombay, for the cost of the Iron Hoops. In the event of the costs of the stocks sold not being deposited within a week of the acceptance of the tender, Government may at their option forfeit the Earnest Money and re-sell the stocks or part thereof to another party at the risk and costs of the original buyer, and also recover any loss suffered by the Government as a result of such failure. Any gain or any re-sale as aforesaid shall belong to the Government.

6. The stocks sold shall be weighed under arrangements made by the Government and at the cost of the Government. The weighment sheets shall be prepared in triplicate and be signed by the buyer or his representative and by an officer of the Government.

12. Arbitration: All disputes and differences arising out of or in any way touching or concerning this contract whatsoever, shall be referred to the sole arbitration of any person nominated by the Secretary of the Ministry of the Government of India administratively dealing with the contract at the time of such nomination, or if there be no Secretary, the administrative head of such Ministry at the time of such nomination. It will be no objection to any such appointment that the person appointed is a Government servant, that he had to deal with his duties as such Govt. servant (and) he has expressed views on all or any of the matters in dispute or difference. The award of such Arbitration shall be final and binding on the parties to this con-

tract. It is a term of this contract that in the event of such Arbitration to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reasons, such Secretary or administrative head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person, to act as Arbitrator in accordance with the terms of this contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessors. It is also a term of this contract, that no person other than a person nominated by the Secretary or Administrative head of the Ministry as aforesaid, should act as Arbitrator and, if for any reason that is not possible, the matter is not to be referred to arbitration at all. Subject as aforesaid the Arbitration Act, 1940 shall apply to the Arbitration proceedings under this clause."

9 Appendix 'C' to the tender signed by the petitioners describes the goods as 'used iron hoops' (scrap released from gunny bales) 244 tons approximately lying in the Government of India godowns at Thana Street, and the price filled in by the petitioners is Rs. 607 per ton. Term 3 of the tender notice pertaining to inspection states that stocks will be open to inspection by the intending tenderer. The quotation will be for the whole lot of Iron Hoops as shown in Appendix 'C' on the basis of 'as lying and where lying'. The tenderer will be deemed to have satisfied himself fully before quoting as to the condition, quality and quantity in the lot. In the terms and conditions of sale reproduced hereinabove, it is stated that the Govt. do not guarantee to make any definite quantity or quality of the iron hoops available to the buyer. The quotation will be for per ton on the basis of 'as is and where is' and the tenderer will be deemed to have satisfied before quoting as to condition, quality or quantity of the stocks, vide paragraph 3 of the tender notice. Term 3 provides that the successful tenderer will, after the acceptance of the tender, be required to deposit the balance amount within seven days from the date of the issue of the acceptance letter and to remove the stocks allotted to him within fifteen days from the date of the delivery of the order or within such other period as may be decided by the Regional Director (Food) Bombay. Clause 4 provides that if the balance price is not deposited within a week of the acceptance of the tender the Government may forfeit the earnest money and re-sell the stock or any part thereof at the risk and costs of the buyer, and to recover loss, if any, on account of the breach of the contract. Clause 6 provides that the stock sold shall be weighed under arrange-

ment by the Government and at the costs of the Government. Clause 2 again provides that the goods shall be removed by the buyer within 15 days from the date of issue of release order or such other period as may be decided by the Regional Director (Food) Bombay, with all the defects, if any, and notwithstanding any errors or misstatements of description, measurement, quantity, weight, enumeration or otherwise and without any objection on the part of the buyer and no claim shall lie against the Government for compensation, nor shall an allowance be made on account of any such faults, misstatements, or errors, although the same may be of a considerable nature. The said clause provides that the buyer should satisfy himself thoroughly as to what is offered for sale before submitting his tender and may inspect the goods prior to tendering & shall be deemed (whether or not such inspection shall have in fact taken place) to have had notice of all defects and faults and any errors and misstatements as aforesaid which he might have discovered on inspection and shall not be entitled to any compensation on account thereof. Nor shall the buyer be entitled to claim or recover from the Government any compensation by way of damages or otherwise if the goods sold are not available by reason of not being at a specified place.

10 The petitioners contend that the letter of the Regional Director (Food), Bombay, dated 25th September 1958 is not an unconditional acceptance of their tender of 18th September 1958 because they had bought the entire lot of iron hoops lying at the Government of India godowns at Thana Street, Bombay, said to be approximately 244 tons but it may actually have been more or less. Their contention is that if on actual weighing the goods were found to weigh more than 244 tons, they would in terms of their tender be entitled as well as bound to lift the entire quantity. Correspondingly, if on actual weighing the goods were found to weigh less than 244 tons, they would still be bound to accept the smaller quantity. They contend that the tender implied that the goods should first be weighed and actual quantity ascertained. They should then be called upon to pay the balance price for the actual quantity found on weighing and or payment of the price of actual quantity, they should be given one delivery order for the entire quantity. According to them, the letter of 25th September 1958 does not contain an unconditional acceptance of the tender, because it calls upon them to pay for a fixed quantity of 244 tons without ascertaining the actual quantity and in lieu of the payment for 244 tons, the said letter offers delivery order

for a quantity not exceeding 244 tons. They contend that this letter is not an acceptance in accordance with the terms of the tender, because they never offered to buy a quantity not exceeding 244 tons, but they offered to buy the entire lot, whatever the quantity. They further contend that inasmuch as what was offered to them in the said letter is a quantity not exceeding 244 tons against their offer of the entire lot which may exceed or be less than 244 tons, the letter of 25th September 1958 contains a variation which the petitioners have not accepted even in their letter of 30th September 1958, because that letter again contains a condition as to price. On this point the reply of Mr. Mukhi for the respondents is that the first paragraph of the letter of 25th September 1958 contains an unconditional acceptance of the tender of the petitioners. According to him the contract became concluded and complete by the said unconditional acceptance contained in the first paragraph of the said letter. According to him, the second paragraph merely contains information about special selling price having been fixed by the Iron and Steel Controller, and the remaining paragraphs chalk out a mode of performance of the contract which, according to him, is strictly in accordance with the terms and conditions of sale and the tender filled in by the petitioners, and even if it were not so this may merely raise the question whether the respondents are in breach in seeking performance in a manner other than the one provided by the contract.

11. In my opinion, the first paragraph of the letter of 25th September 1958 from the Deputy Director (Food), Bombay, to the petitioners contains an unconditional acceptance of the petitioners' tender on the terms and conditions of the tender. This results in a concluded contract and holds that there is a concluded contract between the petitioners and the respondents.

12. The contract is for sale of a quantity of iron hoops weighing 244 tons approximately." The dictionary meaning of the word "approximately" is "nearly" or "nearly correct." It is a matter of common knowledge that it is not possible to sell quantities of iron and steel, whether prime material or scrap, correct to the last ounce. Iron and Steel as well as scrap is always in big pieces and the weight can always be approximate, and not exact. According to the respondents, they held a lot of approximately 244 tons of iron hoops in their godowns at Thana Street, Bombay-9, and this is what they contracted to sell. It could be that on actual weighment the goods may weigh slightly more or slightly less, because the word "approximately" does not permit of

large variations in weight and, therefore, when the respondents stated that on payment of the price of 244 tons they would give a delivery order for a quantity not exceeding 244 tons, this was because a quantity not exceeding 244 tons had been paid for and they would not be liable to deliver goods in excess of 244 tons. But this contention still leaves unsettled the question of the excess in weight over 244 tons or shortage in weight however small the excess or shortfall may be. The contention of the petitioners that they would be entitled to the entire lot of goods, whether in excess or short is correct. The fact is that in my opinion, the contract concluded by the tender of the petitioners and the first paragraph of the letter of 25th September 1958 is silent on two points: (a) as to what would happen if after the petitioners had paid the price of 244 tons within seven days of the acceptance of the tender and the goods were weighed thereafter, and were found to weigh in excess of 244 tons, however slight that excess may be, and (b) what would happen if the goods were found to be short, however short the shortfall may be. It is a matter of common experience that no perfect contract can be made, because the parties to it may not at the stage of making it, envisage or provide for all the contingencies that may arise. Several times the parties to a contract may either through forgetfulness or through bad drafting fail to incorporate into the contract terms which, had they adverted to the situation, they would certainly have inserted to complete the contract. In such cases, in order to give efficacy to the contract, the Court will imply into a contract terms which the parties have not themselves expressly inserted. It is true that it is not the function of the Court to make contracts for the parties, but only to interpret contracts already made. Nevertheless, in certain circumstance, the Court will imply terms. In this case the contract provides for price calculated per ton. It further provides that after the acceptance the buyer is to make a deposit of the price for a quantity which is stated to be approximately 244 tons and the goods are thereafter to be weighed, and that the seller will, in the first instance, give delivery order for a quantity not exceeding 244 tons to the buyer because the payment is to be made in advance. It may reasonably be expected that in such a case if on actual weighment the goods are found to be less than 244 tons, the excess price paid would be refunded. It is also reasonable to expect that if the goods are found to be more, the seller will call upon the buyer to pay the balance of the price and to take delivery of the excess goods. I,

think, these terms should be implied in to this contract. Such terms are neither contrary to nor inconsistent with the express terms of the contract contained in the terms and conditions of sale. Anson on the Principles of the English Law of Contract 22nd Edition states at page 129, as follows.

'The doctrine is, therefore of narrow application and the requirements are stringent

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement they would testily suppress him with a common 'Oh, of course!'

Anson further goes on to say that this doctrine of implied terms has frequently been applied where the circumstances demanded and particularly where the contract would fail completely, unless such terms were implied, or where, in effect, it gives substance to the whole transaction. Halsbury's Laws of England, 3rd Edition, Vol 8 at page 121 in para 212, also lays down.

"212 Implication of terms. In construing a contract, a term or condition not expressly stated may under certain circumstances be implied by the court, if it is clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such a term or condition to be a part of the agreement between them. Such an implication must in all cases be founded on the presumed 'intention of the parties and upon reason, and will only be made when it is necessary in order to give the only transaction that efficacy that both parties must have intended it to have and to prevent such a failure of consideration as could not have been within the contemplation of the parties. In every case the question whether an implication ought or ought not to be made will depend on the particular facts consequently it is neither possible nor desirable to lay down any hard and fast rules on the subject and it must be remembered that the construction of one contract will afford but little guidance for the construction of another unless the facts and surrounding circumstances are practically identical'. I must say that an implied term must always be based on the presumed intention of the parties and upon reason. In my opinion, the implied terms suggested by me are reasonable. The contract is for a particular lot of goods and for approximate, and not exact quantity and at a price calculated by weightment. It

is reasonable to suppose that the parties intended that in case of excess the same would be paid for and taken delivery of later, and in case of shortfall, the excess of price paid in advance would be refunded. I have no hesitation in so holding. Mr. Parekh has invited my attention to Sections 31, 32 37 and 38 of the Sale of Goods Act, and the provisions contained therein. I think these sections have no application to the facts of this case. The matters covered by the sections are provided for in the contract. Mr Parekh for the petitioners stated that the contract does not provide for instalment delivery in case the goods are on weightment found to weigh more than 244 tons. I think, in this case the question of instalment delivery does not arise. Nonetheless, if on actual weightment the goods were found to be in excess of 244 tons, the excess would be paid for and taken delivery of. However, as I have stated above, these questions pertain to the performance of the contract and not to the making of it and, in my opinion, there is nothing in the third and the subsequent paragraphs of the letter of 25th September 1958 accepting the tender which contains any departure from the terms of the contract. In my opinion, the letter of 25th September 1958 does not contain any counter offer which is as contended by the respondents accepted by the letter of 30th September 1958 written by the petitioners. It is, however, significant to note that the petitioners say in the letter of 30th September 1958 that 'we however accept the order' indicating perhaps that in their opinion the contract is concluded and complete

13 Having dealt with the question of the existence of the contract, I come to the question of its validity. The petitioners have contended that the contract Ex. B (Colly) to the petition, which contains the arbitration agreement, is unenforceable by reason of being in contravention of Article 299 of the Constitution of India. In paragraph 9(b) of the petition the petitioners had contended that the Deputy Director (Food), Bombay, who had purported to enter into the contract contained in the correspondence Ex. B (Colly) to the petition, had no authority whatsoever to enter into such contract on behalf of the President of India. The respondents have pointed out in the first paragraph numbered 17 of the affidavit dated 29th day of March 1963 of Mr C. L. Rathi in reply that under S R C. 3442 dated 2nd November 1955 published in the Gazette of India, dated 12th November 1955 Part II, Section 3 the Deputy Directors of the Food in India have been authorised to enter into such contract. The petitioners have not pressed the said contention at the hearing of the petition. They have argued, although

not seriously, that the contract Ex. B (Colly) to the petition is neither expressed to be made by the President of India, nor is made in the name of the President of India, and is, therefore, in contravention of Article 299 of the Constitution and as such is null and void and unenforceable in law.

14. In this case, the contract is contained in correspondence Ex. B (Colly.) to the petition. The first letter is dated 4th August 1958 and is addressed to the petitioners. In the very opening paragraph, it states that "On behalf of the President of India, the Regional Director of Food, Western Region, Bombay, invites tenders....." The said tender notice is signed by the Deputy Director (Food), Bombay. The petitioners filled in the tender and submitted the same to the Regional Director (Food), Bombay, with a covering letter dated 18th August 1958. The said letter is addressed by the petitioners to the President of India. This letter contains the offer to buy the said scrap. The Deputy Director (Food) Bombay, accepted the said offer by his letter dated 25th September, 1958. The said letter is signed by the Deputy Director (Food), Bombay, "for and on behalf of the President of India". Article 299 of the Constitution of India nowhere requires that a contract made on behalf of the Union of India should be contained in any formal document. It is enough if the contract is contained in correspondence. All that the Article requires is that the contract shall be expressed to be made by the President of India and shall be executed on behalf of the President by a duly authorised person. It has been held by the Supreme Court in the case of Union of India v. A. L. Rallia Ram, AIR 1963 SC 1685, that Section 175(3) of the Government of India Act, 1935, did not require that formal contracts should be drawn up and executed and that the contracts on behalf of the Dominion of India may be contained in the correspondence, and that a tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of Section 175(3). In this case, the contract is contained in correspondence Ex. B (Colly.) to the petition. The tender and letter of acceptance of the respondents are expressed to have been issued and written respectively on behalf of the President of India and the letter of the petitioners containing the offer is addressed to the President of India. In my opinion, the provisions of Art. 299 of the Constitution of India have been sufficiently complied with and, there is no substance in

the contention that the contract in this case contravenes the provisions of Article 299 of the Constitution of India.

15. The first contention of the petitioners with regard to the order of the Iron and Steel Controller dated 4th September 1958 Ex. C to the petition is that the price of scrap hoops having been fixed by the Iron and Steel Controller by the Scrap Price Circular No. 5 of 1957 in exercise of the powers conferred by clause 27(1) of the Iron and Steel Control Order, 1956, and the said Circular having been duly published in the Gazette of India, and the price thereby fixed being much lower than Rs. 607 per ton, fixing of higher price by the order dated 4th September 1958 is contrary to the provisions of the Iron and Steel Control Order, 1956, and, therefore it is contrary to the provisions of the Essential Commodities Act, 1955. One has only to look at the provisions of the proviso to sub-clause (2) of clause 27 of the Iron and Steel Control Order, 1956, to find that in case of scrap held by a Railway or a Government Department or Government Corporation, the Controller has power to fix a special price for any specified stock. There is no doubt that the Iron and Steel Controller has made the order dated 4th September 1958 in exercise of this power. There is, therefore, no substance in this contention.

16. It is next contended by the petitioners that the order dated 4th September 1958 purports on the face of it to have been made in exercise of the powers conferred on the Iron and Steel Controller by sub-clause (2) of clause 27 of the Iron and Steel Control Order, 1956 and not in exercise of the powers conferred on him by the proviso to the said sub-clause, and the said order is, therefore, illegal. It is a well-settled principle of interpretation that as long as an authority has the power to do a thing, it does not matter if he purports to do it by reference to a wrong provision of law. The order made can always be justified by reference to the correct provision of law empowering the authority making the order to make such order. There is no substance in this contention also.

17. The next contention of the petitioners is that the power of fixation of special prices is subject to the condition precedent that in the order the Controller must "direct that the maximum prices fixed under clause (1) or (2) shall not apply to any specified stocks of scrap". It is contended that the order dated 4th September 1958 contains no such direction and is therefore illegal. A reference to the order of 4th September, 1958 indicates that what the Iron and Steel Controller purports to fix is "Spe-

cial selling price for 244 tons of scrap iron hoops". I think the fixing of a "special selling price" by implication contains a direction that the general selling price contained in the Scrap Price Circular No. 5 of 1957 shall not apply to the stocks specified in the order of 4th September 1958. Such direction appears to me to be implicit in the said order and, in my opinion the fact that the order does not explicitly contain such direction makes no difference to the validity of the said Order.

18. It is then contended that under the proviso to sub-clause (2) of clause 27 of the Iron and Steel Control Order, 1956, the Controller has power to fix a maximum price, and not a price at which a specified stock may be sold. Now, sub-clause (1) of clause 27 refers to fixation of "prices" by notification, and not to fixation of "maximum prices". In spite of this the Scrap Price Circular No. 5 of 1957 refers to "maximum prices", being fixed. Sub-clause (2) also refers to fixation of price, and not to fixation of maximum price. The proviso to sub-clause (2) refers even to the "prices" fixed under sub-clause (1) as "maximum prices," for it states "provided that the Controller may direct that the maximum price fixed under sub-clause (1) or (2) shall not apply to any specified stock of scrap". This assumes that "prices" fixed under sub-clauses (1) & (2) are "maximum prices". Sub-clause (4) of clause 27 refers to all prices notified or fixed under clause 27 as "prices". This indicates that in the entire clause 27 of the Iron and Steel Control Order, 1956, the words "prices" and "maximum prices" are used synonymously and have the same meaning. The order of 4th September 1958 is, therefore, not illegal even on this ground.

19. It is then contended that the special selling price fixed under the proviso to sub-clause (2) of clause 27 of the Iron and Steel Control Order, 1956, should be for a specified stock of scrap, and should not be the special selling price of a Railway or Government Department or Corporation. In other words, the price should be attached to specified goods and not to a specified seller. It is contended that the effect of fixation of a special price for sale by a Railway, Government Department or Corporation would be that the buyer from the Railway or Government Department or Corporation who buys the material at Rs. 607 per ton will have to sell the same material at a loss at the lower price fixed by the Scrap Price Circular No. 5 of 1957. The special selling price should, therefore, attach to the specified stocks of scrap, and not to a particular Government seller. This contention loses sight of the fact that under the proviso, the special selling price has to

be fixed for a specified stock of scrap held by Railways or Government Departments and Corporations. The proviso clearly indicates that a special selling price has to be fixed for a stock held by a Government Department or Corporation, and not by any other person. The moment such goods pass to a buyer, they ceased to be held by a Railway or Government Department or Corporation. It may be that the effect of such interpretation would be that the buyer from a Government Department or Corporation would have to sell the goods at a loss. But this need not be so, for it is open to such buyer to approach the Iron and Steel Controller to classify the scrap bought by him under sub-clause (2) of clause 27 and to fix for such scrap such price as he considers appropriate. Such price so fixed may even provide for a margin of profit. In any event, whether sub-clause (2) of clause 27 is or is not available to the buyer from a Government Department or Corporation and whether the Iron and Steel Controller obliges such buyer or not, it must be borne in mind that in cases like the present one, the buyer has offered to buy the goods from the Government Department or Corporation with open eyes at a price much higher than the general selling price fixed by the Scrap Price Circular No. 5 of 1957. The petitioners were not compelled to fill in a tender for these goods and have done so with full knowledge of the situation and their legal obligations. They have even in their letter to the Iron and Steel Controller of 18th August 1958 pointed out this position to him. If they filled in the tender with a mental reservation that they would be able to bring down the price to the general controlled price and have not succeeded in doing so, they have to bear the loss arising from their own act. There is no substance in the contention that the price must be attached to a specified stock without reference to who holds such stock or that it must attach to all subsequent sales of the said specified stock. This does not appear to me to be the intention of the proviso to sub-clause (2).

20. It is further contended that the power conferred on the Iron and Steel Controller under sub-clause (2) or in any case under the proviso to sub-clause (2) of clause 27 of the Iron and Steel Control Order is coupled with a duty and is for the benefit of the citizen and the Iron and Steel Controller before fixing the selling price should have fixed an economic price on the cost of production or acquisition of the said goods by the Government and after notice to the petitioners. It is not contended that the Iron and Steel Controller in fixing prices under clause 27 exercises any judicial or quasi-

judicial functions. I think, therefore, there is no substance in the contention that notice should have been given to the petitioners before fixing the special selling price of Rs. 607 per ton. In any case, as the petitioners had themselves offered to buy the said goods for that price, no useful purpose would have been served by hearing them even if there were a duty cast on the Iron and Steel Controller to hear them before fixing the selling price. I am also not able to agree with the contention of the petitioners that the price should have been an economic price based on cost of production or acquisition of the scrap by the Government. There is no warrant for such conclusion.

21. It is then contended that the order of 4th September 1958 contravenes the provisions of Arts. 14 and 19 (1) (f) and (g) of the Constitution of India. Now, it is not contended that clause 27 of the Iron and Steel Control Order, 1956 contravenes the said provisions of the Constitution of India. The said clause, therefore, remains unimpugned. What is contended is that the order of 4th September 1958 contravenes these provisions. I do not see how, if clause 27 is allowed to stand, an order made pursuant to the powers conferred by the said clause can be challenged. However, a plain reading of these provisions of the Constitution shows that these provisions have not been contravened. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territories of India. If it is suggested that the provision authorising the Iron and Steel Controller to fix a selling price for a Government Department or Corporation denies equality before the law, I think it is that provision itself which should have been impugned. But I think had it been contended that the proviso to sub-clause (2) of clause 27 is itself invalid, the respondents may have come forward with a contention of reasonable classification. The contention of reasonable classification would apply equally to the order of 4th September 1958. Article 19(1)(f) provides that all citizens shall have the right to acquire, hold and dispose of property. It is contended on behalf of the petitioners that inasmuch as the order of 4th September 1958 fixes a price higher than at which the petitioners can sell the goods under Scrap Price Circular No. 5 of 1957, it compels them to dispose of property at a loss and as such it is a restriction on their right to disposal of property. I think, there is no substance in this contention because the right of disposal of property has not been taken away from the petitioners. If the petitioners had not succeeded in getting a special selling price fixed for them-

ves, it may be that they would have had to re-sell the said scrap at a loss, had they paid for and taken delivery of the same. But this was a calculated risk and in any case did not restrict their right to disposal of property. There is also the further consideration that there can be no restriction on the petitioners' right to dispose of property which they have not even acquired by paying for and taking delivery of the goods.

22. Article 19(1)(g) provides that all citizens shall have the right to practise any profession or to carry on any occupation, trade or business. The petitioners contend that by being compelled to sell scrap at a price lower than that for which they agreed to buy, their right to carry on trade or business is being interfered with. I do not agree with this contention also. This single transaction does not constitute the trade or business of the petitioners which must inevitably consist of series of other transactions. There is also no imaginable restriction on their trade or business. The possibility of sale at a loss was a calculated risk. In any case, they have not paid for and obtained delivery of the goods and the question of re-sale has not even arisen. For these reasons, I reject the contention of the petitioners that the order of 4th September 1958 contravenes the provisions of either Article 14 or Article 19 of the Constitution of India even assuming that the protection of Article 19 was available to the petitioners.

23. The next contention of the petitioners in challenging the legality and validity of the order of 4th September 1958 is that as sub-clause (1) of clause 27 of the Iron and Steel Control Order 1956, provides two conditions requisite for fixation of prices by the Iron and Steel Controller namely, (a) approval of the Central Government and (b) publication by notification in the Gazette of India, and these conditions not having been satisfied in making the order of 4th September 1958, the said order is illegal and invalid. Now, a reading of clause 27 indicates that prices may be fixed by the Iron and Steel Controller in two ways. One of the ways which is prescribed by sub-clause (1) is that the fixation must be with approval of the Central Government, and secondly, the fixation must be published by a notification in the Gazette of India. Sub-clause (2) of clause 27 does not require either the approval of the Central Government or publication in the Gazette of India of the prices fixed thereunder. The prices fixed under sub-clause (1) being general prices, it is reasonable to expect that public should be given notice thereof by publication in the Gazette of the Government of India. Prices fixed under sub-clause (2) are only either in

respect of a particular class of scrap or in respect of specified stock held by a Railway or Govt. Department or Corporation and no notice to the public appears to be necessary. In any case, sub-clause (2) does not provide either for the approval of the Central Government or for publication in the Gazette of India. It is also significant to note that sub-clause (4) of clause 27 contemplates two modes of fixation of prices, namely prices notified and prices fixed — obviously otherwise than by notification. Sub-clause (4) states that no person shall sell or offer to sell or otherwise dispose of, and no person shall acquire any scrap at prices in excess of those notified or fixed by the Controller under this clause. It is obvious that two modes of fixation are contemplated one by notification under sub-clause (1) and the other without a notification under sub-clause (2) and its proviso. It is further contended that prices under sub-clause (1) of clause 27 having been fixed with the approval of the Central Government and by publication in Government Gazette any amendment, variation or rescission of such prices must also be with the approval of the Central Government and by publication in the Gazette of India. It is contended that the order of 4th September 1958 amends or varies or rescinds in any case with regard to a specified stock the prices fixed under sub-clause (1) of cl. 27. Reliance has been placed on S. 21 of the General Clauses Act which provides as under:

21. Where, by any Central Act or Regulation, a power to issue notifications, order rules or bye-laws is conferred then that power includes a power exercisable in the like manner and subject to the like sanction and condition (if any) to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

In my opinion, S. 21 of the General Clauses Act has no application. What Section 21 contemplates is such addition, amendment, variation or rescission of a notification such as Scrap Price Circular No. 5 of 1957 which brings about a textual addition to or amendment or variation in or rescission of such notification. It applies only if the said notification is thereafter to be read with and subject to such addition, variation, amendment and rescission. In this case the order of 4th September 1958 merely excepts from the operation of the said notification a specified stock pursuant to power conferred on the Iron and Steel Controller under clause 27 of the order. The Scrap Price Circular No. 5 of 1957 is not so amended, varied or rescinded that after the order of 4th September 1958 it is to be read subject to the amendment, variation or rescission. The Scrap Price Circular No. 5 of 1957 continues even after 4th September 1958 to be and to read the same as before.

Section 21 of the General Clauses Act, has therefore no application.

24. I have dealt with all the contentions of the petitioners in support of their challenge to the legality and validity of the order of 4th September 1958, Ex. C to the petition and I hold that the said order is not illegal or void or without jurisdiction. Consequently I also reject the contention of the petitioners that on account of the said order being illegal, void and without jurisdiction, the contract Ex. B (Colly) to the petition containing the arbitration clause is illegal and void. I hold that the said contract is neither illegal nor void and the arbitration agreement is valid and enforceable.

25. I now come to the question that the arbitration clause namely clause 12 of the terms and conditions of sale, part of Ex. B (Colly) does not apply in respect of disputes between the parties relating to the existence and validity of the contract Ex. B (Colly) to the petition or the order dated 4th September 1958, Ex. C to the petition, and that the arbitrator has no jurisdiction to determine these questions pursuant to the said clause. It appears to me that the arbitration clause is wide enough to cover such questions. However in view of the fact that these questions have been determined by me in this judgment, they do not survive for determination by the arbitrator and it is not necessary for me to deal with this contention.

26. It has finally been contended by the petitioners that having regard to the nature of the disputes between the parties as set out in the petition and having regard to the said arbitration clause, it is in the interests of justice that the claims and disputes between the parties be adjudicated upon in ordinary courts of law and not by the arbitrator and that they should be granted leave to revoke the authority of the arbitrator appointed pursuant to the said arbitration clause. In support of this contention, the petitioners have cited before me several judgments of various courts in support of the proposition that when difficult questions of law more particularly those arising from interpretation of the Constitution of India arise the Court should not stay a suit under Section 34 of the Arbitration Act, and compel parties to go to arbitration on those questions. It has been contended by the petitioners that principles applicable to stay applications under Section 34 of the Arbitration Act apply equally to giving effect to arbitration agreements under S. 20 or 33 of the Arbitration Act. The petitioners have not cited any authority in support of this latter proposition. I think, there is

withdraw his pleasure in the matter of the holding of the office by the Ministers is in my view, beyond the scope of this application. As I said earlier the only question in this application is the validity of the appointment of the respondent No. 1 as the Chief Minister and on his advice, of the other Ministers, who now constitute the Council of Ministers. But it was strenuously argued before me that the removal of Shri Ajoy Kumar Mukherjee as the Chief Minister and also of the Council of Ministers headed by him was illegal. It was however argued, though somewhat faintly on behalf of some of the supporting respondents that the appointment of Dr. P. C. Ghose as the Chief Minister, was itself illegal on the ground that the removal of Shri Ajoy Kumar Mukherjee was invalid, and if Shri Ajoy Kumar Mukherjee continued to be the Chief Minister even after the Notification issued by the Governor, Dr. P. C. Ghose could not be lawfully appointed the Chief Minister. I shall, therefore, express my views on the contention that the removal of Shri Ajoy Kumar Mukherjee by the Notification No. 3777-A.R. dated November 21, 1967, and also of the Council of Ministers headed by him was invalid.

41. Article 164 (1) provides that the Ministers shall hold office during the pleasure of the Governor. This exercise of pleasure by the Governor, however, has not been fettered by any condition or restriction. The withdrawal of the pleasure by the Governor is, in my view, a matter entirely in the discretion of the Governor. The provision in clause (2) of Article 164, that the Ministers shall be collectively responsible to the Legislative Assembly of the State, does not in any manner fetter or restrict the Governor's power to withdraw the pleasure during which the Ministers hold office. Collective responsibility contemplated by Cl. (2) of Article 164 means that the Council of Ministers is answerable to the Legislative Assembly of the State. It follows that a majority of the members of the Legislative Assembly can at any time express its want of confidence in the Council of Ministers. But that is as far as the Legislative Assembly can go. The Constitution has not conferred any power on the Legislative Assembly of the State to dismiss or remove from office the Council of Ministers. If a Council of Ministers refuses to vacate the office of Ministers, even after a motion of no-confidence has been passed against it in the Legislative Assembly of the State, it will then be for the Governor to withdraw the pleasure during which the Council of Ministers hold office. The power to appoint the Chief Minister, and the Council of Ministers on the advice of the Chief Minister, and the power to remove the

Ministers from office, by withdrawing the pleasure contemplated by Article 164 (1) have been conferred upon the Governor of the State exclusively.

42. There are other provisions in the Constitution which empower the Governor to make an appointment to an office. As for example, the power under Article 165 (1) to appoint a person as the Advocate-General of the State. This power, however, has been conditioned by the restrictions imposed thereby, namely, that a person can be appointed Advocate-General if he is qualified to be a Judge of a High Court. If this condition is violated, and a person is appointed who is not qualified to be a Judge of a High Court, the appointment can certainly be questioned in writ proceedings as was done in the writ petition filed in the Nagpur High Court. Then again under Article 310 (1) various public servants mentioned therein hold office during the pleasure of the President and a Governor. But Article 310 (1) opens with the words: "except as expressly provided by this Constitution". Article 311 provides for dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or the States, and the pleasure of the President or the Governor contemplated by Article 310 (1) is conditioned by the limitations prescribed by Article 311 of the Constitution. If the conditions and the limitations created by Article 311 are violated in dismissing, removing or reducing in rank a servant of the Union or a State, the order of the President or the Governor can be questioned in appropriate proceedings. But there is no such limitation or condition to the pleasure of the Governor prescribed by Article 164 (1) and it must, therefore, be held that the right of the Governor to withdraw the pleasure, during which the Ministers hold office, is absolute and unrestricted. Furthermore having regard to the provisions in Clause (2) of Article 163 the exercise of the discretion by the Governor in withdrawing the pleasure cannot be called in question in this proceeding.

43. I shall now turn to the contention raised by the learned Counsel for the supporting respondents that the Governor in all circumstances is bound to act on the advice of the Council of Ministers, in appointing a Chief Minister, and if the appointment of a Chief Minister is made without the advice of a Council of Ministers, such an appointment could not be held to be an appointment in terms of Article 164 (1), and therefore must be held to be invalid. In my view, there is an inherent fallacy in this argument. Upon a motion of no confidence being passed against a Council of Ministers, it would be open to the Chief Minister to

advice dissolution of the Legislative Assembly of the State, and require a fresh general election. But the Governor may require the Council of Ministers to continue in office until a new Council of Ministers is appointed. It may be that the general election may not secure to the outgoing Council of Ministers a majority in the Legislative Assembly. Can it be said that the Governor is bound to act, in appointing a Chief Minister, on the advice of the outgoing Chief Minister who has lost his majority in the Legislative Assembly as a result of the General Election? I think not. Then again, the President may under Article 356 (1) issue a proclamation and assume to himself the functions of the State Government as provided in sub-clause (a) of Article 356 (1) of the Constitution. This presidential proclamation may sometime later be followed by a General Election, and at that time there would be no Chief Minister to advise the Governor with regard to the appointment of a Chief Minister under Article 164 (1). Can it be said that in such circumstances because the Governor appointed a Chief Minister in exercise of his powers under Article 164 (1) without the advice of a Chief Minister, the appointment of the new Chief Minister must be held to be invalid? I again think not. In appointing a Chief Minister therefore the Governor must act in his own discretion. It is for him to make such enquiries as he thinks proper, to ascertain who among the members of the Legislature ought to be appointed the Chief Minister and would be in a position to enjoy the confidence of the majority in the Legislative Assembly of the State. To my mind, it is clear that there is no force in the contention raised on behalf of the petitioner, and the supporting respondents, that the appointment of Dr P. C. Ghose as the Chief Minister is invalid because it was made by the Governor in his own discretion and without the advice of the Council of Ministers.

44. Let me now proceed to examine the events, in the sequence in which they happened, as alleged in the petition, immediately preceding the impugned orders of the Governor. It will then have to be seen, if a charge of mala fide, even if it is contended that such a charge is implied, can be sustained.

45. On November 6, 1967, the respondent No 1 and some other members of the Assembly claimed that the United Front had ceased to command the support of the majority of the members of the Legislative Assembly, and as such had no right to continue to function as the Council of Ministers. On the same day the Governor asked the Council of Ministers headed by the respondent No 12 to call the Legislative Assembly into

session as early as possible, but not later than the third week of November, 1967, as he had doubts if the United Front Ministry commanded the support of a majority of the members of the Legislative Assembly and accordingly he required that the issue should be settled in a session of the Legislative Assembly. This was followed by a second request from the Governor on November 14, 1967, to the respondent No 12 to call the Legislative Assembly into session on November 23, 1967, but the respondent No 12 declined to accede to the Governor's request as it was decided by the Council of Ministers to call the Assembly Session on December 18, 1967. On or about November 16, 1967, the Governor for the third time requested the respondent No 12 to agree to the summoning of the Legislative Assembly not later than November 30, 1967. But again the Council of Ministers informed the Governor that the Assembly could not be summoned before December 18, 1967. This was followed by a letter from the respondent No 12 to the President of India on November 18, 1967, requesting a reference to Supreme Court for its opinion of the Constitutional questions under Article 143 of the Constitution. On or about November 21, 1967 the President of India refused to refer the said questions for the opinion of the Supreme Court. On November 21, 1967, the Governor made the impugned orders which are the subject matter of this application.

46. It is clear from the averments in the petition that the Governor had in his possession materials which raised a doubt in his mind about the Council of Ministers' continued enjoyment of the support of the majority of the members of the Legislative Assembly. To dissolve and dispel these doubts he thrice requested the respondent No 12 to agree to the Legislative Assembly being called into session not later than November 30, 1967.

47. No doubt the Governor was anxious, and rightly so, that having regard to the acute famine conditions and lawlessness on a wide scale then prevailing in the State, as alleged by the petitioner, the vital questions involved in the claim made by the respondent No 1 should be settled on the floor of the Legislative Assembly as early as possible. If the Governor felt that having regard to the conditions then prevailing in the State, the strings of Administration should not be left in the hands of a Council of Ministers, whose right to continue in charge and control of the administration has been challenged, unless it was proved without delay that the challenge was without substance, can it be said that the impugned orders of the Governor are tainted with mala fide? I think not.

48. A large number of decisions of different Courts have been relied upon by the petitioner and also the supporting respondents. I have already referred to those decisions earlier in this judgment, and in my view, none of those decisions are decisive of the questions raised in this application. A good deal of emphasis was laid on the decision of this Court reported in (1967) 71 Cal WN 926 for the proposition that the Governor's decision not being in accordance with Article 164 (1), the decision could be called in question in this proceeding and set aside if found to be invalid. But this decision is no authority on the question of the Governor's power under Article 164 (1) as all that was held so far as that decision is of any assistance to the petitioner in this case, was that Article 217 (3) of the Constitution imposed a quasi-judicial obligation and a hearing, therefore, ought to be given to the party to be affected before making an order. This decision, to my mind, is of no assistance to the petitioner in the instant case as it has not even been suggested, much less argued, that the Governor's power under Article 164 (1) of the Constitution was quasi-judicial in nature.

49. The only question is if the petitioner and the supporting respondents have made out a prima facie case in which arguable issues have been raised. No doubt, having regard to the political consequences arising out of the impugned orders made by the Governor, the questions raised in this case have attracted a considerable amount of public attention. It is also clear from the averments in the petition that a large measure of controversy has been raised and is vigorously pursued in the press. But, in my view, it is not just enough for the issue of a rule nisi in this case that a section of the public, and even a large section of the public is interested in the questions raised by the petitioner. It is again not just enough that controversial questions relating to the Constitution have been raised by the petitioner. It is easy for a petitioner in writ proceedings to raise questions touching one or other provisions in the Constitution. It is equally easy for a petitioner in writ proceedings to contend that controversial questions relating to interpretation of the Constitution have been raised. But in considering the question if a rule nisi ought to be issued, the test is, as it always must be, if arguable issues have been raised by the petitioner. That was the test prescribed by the Supreme Court in AIR 1964 SC 1636 (supra), and that test must be satisfied before a rule nisi can be issued by this Court in this proceeding.

50. In my view, the petitioner has failed to make out a prima facie case.

He has failed to raise any arguable issues. The Governor in making the appointment of the Chief Minister under Article 164 (1) of the Constitution acts in his sole discretion. There is no scope for argument on this question. The exercise of this discretion by the Governor cannot be called in question in writ proceedings in this Court.

51. For the reasons mentioned above, this application is rejected. There will be no order as to costs.

CWM/D.V.C.

Application rejected.

AIR 1969 CALCUTTA 211 (V 56 C 36)

B. N. BANERJEE AND K. L. ROY, JJ.

Commissioner of Income-tax, West Bengal-1, Applicant v. Sandersons and Morgans, Respondent.

Income-tax Reference No. 69 of 1964, D/- 24-4-1968.

Income-tax Act (1922), Ss. 2 (6C) and 4 — 'Client's money' with solicitor not income — Solicitors hold money as trustee — English Common Law principles to govern their relationship — (Trusts Act (1882), S. 88 — Money left with solicitor for some work to be done by him — Solicitor holds the money as trustee) — (Contract Act (1872), S. 171 — Money of client with solicitor — Solicitor has lien over it for his costs) — (Words and Phrases — "Client's money" — Expression means the same thing as in England).

Certain unclaimed balances of amounts entrusted by clients to their solicitors (assessee firm) for some work being done by them were ultimately transferred to the assessee's profit and loss account. The Revenue sought to treat it as revenue receipts liable to tax.

Held, that the amounts were clients' moneys and are not profits and therefore not assessable to tax. (Paras 13 & 16)

In the absence of statutory provisions in India, English Common Law principles based on justice, equity and good conscience should govern the relationship between solicitors and clients in India. Similarly, since in India there are no rules like the Solicitors Accounts Rules as in England, the expression "client's money" should mean the same thing as in England. Since, therefore, a solicitor in India fulfils the description of legal adviser the advantages, if any, gained by him in his fiduciary character must be governed by the provisions of S. 88 of the Trusts Act. Although standing in a fiduciary capacity a solicitor as agent of his principal, namely, the client, has a lien on client's money and over goods bailed to him for his costs. This is so by reason of S. 171, Contract Act. AIR 1927

HL/LL/D491/68

Bom 542 & AIR 1934 Cal 341 & (1898) ILR 25 Cal 887 & (1950) 2 All ER 124, Halsbury's Laws of England (Simond's Edn.) Vol. 36, Arts. 85, 131 and 275, Cordery's "Law Relating to Solicitors" (5th Edn.) pp. 144-145, Rel. on.

(Paras 2, 4 & 5)
The money received by the solicitors does not have any profit-making quality about it when received. It remains money received by a solicitor as "client's money" for being employed in the client's cause. The fact that such money has been mixed up with solicitor's own moneys or that ultimately such moneys were brought into profit and loss account does not convert it into assessee's money or trading receipt or income AIR 1954 Punj 61 Dist (1939) 22 Tax Cas 51=7 ITR 316 (C.A.), Foll. (Paras 13 & 16)

Even though the remedy of some of the clients may have become barred by limitation, even then the barred debt did not become income of the assessee and could not be taxed under the Income-tax Act (1963) 49 ITR 578 (Bom), Foll.

(Para 17)
Cases Referred Chronological Paras
(1963) 49 ITR 578 (Bom) Kohinoor Mills Co Ltd. v Commr of I T, Bombay City 17
(1959) AIR 1959 SC 346 (V 46)= (1959) 35 ITR 519, Punjab Distilling Industries Ltd. v Commr of I T, Simla 13, 14, 16
(1954) AIR 1954 Punj 61 (V 41)= (1953) 24 ITR 597, Punjab Distilling Industries Ltd. v Commr of I T, Simla 9 11, 16
(1950) (1950) 2 All ER 124=1950 Ch 491, Loescher v Dean 5
(1939) 22 Tax Cas 51=7 ITR 316 (C.A.) Morley (Inspector of Taxes) v Tattersall 9, 11, 12 13, 16
(1934) AIR 1934 Cal 341 (V 21)= ILR 60 Cal 1442, Damodar Das v Morgan & Co 2
(1927) AIR 1927 Bom 542 (V 14)= ILR 51 Bom 855, Tyabji Dayabhai & Co v Jetha Devji & Co 2
(1898) ILR 25 Cal 887=2 Cal WN 503, Khetter Kristo Mitter v. Kally Prosunno Ghose 2

B L. Pal with N L. Pal, for Applicant; D Pal, for Respondent.

BANERJEE, J — This reference, under Section 66 (1) of the Indian Income-tax Act 1922 raises an interesting question about solicitor-client relationship

2 The institution of Solicitors is an English institution, which has been imported to or copied by this country. In dealing with the position of Solicitors in India, Marten, C J., observed in Tyabji Dayabhai & Co v Jetha Devji & Co., AIR 1927 Bom 542.—

"In the first place it, must be clearly understood that the rights and duties of

attorney are in no way part of the indigenous law or practice in India. Their profession originates from England, it grew up under the English Common Law and it is clear that it was the Common Law which governed their rights and duties in the King's Courts established by the Supreme Court Charter of 1823 to which Courts our present High Court is the successor"

This Court quoted with approval the above observation in Damodar Das v Morgan & Co, AIR 1934 Cal 341 and Panckridge, J., observed.

"Mutatis mutandis those words appear to me to apply to the Calcutta High Court I take the learned Chief Justice's words as amounting to a statement that the rights of an attorney in India are the same as the rights of a solicitor in England, except in so far as the latter have been diminished or increased by statute." There are good reasons why the English Common Law principles should be applied in relation to Indian Solicitors. Those principles are based on justice, equity and good conscience and, in the absence of statutory provisions in this country, should govern the relationship between solicitors and clients. This view was expressed by Jenkins, J., (as he then was) in Khetter Kristo Mitter v Kally Prosunno Ghose, (1898) ILR 25 Cal 887, in the following language—

"These principles appear to me to be the clear result of the authorities in England and founded, as they are, on justice, equity and good conscience, I see no reason why they should not apply in this country"

3. Now, the relationship in which a solicitor stands with his client, under the English Common Law, particularly in respect of client's money, has been described in Halsbury's Law of England (Simonds Edition), Volume 36 in the following language—

(Article 85) "The relationship between solicitor and client is a fiduciary one, but it does not follow that a solicitor is in all respects a trustee in relation to his client. Ordinarily the relationship between solicitor and client is that of agent and principal and therefore time will run against the client in respect of money left in his solicitor's hands, but special circumstances, as where money is paid by the client to his solicitor for a particular purpose may constitute the solicitor a trustee of that money in relation to the client, so that time will not run against the client to preclude his recovery of money, not applied for the particular purpose."

(Article 131): "The obligations of a solicitor towards his client may be viewed from two aspects, namely, that of equity, and that of the Common Law In

equity the relationship of solicitor and client is recognised as a fiduciary relationship and carries with it obligations on the solicitor's part to act with strict fairness and openness towards his client; for failure to fulfil this obligation a solicitor will be liable to make compensation in respect of any resulting loss to his client, though the circumstances are not such as would sustain an action for deceit at common law. By the common law a solicitor's retainer imposes on him an obligation to be skilful and careful; for failure to fulfil this obligation he may be made liable in contract for negligence, whether he is acting for reward or gratuitously, and whether he has or has not a practising certificate in force at the time.

A solicitor, like any other individual, is liable for his wrongful acts, and, if the circumstances justify the charge, may be made liable to his client in tort as, for example, in an action for deceit or libel or conversion. So, too, when acting as agent for his client he is under the obligations ordinarily imposed by the law of agency upon an agent; for example, he is bound to allow his client to inspect documents relating to an action in which the solicitor acted for the clients."

(Article 275): "A solicitor who, as solicitor for a client, has received and has in his hands money of the client, may be ordered, on application being made by or on behalf of that client or his personal representatives, under the Court's inherent jurisdiction over its officers, to account for money received or paid and to pay over to the client, or into Court, the balance due to the client after deducting any money owing to the solicitor by the client for costs or other reason. If misconduct was not alleged the application was formerly a proper one to make at chambers, and it is now usually made there by summons under a special rule of Court, and the order may be enforced by attachment if it comes within an exception to the Debtors Act, 1869, and the payment is defined with sufficient certainty."

4. In Cordery's 'Law Relating to Solicitors' (5th Edition) at pp. 144-145, the same view appears:

"The usual relation of solicitor and client is that of agent and principal, and this is so in respect of the client's moneys received by the solicitor in the ordinary course of business. In the absence of special circumstances, therefore, the Limitation Act, 1939, Section 2 (q), which bars the action in six years, will run from the time of the receipt by the solicitor or last acknowledgment or part payment."

"Special circumstances are needed to raise the relation of trustee and cestui

que trust between solicitor and client, as where the solicitor receives his client's money not for remittance, nor as banker merely, but for a particular purpose, and with the duty of holding it for the benefit of the client, and keeping it until it is called for."

At p. 441 of the same book the following passage appears:—

"Every solicitor who holds or receives client's money including money proper to be paid in under Rule 4, is bound to keep and maintain separate bank account for clients' money and without delay to pay such money into his client account; and any solicitor may keep more than one client account.

Clients' money is trust money in the wider sense demanded by the general law of trusts; and thus, for example, on a solicitor's bankruptcy the chose in action represented by the client account is 'property held by the bankrupt on trust for another person' within Section 38 of the Bankruptcy Act, 1914, and does not vest in the trustee in bankruptcy."

The expression client's money has a well-known meaning, as appears from the definition of the expression in the English rules known as Solicitors' Accounts Rules, 1945. In the said rules client's money is defined as:—

"Client's money shall mean money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or, in connection with his practice as a solicitor, as agent, bailee, stakeholder or in any other capacity; provided that the expression 'client's money' shall not include:—

(a) money held or received on account of the trustees of a trust of which the solicitor is solicitor-trustee, or

(b) money to which the only person entitled is the solicitor himself, or in the case of a firm of solicitors, one or more of the partners in the firm."

Although we have no rules like the Solicitor's Accounts Rules in this country, we think that the expression 'client's money' should not be given a different meaning in this country.

5. In this context we need remind ourselves of the provisions of Section 88 of the Indian Trusts Act, 1882, which reads as follows:—

"Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he

must hold for the benefit of such other person the advantage so gained."

Now, a solicitor in this country fulfils the description of legal adviser and the advantages, if any, gained by him in his fiduciary character must be governed by the provisions of Section 88 of the Trusts Act. Although standing in a fiduciary capacity a solicitor, as agent of his principal, namely the client, has a lien on client money and over goods bailed to him for his costs. This appears from Section 171 of the Indian Contract Act. This is also so in England, as appears from *Loescher v Dean*, (1950) 2 All ER 124. What happened in this case was that a plaintiff obtained a decree for specific performance of a contract to convey certain property, subject to the payment by him of £ 268 4s. 9d. to the defendant and was awarded costs. On April 17, 1950, the money was paid to the defendant's solicitors who attended the completion on the defendant's behalf, and the conveyance was made to the plaintiff. On the same day the plaintiff applied for and obtained an order nisi to garnishee all debts due from the defendant's solicitors to the defendant in respect of the plaintiff's costs, which had been taxed at £ 268 16s. 5d. On April 19, 1950, the garnishee order having been served on them, the defendant's solicitors took out a summons in the action for a charging order in respect of their own costs under Section 69 of the Solicitors' Act, 1932. On the above facts, Harnam, J. held that although, as they were bound to do, the solicitors had placed the money received by them from the plaintiff in the "client account" opened by them, they had a lien on it for the amount of their costs incurred on the defendant's behalf, and as by a garnishee order the creditor could not be put in any better position than the debtor, the garnishee order nisi must be discharged to the extent of the solicitors' lien.

6. Bearing in mind the above legal position, we have now to turn to the facts involved in the present case.

7. The assessee is a well-known firm of solicitors in Calcutta. The assessment year involved is the year 1957-58, corresponding to the previous year ended on December 31, 1956. In its profit and loss account, the respondent assessee had credited a sum of Rs. 4078, representing the aggregate of the unclaimed balances in as many as 83 personal ledger accounts of the assessee's clients, who had advanced money to them in connection with cases entrusted with the assessee some years back. Even after final adjustments of bills small balances continued to be carried forward from year to year till December 31, 1956, when the assessee thought of closing the accounts

of the clients and transferred the balances to the profit and loss account. This amount of Rs. 4078 inflated the net profit of the assessee to the same extent and was ultimately apportioned as between the partners of the assessee in their respective profit sharing ratio. The Income-tax Officer added back the said amount to the total assessable income of the assessee with the following observation.

"Client's unclaimed balances written off being in the nature of professional income."

8. The assessee appealed before the Appellate Assistant Commissioner and contended that the relationship between solicitors and clients was the relationship between a trustee and a beneficiary and since the Limitation Act did not apply in the matter of recovery of amount deposited by clients, the liability of the assessee continued in spite of the fact that certain unclaimed balances had been written off and transferred to the profit and loss account. The Appellate Assistant Commissioner accepted the assessee's contention and directed the deletion of a sum of Rs 4078 from the total income of the assessee.

9. Thereupon, the Revenue preferred an appeal before the Appellate Tribunal. It was contended by the Revenue that the conduct of the assessee in appropriating the unclaimed balances in the constituents' account raised a strong presumption that the sum of Rs 4078 had been earned as professional income. The Revenue relied on the decision of the Punjab High Court in *Punjab Distilling Industries Ltd. v Commissioner of Income-tax, Simla*, (1953) 24 ITR 597=(AIR 1954 Punj 61). The Tribunal distinguished the facts of the Punjab case from the facts of the instant case and following the principles laid down in *Morley (Inspector of Taxes) v Tattersall*, (1939) 22 Tax Cas 51=7 ITR 316 (C.A.) came to the conclusion that the unclaimed balances in the clients' accounts were "obviously liabilities" of the assessee firm, when first received and no subsequent operations could turn them into "professional receipts". The Tribunal further observed that the mere fact that the unclaimed balances had been credited to the profit and loss account of the assessee would not change the character of the amount, which were "evidently the clients' money". In that view of the matter, the Tribunal dismissed the appeal.

10. Thereupon, the Revenue obtained reference of the following question of law to this Court—

"Whether, on the facts and in the circumstances of the case, a sum of Rs. 4078 representing unclaimed balances in the accounts of the clients and credited to the profit and loss account of the as-

assessee firm were revenue receipts and as such liable to tax under the Indian Income-tax Act, 1922?"

11. It was contended by Mr. B. L. Pal, learned Counsel for the Revenue, that the assessee carried on a business or profession and the different sums of money received by the assessee from its clientele were trading receipts and the balance thereof, if transferred to the profit and loss account, would constitute income of the assessee. Mr. Pal, in his fairness, did not dispute that the assessee was bound to refund the balance of the money if demanded by the client, but nevertheless contended that if the unrefunded money be taken to the profit and loss account, resulting in augmentation of the profit, that would constitute income. He argued that the case of 22 Tax Cas 51=7 ITR 316 (C.A.) (supra) was distinguishable on facts and the Tribunal was in error being guided thereby. He contended that the case of (1953) 24 ITR 597=(AIR 1954 Punj 61) (supra) was nearer the facts of the present case and should have been followed and the Tribunal was in error in electing to be misguided by the English decision in Tattersall case, (1939) 22 Tax Cas 51=7 ITR 316 (C.A.) (supra) which was distinguishable.

12. The argument of Mr. Pal necessitates the examination of the two decisions in some details. In (1939) 22 Tax Cas 51=7 ITR 316 (C.A.) the facts were like this. Messrs. Tattersall, a firm which carried on the business of auctioneers of horses, had as one of the conditions of sale that no purchase money would be paid or remittance sent by post without written order. Unclaimed balances amounting, in course of time, to considerable sums remained in the firm's hands; at all times the firm considered itself liable to pay such balances as and when claims were made. Under the partnership deed by which the firm was constituted, part of the unclaimed balance was transferred to the credit of the partners and provision was made for subsequent annual transfers. The deed provided also that any payments which might be claimed and made in respect of the balances should be borne by the partners in proportion to their shares of profits at the date of payment. The question arose whether the unclaimed balances transferred to the partners were trading receipts in respect of which the assessee was assessable to Income-tax under Case I, Schedule D of the English Income-tax Act. Giving a negative answer to the question Sir Wilfrid Greene, M. R. observed:—

"Now the Crown put forward two arguments. The learned Solicitor-General put forward one argument and adumbrated another argument, which he only sketched and did not develop. Mr. Hills

would have none of the Solicitor-General's argument and developed at considerable length the argument which the learned Solicitor-General had only adumbrated. Both arguments proceeded on the footing that it was impossible to say that the sums when received were trade receipts. That was subject to a qualification, I think, in the Solicitor-General's argument, as will appear when I came to describe it. It might, I think, be more convenient to deal with Mr. Hill's argument first, because that is the one which starts off with this perfectly clear admission, that the money when received from the purchasers was not a trade receipt. That proposition, I should have thought, in any case, was quite incontestable. The money which was received was money which had not got any profit-making quality about it; it was money which, in a business sense, was the client's money and nobody else's. It was money for which they were liable to account to the client, and the fact that they paid it into their own account, as they clearly did, and the fact that it remained among their assets until paid out do not alter that circumstance. It would have been for income-tax purposes, in my judgment, entirely improper to have brought those receipts into the account at all for the purpose of ascertaining the balance of profits and gains. Indeed, as I have said, the Crown did not suggest that that would have been proper. But what was said was this: Mr. Hills' argument was to the effect that, although they were not trading receipts at the moment of receipt, they had at that moment the potentiality of becoming trading receipts. That proposition involves a view of Income-tax Law in which I can discover no merit except that of novelty. I invited Mr. Hills to point to any authority which in any way supported the proposition that a receipt which at the time of its receipt was not a trading receipt could by some subsequent operation *ex post facto* be turned into a trading receipt, not, be it observed, as at the date of receipt, but as at the date of the subsequent operation. It seems to me with all respect to that argument, that it is based on a complete misapprehension of what is meant by a trading receipt in Income Tax Law. No case has been cited to us in which anything like that proposition appears. It seems to me that the quality and nature of a receipt for Income-tax purposes is fixed once and for all when it is received. What the partners did in this case, as I have said, was to decide among themselves that what they had previously regarded as a liability of the firm they would not, for practical reasons, regard it as a liability; but that does not mean that at that moment they received some-

thing, nor does it mean that at that moment they imprinted upon some existing asset a quality different from what it had possessed before. There was no existing asset at all at that time. All that they did, as I have already pointed out, was to write down a liability item in their balance-sheet, and how in the world by effecting that operation you can be said to have converted a sum received years and years ago into something which it never was in a thing which, with all respect, passes my comprehension."

13 Mr Pal argued that we should not be guided by Tattersall's case (1939) 22 Tax Cas 51=7 ITR 316 (C A) because in that case there was no money initially paid as was done in the instant case. He submitted that what was done in that case was to put a horse belonging to a client to auction. The proceeds of the sale was money belonging to the auctioneer's client, as much as the animal itself had belonged to the client. The auctioneer might have been entitled to some remuneration out of the money received but for all practical purposes the sale proceeds did not belong to the auctioneer but to the client. On the other hand, he submitted when money was made over to the solicitor, in the instant case, the solicitor received the money as trading receipt. That character, he submitted, was impressed upon the money throughout and the balance of that money, even though refundable to the client, when transferred to the profit and loss account would be profit out of trading receipt and consequently assessable to Income-tax. In our opinion, this argument should not be accepted. The argument proceeds on an entire misconception of the character of client's money received by a solicitor. The solicitor is the agent of the client. The client makes over the money to the solicitor for some work being done by the Solicitor as his agent. The money must be employed to that purpose and must not be treated as money received for any other purpose. This position is not altered by the fact that the solicitor retains a lien upon the balance of the money for his costs. The result of solicitor having a lien on the balance of the money is no more than a person having a charge on somebody else's money. We are of the opinion that when a solicitor receives money from his client, he does not do so as a trading receipt but he receives the money of the principal in his capacity as an agent and that also in a fiduciary capacity. The money so received does not have any profit making quality about it when received. It remains money received by a solicitor as "client's money" for being employed in the client's cause. The solicitor remains liable to account by this money to his client. The fact that, in Tattersall's case, 22 Tax Cas 51=

7 ITR 316 (C.A.) there was an animal entrusted to an auctioneer for auction and, in the instant case, there was money paid to solicitor by a client will not make any difference, if initially the money was not received as trade receipt. In the case of Punjab Distilling Industries Ltd. v Commissioner of Income-tax, Simla, (1959) 35 ITR 519=(AIR 1959 SC 346), the Supreme Court had occasion to consider the case of Tattersall, (1939) 22 Tax Cas 51=7 ITR 316 (C.A.) (Supra) and observed.—

"All that this case decided was that moneys which were not when received, income — and as to this there was no question — could never latter become income."

Since we are convinced that money received by the assessee from its clients were not trading receipts but were clients' money, to be held in a fiduciary capacity, we are of the opinion that the decision in Tattersall's case will apply to the facts of the instant case and should not be ignored as was contended by Mr Pal.

14 We now turn to examine the Supreme Court decision in Punjab Distilling Industries Ltd. case, (1959) 35 ITR 519=(AIR 1959 SC 346) on which Mr Pal so much relied, being the decision in appeal from the Punjab High Court, decision on which the Revenue relied before the Tribunal. What happened in that case was that the assessee carried on business as a distiller of country liquor and sold the produce of its distillery to licensed wholesalers. After World War II difficulty was felt in finding bottles in which liquor was to be sold. To relieve the scarcity, the Government devised a scheme whereby the distiller was entitled to charge the wholesaler a price for the bottles in which liquor was supplied, at rates fixed by the Government, which he was bound to repay when the bottles were returned. In addition to the price fixed under the Government scheme, the assessee took from the wholesalers certain further amounts, described as "security deposits", without the Government's sanction and entirely as a condition imposed by the assessee itself for the sale of its liquor. The moneys described as "security deposits" were also returned as and when the bottles were returned but in this case the entire sum taken in one transaction was refunded when 90 per cent of the bottles covered by it were returned. The price of the bottles received by the assessee was entered by it in its general trading account while the additional sum was entered in the general ledger under the heading "empty bottles return security deposit account". The question arose whether the assessee could be assessed to tax on the balance of the amounts of

these additional sums left after the refunds made thereout. In proposing an affirmative answer to the question the Supreme Court held, (i) that in realising the additional amount described as security deposit the assessee was really charging an extra price for the bottles, and the additional amount was actually a part of the consideration for the sale of the liquor and was part of the price of what was sold: it did not make any difference that the additional amount was entered in a separate ledger termed "empty bottles return deposit account", for what was a consideration for the sale did not cease to be so by being written up in the books in a particular manner; nor did the fact that the price of the bottles was repaid as and when the bottles were returned whereas the additional sums were repaid in full when 90 per cent of the bottles were returned affect the question;

(ii) that as the wholesalers were clearly under no obligation to return the bottles, the additional sums taken were not security deposits and the fact that they were described as such was alone not sufficient to create an obligation to return the bottles; there could be no security given for the return of bottles unless there was a right to their return;

(iii) that as the additional amounts taken were integral part of the commercial transaction of the sale of liquor in bottles and when they were paid were the moneys of the assessee and remained thereafter the moneys of the assessee, they were the assessee's trading receipts; and, therefore, the balance of these additional sums left after the refunds made thereout were assessable to tax.

15. Towards the end of the judgment the Supreme Court observed:

"If we are right in our view that the amounts were trading receipts, it follows that they must have a profit-making quality about them. Their payment was insisted upon as a condition upon which alone the liquor would be supplied with an agreement that they would be repaid on the return of the bottles. They were part of the transactions of sale of liquor which produced the profit and therefore they had a profit-making quality. Again, a wholesaler was quite free to return the bottles or not as he liked and if he did not return them, the appellant had no liability to refund. It would then keep the moneys as its own and they would then certainly be profit. The moneys when paid were the moneys of the appellant and were thereafter in no sense the moneys of the persons who paid them."

16. We do not think that the principles laid down by the Supreme Court can be applied to the facts of the instant

case. In Punjab Distilling Industries case, (1959) 35 ITR 519=(AIR 1959 SC 346) (supra) what was received was price of the bottles, which price included the security deposit. There only remained a contingency for which a part of the price was to be returned to the wholesalers. Since the money so received was impressed with the character of price, from the inception, the contingency that the part of the money was refundable did not change the character of the unfunded money. The receipt thus constituted trading receipt. In the instant case, we have already observed, the money received was money of the principal received by the agent in a fiduciary capacity, for being employed for the work of the principal entrusted to the agent. We have already seen that the balance of the money was refundable by the agent to the principal. Since the money was impressed with the character of somebody else's money, namely, clients' money, it did not become the income of the assessee. It may be, in the absence of a Rule like the Solicitors' Account Rules in this country, the assessee mixed up this money with its own money and may have deposited the money in its own bank account; it may be that this money remained part of the general assets of the assessee for a long time; but this mixing up did not have the result of converting the money into the assessee's money or trading receipt or income. That being the position, we do not think that the Tribunal was wrong in not relying upon the Punjab case, (1953) 24 ITR 597=(AIR 1954 Punj 61) and being guided by Tattersall case, (1939) 22 Tax Cas 51=7 ITR 316 (C.A.) in this matter.

17. It was lastly contended, on behalf of the Revenue, that since the solicitor did not stand in the position of a trustee to the client and since Limitation Act applied, the remedy of the clients to recover sum of the balances may have become barred by limitation. We do not think that this consideration in any way alters the legal position. In the case of Kohinoor Mills Co., Ltd. v. Commissioner of Income-tax, Bombay City, (1963) 49 ITR 578 (Bom), a question similar to that which we have to consider came up for consideration. There certain wages were payable but they were unclaimed and their recovery became barred by limitation. Nevertheless, the Bombay High Court held that the debt subsisted, notwithstanding that the recovery had become barred by limitation. There was no 'cessation of trading liability' within the meaning of Section 10 (2A), and the amount of such wages could not be added to income. Thus even though the remedy of some of the clients may have become barred by limitation, even then the barred debt did not become income of the

assessee and could not be taxed under the Income-tax Act.

18 In the view that we take we answer the question referred to this Court in the negative and in favour of the assessee. The assessee is entitled to costs of this Reference.

19 K. L. ROY, J — I agree.

TVN/D V C. Reference answered in the negative.

AIR 1969 CALCUTTA 218 (V 56 C 37) S A. MASUD J

Rahni Roy Plaintiff v M/s Jethmull Bhojraj and another Defendants

Suit No 96 of 1967 D/- 19 6 1968

(A) Civil P C. (1908) O 37 R 2 and 4 — Negotiable instruments — Summary procedure — Setting aside of decree passed under R. 2 — Maintainability of application.

It is not correct to say that the Court can only set aside a decree under O 37 R. 4, if the defendant fails to obtain leave to defend or having obtained such leave has not appeared and defended the suit. It will be too narrow a construction to say that if he appears after getting the leave to defend, he cannot make an application under O 37 R. 4 in any case. (Nature of jurisdiction under O 37 and the nature of a decree under R. 2 thereof indicated) AIR 1964 Bom 251 Relied on. (Para 5)

(B) Civil P C. (1908) O 37, R. 4 — Negotiable instruments — Summary procedure — Application to set aside decree passed under R 2 of O 37 — Held on facts that there were no special circumstances for the Court to use its judicial discretion for setting aside the decree AIR 1964 Bom 251 Explained AIR 1949 Mad 742 & AIR 1957 Mad 752 Dist.

(Para 6)

Cases Referred Chronological Paras

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| (1964) AIR 1964 Bom 251 (V 51)= | |
| 66 Bom LR 277 Ram Chandra Dhundu v Vithaldas Gokuldas | 5, 7 |
| (1957) AIR 1957 Mad 752 (V 44)= | |
| ILR (1958) Mad 110 M. A. Ethurajulu Naidu v T. K. C. K. Panikkar | 7 |
| (1949) AIR 1949 Mad 742 (V 36)= | |
| 1949 1 Mad LJ 514, S Murahari Rao v K. Bapayya | 7 |

Tibrewalla, for Petitioner

ORDER — This is an application on behalf of the petitioner a partnership firm, under Order XXXVII Rule 4 of the Code of Civil Procedure for setting aside a decree passed by me as an undefended suit on 8th September 1967. Admittedly this suit was instituted as a summary suit under Order XXXVII on three

bundis for Rs. 10 000/- each payable to the plaintiff or order 180 days after the said date without grace. The said bundis were drawn by the petitioner firm, M/s. Jethmull Bhojraj on K. K. Sukhani and were purported to have been accepted by one K. C. Sukla, the defendant No 2. The said hundis on maturity were duly presented to the defendant No 2 for payment but were dishonoured by non payment due notice of which was given to the defendant No 1 also. The defendants having failed and neglected to pay the amounts of the said hundis, the present suit was instituted against the defendants for a decree for Rs. 35 365/- on 12th January 1967. On 9th February 1967, the defendant No 1 was informed by one of its assistants that Writ of Summons in the said summary suit along with a notice dated 8th February 1967 was purported to have been served upon the defendants. On 21st February 1967 the firm by a Master's Summons taken out by its attorneys, Khaitan & Co made an application in the said suit, inter alia, for setting aside the purported service of the writ of summons and alternatively for leave to enter appearance and to defend the suit. On 28th June, 1967 the said application came up for hearing before R. M. Dutta, J who was pleased to grant him leave to defend on condition that the petitioner would furnish security to the extent of Rs 30 000/- to the satisfaction of the Registrar within one month. His Lordship was further pleased to direct that in case no security is furnished, there would be no order on the said application. Thereafter an application for leave to file the Memorandum of Appeal without a certified copy was presented before the Court of Appeal consisting of Ray and S. K. Mukherjee, JJ., against the said order of R. M. Dutta, J. The said application however was withdrawn with the leave of the Appeal Court. The defendants having failed to deposit the sum of Rs. 30 000/- in pursuance of the order of Dutta, J., the matter appeared in my undefended list on 8th September 1967, and a decree was passed. It is alleged that the petitioner for the first time came to know of the ex parte decree on 21st December 1967. On 2nd February 1968, the Memorandum of Appeal was filed on behalf of the petitioner against the said decree. But the said Memorandum of Appeal was returned to the defendant No. 1's solicitor as the same was filed out of time. On 19th February 1968 the petitioner made an application before the Appellate Court for condonation of delay in preferring the said appeal and for extension of time to file the Memorandum of Appeal. On 5th March, 1968, the said application came up for hearing before the Appellate Court and their Lordships were pleased to deliver a judgment by which

the said application was dismissed. Thereafter, on 11th March, 1968, the present application is filed.

2. The short point to be decided in this application is whether there are "special circumstances" within the meaning of O. XXXVII R. 4 of the Code which would enable me to exercise my discretion to set aside the decree passed by me. Order XXXVII, Rule 4 reads as follows:

"4.— After the decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside the execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

The words "the decree" and "the summons" in Rule 4 must refer to Order XXXVII, Rule 2 which provides:

2 (1).— All suits upon Bills of Exchange, Hundis or Promissory Notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

(2).— In any case in which the plaint and summons are in such forms respectively the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree.

....."
Admittedly, the summons was served in accordance with Form No. 4 in Appendix B which provides that a copy of the Hundis is to be annexed to the summons and not the plaint. The petitioner, however, applied for leave to defend under Order XXXVII, Rule 3, as stated earlier. The petitioner having failed to comply with the conditional order passed by Dutta, J., leave to defend is deemed to have been refused and the statements in the plaint admitted by the defendants.

3. Mr. Tebriwalla, Counsel for the petitioner, has contended that on the face of the three hundis, no decree could have been passed against the petitioner and, as such, I should exercise my discretion under Order XXXVII, Rule 4 in setting aside the decree. According to him, the drawer of the hundis, K. K. Sukhani had no authority to sign the documents on behalf of the petitioner either as a partner or otherwise. Secondly, K. K. Sukhani as partner or authorised agent is the drawer and the drawee is also K. K. Sukhani in his individual capacity; the acceptor is K. C. Sukla, a differ-

ent man who is unknown to the petitioner. Thirdly, the plaintiff's cause of action rested on the presentment of the hundis to the defendant No. 2 for payment and on the fact that the same were dishonoured by non-payment by the defendant No. 2. Relying on Section 37 of the Negotiable Instruments Act 1881, he has argued that no case has been made out in the plaint that K. K. Sukhani in his individual capacity has accepted the hundis, or that the drawer has dishonoured it by non-payment. A specific case was made out that K. C. Sukla is the acceptor and the cause of action arose as a result of Mr. Sukla's failure to pay. He has drawn my attention to Sections 27, 33, 61, 91-93 and 148 and wanted me to hold that, on a proper construction of the said sections read with Section 37, I should hold that there was no cause of action against the petitioner.

4. In my view, in the facts and circumstances of the case, there is not much scope to argue the points raised by Mr. Tebriwalla in an application under Order 37, Rule 4 of the Code. The summary procedure has been enacted by the Legislature to expedite suits on negotiable instrument where the defendant, prima facie, fails to satisfy the Court that he has a good defence. The special procedure, though a rigorous one, is laid down in the interest of the public and, therefore, the Court cannot travel beyond the provisions of Order XXXVII. In the present case, applications for leave to defend have been decided and the learned Judge passed the conditional order under Order XXXVII, Rule 3. The appeal against such order was not pursued. The petitioner having failed to comply with the said conditional order, a decree has been passed. The petitioner has got the right to appeal against such decree and agitate the points in its favour on merits in the appeal before the Appellate Court. I agree with Mr. Tebriwalla's contention that the failure to file an appeal does not mean that the petitioner cannot make an application under Order XXXVII, Rule 4 although his application for condonation of delay has been dismissed by the Appeal Court.

5. In my view, the Court has got ample jurisdiction under Order XXXVII, Rule 4 to set aside a decree passed in a suit under Order XXXVII. This is a special jurisdiction vested in the Court. It is, therefore, necessary for the Court to follow in strict accordance with the procedure mentioned in the said order. Order XXXVII, Rule 4 refers to a decree and this decree is the decree passed under Order XXXVII, Rule 2. Order XXXVII, Rule 2 provides that the defendant has no right to appear or defend the plaintiff's suit unless he first obtains leave from a Judge to appear and defend. It

is only when the defendant does not obtain the leave or where the defendant after obtaining such leave does not appear and make out a case for good defence, the plaintiff is entitled to a decree. The decree contemplated is a decree under certain conditions. One of the conditions is that the defendant must not obtain any leave or must not have entered appearance. Thus where the defendant has obtained leave and has also entered appearance within 10 days from the service of summons, as set out in Form No 4 Appendix B to the Code as in the present case it may be logically argued, the decree passed is not a decree within the meaning of Order XXXVII, Rule 2 sub-clause (2). But, in my opinion, the procedure as to the defendant obtaining leave is set out in Order XXXVII, Rule 3, where the Court has been given power to grant leave unconditionally or upon any terms as the Court thinks fit. Where the Court imposes conditions but the defendant does not comply with such conditions, the leave granted to him stands forfeited and the result is that he must be deemed not to have obtained leave, as provided in Order XXXVII, Rule 2. In such case the leave not having been obtained, one of the conditions under which a decree may be passed under Order XXXVII Rule 2 is satisfied. In the premises the decree passed becomes a decree within the meaning of Order XXXVII Rule 2 sub-clause (2) and on this point I agree with the decision of the Bombay High Court in *Ram Chandra Dhundu v Vithaldas Gokuldas*, AIR 1964 Bom 251 where the learned Judges have stated at para 252.

'Rule 4 must apply to a suit as has resulted into a decree under the summary procedure and it enables the Court to set aside the decree which must mean the decree made under Rule 2.'

But this does not mean, in my opinion, that the Court can only set aside a decree under Order XXXVII, Rule 4 if the defendant fails to obtain leave to defend or having obtained such leave has not appeared and defended the suit, or, in other words, it will be too narrow a construction to say that if he appears after getting the leave to defend, he cannot make an application under Order XXXVII, Rule 4 in any case. Thus, I cannot accept the contention of the counsel for the plaintiff that the application is not maintainable.

6 The next point to be decided is whether there were special circumstances for which I should exercise my judicial discretion in setting aside the decree. Mr Sankar Ghose has argued that far from the fact that there are special circumstances which entitle the defendant No 1 to have the decree set aside, the facts in this case would show

just the contrary. In my view, this is a case where I cannot persuade myself to exercise my discretion in favour of the petitioner for the following reasons:

(a) Admittedly, the petitioner took out the chamber summons for leave to enter appearance and to defend the suit. On 28th June, 1967, Dutta, J., directed the petitioner to furnish security to the extent of Rs. 30,000/- to the satisfaction of the Registrar within one month from the date of the said order. The petitioner has not complied with the said order.

(b) The petitioner preferred an appeal against the said order of Dutta, J., but did not proceed with the said appeal.

(c) Further indulgence was given to the petitioner by extending the date to furnish security up to 11th August 1967 as asked for by the petitioner. The petitioner failed again.

(d) Time to furnish security was again extended till 25th August, 1967, but no security was furnished.

(e) The petitioner allowed the reference before the Registrar-in-Insolvency for furnishing the security to be struck out.

(f) Under the Rules of this Court, the suit appeared on 6th September, 1967, before the Warning List of this Court. The petitioner or his solicitor did not choose to mention the matter or to offer the security money.

(g) On 8th September 1967 the suit appeared in my Peremptory List and a decree was passed on the same date. There was not a whisper from the side of the petitioner between 8th September, 1967 and 19th February, 1968, when the petitioner made an application before the Court of Appeal for an order that the delay in preferring the appeal be condoned. The petitioner did not choose to file an appeal against the decree passed by me. The Appeal Court on 5th March, 1968, dismissed his application for condonation of delay and the learned Judges have delivered a short judgment where Ray, J., after holding that there is no sufficient cause which prevents the petitioner from taking steps earlier has also made the following observations:

"Further, Counsel for the respondent rightly contended that the provisions contained in Section 37 of the Negotiable Instruments Act were sufficient to clothe the drawer with liability. The acceptor in the present case might not have liability on the instrument, but that would not rob the drawer of liability."

Mr Tebriwalla has argued the same point before me that the petitioner has no liability as a drawer under Section 37 of the Negotiable Instruments Act. He has fairly conceded that the same point was argued before Dutta, J., and also before the Appeal Court. Three Judges have

decided against his client and I do not feel justified to disturb or review the exercise of discretion of the learned Judges.

(h) No new ground or fact which was overlooked by Dutta, J., or by the Appeal Court has been pointed out to me.

(i) Two letters were written by the plaintiff's solicitor dated 11th October, 1966 and 12th November, 1966, prior to the institution of the suit by registered post to the petitioner, but no reply was given. The petitioner could have stated there that K. K. Sukhani is not the partner of the petitioner firm or, at least could have denied the liability under Section 37 of the Negotiable Instruments Act.

(j) The suit has been instituted on 12th January, 1967, and I find an advertisement in the Amrita Bazar Patrika on 21st April 1967, (Annexure C to the petition) to the effect that K. K. Sukhani has retired from the petitioner firm.

7. The petitioner has relied upon *Murahari Rao v. K. Bapayya*, AIR 1949 Mad 742, and *M. A. Ethirajulu Naidu v. T. K. C. K. Pannikkar*, AIR 1957 Mad 752. In both these cases the decree was set aside because the defendants could not enter appearance for some reason or other and thus the facts of those cases are distinguishable. Mr. Tebriwalla has drawn my attention to the fact in AIR 1964 Bom 251 (supra) that the learned Judges exercised their discretion in setting aside the decree in the said case although a conditional order was made by the trial Judge and the order was not complied with. I have already stated the circumstances why the petitioner's prayer cannot be granted. In the present case, the matter went to the Appeal Court; several times indulgence was granted to him; the suit appeared in the Warning List and also in the Peremptory List; the petitioner did not apply to this Court under Order XXXVII, Rule 4 before the expiry of the period of limitation to file the appeal, he did not choose to file an appeal in proper time; the Appeal Court has already exercised its discretion on the same argument as is urged before me and lastly, the learned Judges in Bombay decision exercised their discretion in their revisional jurisdiction.

8. For all these reasons the application is dismissed with costs.
VGW/D.V.C. Application dismissed.

AIR 1969 CALCUTTA 221 (V 56 C 38)
P. N. MOOKERJEE AND
A. K. DUTT, JJ.

Md. Golam Ali Mina and another, Petitioners v. Land Acquisition Collector and another, Opposite Parties.

Civil Revn. Cases Nos. 1817-1821 of 1966 and 2225 of 1966, D/- 2-5-1968.

GL/IL/D222/68

(A) Constitution of India, Art. 227 — Land Acquisition Act (1894), S. 18 — Collector acting under S. 18 of L. A. Act satisfies test of Tribunal for purposes of Art. 227 of Constitution.

The Collector's functions under S. 18 of the Land Acquisition Act are, primarily, judicial. This is also obvious from the contents of the said section, under which the Collector has to determine, inter alia, before deciding the question of reference, whether the applicant is a person interested, so as to entitle him to apply under that section, and whether the application is within time. The first raises a question of status and involves a right of the subject; the second raises a point of limitation and involves determination of the question whether the enforcement of the said right has become time-barred. Both these are, primarily, questions, which appertain to the jurisdiction and functions of judicial tribunals and, in deciding the said questions, the Collector, obviously, performs judicial functions. This duty of discharging the judicial function has also been entrusted to the Collector under a statute. Clearly, then, the Collector, acting under S. 18 of the Land Acquisition Act, satisfies the test of a tribunal for purposes of Article 227 of the Constitution. Therefore, order of Collector under S. 18, if otherwise revisable, would be well within ambit of Art. 227 of the Constitution. AIR 1924 Mad 442 (FB) & AIR 1946 Cal 508 (FB) & AIR 1965 SC 1595, Rel. on.

(Paras 10 and 11)

(B) Land Acquisition Act (1894), S. 18 — Applications stating that applicants were prepared to accept award amounts under protest and praying for payments accordingly — Payments made and receipts were given on back of above applications without mentioning words 'under protest' — Receipts must be related to applications themselves and must be linked with same and it could not be held to be receipts without protest so as to disentitle applicants to apply for references under S. 18. AIR 1964 Cal 283 & C. R. Case No. 1925 of 1957 (Cal), Ref. (Paras 12 to 14)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1595 (V 52)=
- (1965) 2 SCR 366, Associated Cement Companies Ltd. v. P. N. Sharma 110
- (1964) AIR 1964 Cal 283 (V 51), Suresh Chandra Roy v. Land Acquisition Collector, Chinsurah 13
- (1962) 66 Cal WN 446=1964 Cal LJ 114, Kalidasi Dasi v. Land Acquisition Collector, Suri 7
- (1957) Civil Revn. Case No. 1925 of 1957 (Cal), Atul Kumar Bhadra v. State of West Bengal 14

(1946) AIR 1946 Cal 508 (V 33)=
50 Cal WN 758 (FB) Khetsidas
Gangaram v First L. A. Collector
Calcutta 9

(1924) AIR 1924 Mad 442 (V 11)=
11LR 47 Mad 357 (FB) Abdul
Sattar v Special Deputy Collec-
tor Vizagapattam 9

P N Mitter Amarendra Mohan Mitra,
Arunendra Nath Basu, for Petitioners
Ranjit Kumar Banerjee (Senior Govt.
Advocate) Biswanath Mullick, for Oppo-
site Parties.

ORDER.—These Rules are directed against the refusal of the learned Land Acquisition Collector to make references under Section 18 of the Land Acquisition Act in the instant cases.

2. The prayer for reference was rejected upon the view that the claimants applicants having received payments under the awards, otherwise than under protest, were not entitled to maintain applications for references

3 On behalf of the petitioners, it has been contended by Mr Mitter that, in the instant cases the applicants filed applications clearly stating therein, that they were prepared to accept the award amounts under protest and prayed for payments accordingly. The payments appear to have been eventually made by the learned Collector and the receipts, which were given by the applicants for such payments were endorsed on the back of the said applications. In the said receipts the words under protest do not appear although the above applications on the back whereof the said receipts were endorsed clearly contained statements that the applicants were prepared to receive payments under protest.

4 The learned Land Acquisition Collector construed the above receipts as receipts for payment, otherwise than under protest and, upon that view refused the applicants prayer for reference. The propriety of this decision is one of the points, arising in these Rules.

5 The other question, which has been raised in these proceedings before us, arises on the objection of the opposite parties to the maintainability of the instant revision applications upon the ground that the Collector acting under Section 18 of the Land Acquisition Act, is not amenable to the revisional jurisdiction of this Court, even under Article 227 of the Constitution.

6 This last point, which raises a question of jurisdiction of this Court and goes to the root of the entire thing so far as the present revision cases are concerned, is, obviously a point of considerable and far reaching importance, and, accordingly we will deal with it first. This point has been very strenuously argued by Mr Banerjee, learned Senior

Government Advocate who has sought to oppose these Rules inter alia on this preliminary ground, namely that this Court has no jurisdiction to interfere with the Order of the Collector acting under Section 18 of the Land Acquisition Act. Mr Banerjee's principal contention in this respect is to the effect that the Collector even while he is acting under Section 18 and dealing with an application for reference is not exercising any judicial function but is acting purely as an administrative officer and, accordingly he acting as aforesaid is not amenable to the powers of this Court even under Article 227 of the Constitution.

7 This submission of Mr Banerjee is directly opposed to the recent Bench decision of this Court, reported in *Kalidas Das v Land Acquisition Collector Surl*, (1962) 66 Cal WN 446. But Mr Banerjee has made elaborate submissions on the point and has pressed us to hold that the said decision was not correctly made.

8 Mr Mitter appearing in support of these Rules has contended inter alia that the Collector whatever be his position under Chapter II exercises judicial functions while acting under Chapter III of the Land Acquisition Act, starting with Section 18 and, in dealing with an application for reference under the said section, he has to decide questions which primarily appertain to the jurisdiction and functions of a judicial officer and primarily concern judicial matters. The whole dispute between the parties so far as this point is concerned is as to the question whether the Collector acting under Section 18 of the Land Acquisition Act, is acting judicially or exercising judicial functions, so as to be a tribunal within the meaning of Article 227 of the Constitution. If the said question be answered in the affirmative the Collector acting under Section 18 of the Land Acquisition Act, would, obviously be amenable to the jurisdiction of this Court under Article 227 of the Constitution. If on the other hand, the said question be answered in the negative, the Collector not being a tribunal, far less a Court, would not be amenable to such jurisdiction.

9 On the above disputed question, the legal position may be briefly summed up as follows

Prior to the Constitution, the matter came up before this Court and also before several other High Courts under Section 115 of the Code of Civil Procedure. There was sharp difference of opinion amongst the learned Judges, considering the said question, and, while there was a strong body of opinion that the Collector acting under Section 18 of the Land Acquisition Act, is not only a judicial officer but even a Court, so as to make Section 115 of the Code of Civil

Procedure applicable to him, the predominant view was to the contrary, namely, that the Collector, acting as such, was not a Court, — at any rate, not a Court, subordinate to the High Court for purposes of Section 115 of the Code of Civil Procedure, so as to be amenable to the revisional jurisdiction under that Section. The leading decisions on the point are to be found in *Abdul Sattar v. Special Deputy Collector, Vizagapatam*, ILR 47 Mad 357=(AIR 1924 Mad 442), a Full Bench case of the Madras High Court, and *Khetsidas Gangaram v. First L. A. Collector, Calcutta*, 50 Cal WN 758=(AIR 1946 Cal 508), a Full Bench decision of this Court, where all the earlier cases of the several High Courts on the point are reviewed. In these cases, it was held that the Collector, acting under Section 18 of the Land Acquisition Act, would not be amenable to the jurisdiction of the High Court under Section 115 of the Code of Civil Procedure, as he would not be a Court, nor, — at any rate, — a Court, subordinate to the High Court. It is interesting to note, however, that, even in these two Full Bench decisions, the view is, apparently, accepted that the Collector, acting under Chapter III of the Land Acquisition Act, starting with Section 18, acts as a judicial officer and exercises judicial functions. Indeed, in spite of some opinions to the contrary, the preponderance of judicial opinion has always been that, as Chapter III of the Land Acquisition Act deals with proceedings in Court and starts with Section 18, which initiates the said proceedings, the said section must be held to be part of the judicial machinery. Section 18 has thus been construed, in the majority of cases, to be the first or the initial stage of the judicial proceeding, which ultimately ends in the award of the learned Land Acquisition Judge.

10. The distinction between the two Chapters II and III, the first, as relating to administrative duties, and the second, as concerning judicial duties, has also been stressed in the above two Full Bench decisions. From the trend of discussion in those two cases, it is clear that the Collector's functions under Sec. 18 of the Land Acquisition Act are, primarily, judicial. This is also obvious from the contents of the said section, under which the Collector has to determine, *inter alia*, before deciding the question of reference, whether the applicant is a person interested, so as to entitle him to apply under that section, and whether the application is within time. The first raises a question of status and involves a right of the subject; the second raises a point of limitation and involves determination of the question whether the enforcement of the said right has become time-barred. Both these are, primarily, questions,

which appertain to the jurisdiction and functions of judicial tribunals and, in deciding the said questions, the Collector, obviously, performs judicial functions. This duty of discharging this judicial function has also been entrusted to the Collector under a statute. Clearly, then, the Collector, acting under Section 18 of the Land Acquisition Act, satisfies the test of a tribunal for purposes of Article 227 of the Constitution, as laid down in the recent Supreme Court pronouncement in *Associated Cement Companies Ltd. v. P. N. Sharma*, AIR 1965 SC 1595. In the judgment, delivered in that case, the tests of a tribunal for purposes of Article 227 of the Constitution have been held to be that it must be a body, performing judicial functions, entrusted to it under the statute or under statutory authority. It has been pointed out, in the said decisions, that, for the constitution of a tribunal, the presence of a *lis* is not essential and it may be sufficient if the relevant functions have to be performed for purposes of adjudicating the rights of the subject at the instance of the Government *vis-a-vis* itself.

11. Applying the said test, in the view, which we have expressed above, the Collector, acting under Section 18 of the Land Acquisition Act, would be a tribunal for purposes of the above Article, as he would be performing judicial functions under the authority of a statute. Nothing more, according to the above Supreme Court decision, is necessary for the purpose of constituting a tribunal under the said Article. In this view, we would hold that the Collector, in the instant cases, would be a tribunal within the meaning of the said Article, and, accordingly, his present order, if otherwise revisable, would be well within the ambit of Article 227 of the Constitution.

12. Turning now to the other question, namely, on the merits it may at once be stated that the receipts of payment in the instant cases cannot but be held to be receipts under protest. As we have already stated, the claimants applied for such payments, specifically stating that they would receive the same under protest. The receipts of payment, which were ultimately given, were endorsed on the back of those applications. In the circumstances, such receipts must be related to the applications themselves and must be held to be linked with the same and cannot but be held to be receipts under protest. The learned Collector, therefore, erred in the exercise of his jurisdiction in refusing to make references in the instant cases upon the erroneous view that the claimants in question had received payments without protest, so as to disentitle them to apply for refer-

ences under the specific terms of Section 18 of the Land Acquisition Act.

13 In support, however of the learned Collector's view on this point, Mr Banerjee referred us to two decisions of this Court, one reported in *Suresh Chandra Roy v Land Acquisition Collector Chinsurah*, AIR 1964 Cal 283, where, Banerjee J held under essentially different circumstances that the receipts before him were receipts without protest. It is true that there is an observation in the judgment of Banerjee J that the protest should be endorsed on the receipt itself, but that observation, in the facts of that case would be clearly obiter and the said case would obviously be distinguishable on its facts. It is unnecessary to say more so far as this case is concerned, but we would like to add that, if it was intended to hold, in that case that unless the protest actually appears in the body of the receipt, the receipt must be taken to be a receipt without protest, we are with respect, unable to agree with the said decision, as such statement of the law would be too wide for our acceptance.

14. Mr Banerjee also relied on the earlier unreported decision of Sinha, J., (as he then was) in Civil Revn. Case No. 1925 of 1957 (Cal) *Atul Kumar Bhadra v State of West Bengal*, where also some observations were made that, unless the protest was embodied in the receipt, the claimant would be disentitled to a reference on the ground that he had accepted payment without protest. It is to be pointed out, in this connection, that Sinha J (as he then was) in his above decision, relied *inter alia* — and, in our opinion, mainly — on affidavits before him and came to a finding upon the same that there was in the case before him, receipt of payment without protest. Upon that finding the decision of Sinha, J. (as he then was) in the above case may be supported. But if it was meant to lay down the law in the form that, unless the protest was embodied in or endorsed on the receipt itself, the claimant would be out of Court, so far as his prayer for reference is concerned we respectfully differ from the same. Law only requires that the claimant has not accepted payment without protest. If the claimant actually makes an application for receiving the amount or payment under protest and, in pursuance of or following that application payment is made and the claimant, as in the instant cases, endorses his receipt of payment on the back of the said application, it would hardly be reasonable to say that the claimant waived his protest and accepted the payment without protest.

15 In the above view we would hold that we have jurisdiction to interfere

with the order of the learned Collector refusing to make references in the instant cases, and to correct his error of jurisdiction, which he exercised, in the instant cases, illegally and with material irregularity upon an erroneous view of the nature of the receipts, given by the claimants as aforesaid, and we direct that the claimants' applications for references be allowed and the references in question be made by the Collector.

16 The Rules are made absolute as above but in the circumstances of these cases there will be no order for costs in any of them.

Civil Revision Case No 2225 of 1966

17 This Rule was disposed of by our judgment delivered yesterday *inter alia* the connected cases, along with which this Rule was heard originally.

18 In the circumstances the said judgment may be deemed to cover this Rule as well, as already stated by us, and it may be deemed to be disposed of accordingly no further order being necessary in the matter.

AKJ/D V C.

Ordered accordingly

AIR 1969 CALCUTTA 224 (V 56 C 39)
BIJAYESH MUKHERJI, J

Ujjal Talukdar Petitioner v Netaji Chand Koley Opposite Party

Civil Revn. Case No 1295 of 1968 D/- 25-7 1968.

(A) Civil P C. (1908) S 20 — Cause of action — Every fact necessary to be proved is cause of action.

Everything which, if not proved, gives the defendant an immediate right to judgment must be part of the cause of action. Cause of action does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. Evidence of a fact should not be confused with the fact itself. Even an infinitesimal fraction of a cause of action will be part of the cause of action and confer jurisdiction on the Court within the territorial limits of which that little occurs. Where the entire dispute over a Cricket Match was occasioned, discussed and settled in Calcutta, and where the plaintiff through his agent was apprised of the decision in Calcutta mere fact that the decision was conveyed to the plaintiff club by a letter received by the Club at Sealdah will not take the cause of action to Sealdah and give Sealdah Court jurisdiction. (1873) 8 CP 107 & (1888) 22 QB 128 & AIR 1954 Bom 491 Rel. on AIR 1931 Cal 659 Not fol-

lowed. AIR 1952 Cal 189, Dist.
(Paras 12, 14, 17)

(B) Civil P. C. (1908), S. 9 — Domestic Tribunal — Jurisdiction of Civil Court to interfere with decisions of domestic tribunal — Conditions necessary — Domestic Tribunal not bound by rules of evidence.

A domestic tribunal cannot do anything it likes, throwing everything to the winds. But the jurisdiction of the Court is of a very limited character. Generally speaking, the Court can set aside the decision of a domestic tribunal on one of the three basic considerations set out below:

A. When the tribunal oversteps the limits of its jurisdiction:

B. When it violates the principles of natural justice:

C. When it acts dishonestly, actuated by bias, bad faith and the like.

A domestic tribunal, is not bound by the rules of evidence, and, indeed, is ignorant of such rules, and is never to be equated with a Court of Law, wedded to just that: the law of evidence. A party appearing before a domestic tribunal when it fails to make a point when the tribunal has not followed a correct procedure, it can be inferred that it has waived its right. (Paras 19, 21, 23)

Where a party appearing before a domestic tribunal alleges dishonesty or mala fide on the part of the tribunal, the Civil Court will need first rate evidence to enable it to arrive at so serious a finding. Case law referred. (Para 24)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 543 (V 53)=
- (1966) 1 SCA 166, Bhagwandas Goverdhandas Kedia v. Girdharlal Parshottamdas & Co. 15
- (1965) AIR 1965 Cal 531 (V 52)=
- Sri Gopal Jalan & Co. v. Singhan Brothers 20
- (1965) AIR 1965 Mys 316 (V 52),
- Munirangappa v. A. Venkatappa 17
- (1963) AIR 1963 SC 1144 (V 50)=
- (1964) 1 SCR 1, T. P. Daver v. Lodge Victoria 20, 23, 26
- (1961) AIR 1961 Cal 31 (V 48)=
- 64 Cal WN 842, State Medical Faculty of West Bengal v. Kshiti Bhusan Dutt 20
- (1954) AIR 1954 Bom 491 (V 41)=
- ILR (1954) Bom 1137, Baroda Oil Cake Traders v. Parshottam Narayandas 12, 13, 15
- (1952) AIR 1952 Cal 189 (V 39)=
- 22 Com Cas 138, Debabrata Basu v. Institute of Chartered Accountants 16
- (1952) 1952-1 All ER 1175=1952-2
- QB 329, Lee v. Showmen's Guild of Great Britain 25

(1949) AIR 1949 PC 313 (V 36)=

54 Cal WN 124, Lennox Arthur Patrick O'Reilly v. Cyril Cuthbert Gitters 20

(1931) AIR 1931 Cal 659 (V 18)=

ILR 58 Cal 539, Engineering Supplies Ltd. v. Dhandhaniah & Co. 15

(1888) 22 QB 128=58 LJQB 120,

Read v. Brown 12, 14

(1873) 8 CP 107=42 LJCP 98, Cooke v. Gill 12

B. K. Ghose, Biswajit Ghose, Benoy Bhusan Dutta, Tapendra Narayan Roy Chowdhury, and Samir Kumar Mookerjee, for Petitioner; P. N. Mitra and Mukul Gopal Mukherjee, for Opposite Party.

ORDER:— This rule under Section 115 of the Procedure Code (5 of 1908), issued by Chatterjee, J., on April 29, 1968, has, as its genesis, a one-day cricket match played on January 14, 1968, on George Telegraph Sports ground in the Calcutta Maidan, between Belgachia United Club and George Telegraph Sports Club, both the clubs belonging to Group "E" of the Second Division League. "Belgachia" — that is how I shorten the full name of the club — lost the toss and was asked to bat first, which it did, to collect 155 runs for the loss of five wickets, by 12.05 hours, when due to rains, the game "had to be stopped by the Umpire," who, however, held no discussion with the Captains of the two competing teams: vide paragraph 9 of the plaint presented by "Belgachia's" Honorary Secretary. Ujjal Talukdar, qua plaintiff, in the Court of a Munsiff at Sealdah, being suit No. 97 of 1968. "Belgachia" requested the sole defendant in that suit, Netai Chand Koley, Honorary Secretary, Cricket Association of Bengal (for short, CAB hereafter), to arrange for a replay of the match, upon the result of which depended not only the Group Championship of Group "E" of the Second Division League, but also the Championship of the Second Division League itself, leading ultimately to the promotion to the First Division League. On February 9, 1968, "Belgachia" was verbally informed of the decision of the Tournament Committee that the match of January 14, 1968, would be reckoned as a drawn game, with the points equally divided between the two teams. On February 10, 1968, "Belgachia" appealed to CAB's Working Committee. On February 15, 1968, the Working Committee affirmed the decision of the Tournament Committee, rejected "Belgachia's" appeal, and decided to go ahead with the Second Division Championship matches amongst the different Group Champions. On February 19, 1968, "Belgachia" received, at 25 Indra Biswas Road, a letter dated February 17, 1968, from the CAB's Honorary Secretary, Koley, communicating the decision of the Working Committee: vide paragraph 23 of the plaint *ibid*.

2. This led "Belgachia" to file the suit it did, through its Honorary Secretary Ujjal Talukdar in the court of a munsiff at Sealdah, on February 23, 1968 for, amongst others, a declaration that the decision dated February 15, 1968, of the CAB Working Committee, confirming the decision of the Tournament Committee that the match between "Belgachia" and George Telegraph Sports Club, on January 14 previous, was to be regarded as a drawn game, is bad at law and inoperative, and also for a permanent injunction restraining the CAB from holding the Second Division Cricket League Championship by keeping out "Belgachia"

3. On the very day the suit was filed, a temporary injunction was prayed for too. The learned Munsiff, after having wavered between one view and another on the twin question of territorial jurisdiction and the suit being a suit of civil nature, as his orders in the order-sheets reveal, granted, in the end, the temporary injunction, on March 11, 1968, holding, among other things:

1 "Belgachia" has a fair *prima facie* case in support of the right claimed.

2. There is greater convenience in granting than in refusing the injunction.

3 Part of the cause of action for the suit arose within his jurisdiction, in that "Belgachia" had received the letter dated February 17, 1968 from CAB Secretary Koley on February 19 1968, at Indra Biswas Road, a place within the territorial limits of his jurisdiction.

4. The defendant, CAB Secretary Koley appealed. On April 24, 1968, the learned Appellate Judge reversed the Munsiff and rejected the prayer for a temporary injunction, holding, *inter alia*,

1 The suit is not a suit of civil nature within the meaning of Section 9 of the Procedure Code.

2. Even if it is, the Civil Court has no jurisdiction to sit in appeal over the decision of a domestic body like the CAB and to substitute its view for the view taken by such a body: a matter within its exclusive jurisdiction.

3 The Munsiff has no territorial jurisdiction to try the suit.

4. All this apart, no title to injunction has been made out.

5 This is why "Belgachia's" Secretary Ujjal Talukdar came to this Court in revision and obtained on April 29, 1968, from Chatterjee, J., the rule, as also a stay, concerning the appellate order of reversal, refusing the injunction he had prayed the Court for

6. Before I come to the merits of the rule, a little more has to be noticed yet, if only to complete the narration of facts. On May 3, 1968 Chatterjee, J., heard the rule in part. His Lordship was of opinion that the suit "which relates to the

Cricket League should be decided as early as possible." With that end in view, and, in particular, because of the matter having been "urged in three courts," no less because of the defendant seeking "to raise certain preliminary points" capable of being "decided on questions of law alone independent of any evidence", — points which "should be decided at an early date", — his Lordship formulated them:

1. whether the suit is maintainable in view of the fact that it relates to nothing of a civil nature";

2. "whether the suit is maintainable in view of the Rules of the Cricket Association of Bengal League", and

3 "whether the Court has territorial jurisdiction to entertain the suit."

Having formulated the points so his Lordship directed the Munsiff to 'decide those issues' within three weeks, adjourned the hearing of the rule accordingly, and relaxed the interim stay granted on April 29, 1968 by allowing the CAB to 'fix the rest of the games as under the Rules in the meantime', and at the same time restraining the CAB from determining the championship, as also promotion to the First Division League.

7. On May 18, 1968, the Munsiff framed the following three issues, "as desired by the High Court".

1. Is the suit a suit of civil nature?

2. Is the suit maintainable in view of the rules of the CAB?

3. Has this Court territorial jurisdiction to try the suit?

(See Order No. 20 dated May 18, 1968, in the order-sheets.)

8. The Munsiff, it seems, misread the direction of Chatterjee, J. The first issue or point formulated by him reads:

"whether the suit is maintainable in view of the fact that it relates to nothing of a civil nature."

It was not, therefore, open to the Munsiff to strike the first issue: he did, keeping at large the question of the suit being a suit of civil nature — a question which Chatterjee, J., had closed, by recording that "it relates to nothing of a civil nature."

9. Be that as it may, on May 21, 1968, the Munsiff entered into evidence — oral and documentary. The defendant called witnesses. The plaintiff did not. Usual hearing and arguments over, the Munsiff recorded an order on May 27, 1968, answering the first issue — whether or no the suit is of a civil nature — in favour of the plaintiff, and the remaining two — (i) maintainability in the face of the CAB rules and (ii) territorial jurisdiction — in favour of the defendant. Still he did not, as indeed he could not, record a final decision dismissing the suit, because this rule did pend then.

10. Meanwhile Chatterjee, J., was assigned to a different Bench. He, had,

therefore, the case put up before him in chambers, on June 13, 1968, and ordered:

"There is no order stating that the matter be treated as heard in part by me. The matter will not be so treated.

Let the matter be placed before the appropriate Bench for hearing." This is how the matter comes up before me.

11. The first question to which I address myself is whether the Court of the Munsiff at Sealdah has territorial jurisdiction or not to try the suit. The impugned match was played on George Telegraph Sports ground in the Calcutta Maidan. Due to rains, the game "had to be stopped by the umpire", as the plaint, by paragraph 9, avers. Right or wrong, a decision as this was given right there at the Calcutta Maidan, a place beyond the territorial limits of the Sealdah Court's jurisdiction. The request by "Belgachia" for a replay of the abandoned game of January 14, 1968, was made to Secretary Koley of CAB in Calcutta too. The Tournament Committee decided, at Calcutta again, that the aforesaid match would be taken as a drawn game. Its decision was verbally communicated to "Belgachia" on February 9, 1968, and at Calcutta too. On the day following (February 10) "Belgachia" appealed to the CAB, "Eden Gardens, Calcutta" through its Honorary Secretary. The Working Committee of the CAB, in a meeting held on February 15, 1968, at the NCC Pavilion, Eden Gardens, Calcutta, at 6 p.m. deliberated upon such appeal, called upon Belgachia's representative, Dr. Manab Munshi, present in the meeting, to say what he had to, in support of the appeal, unanimously upheld the Tournament Committee, and necessarily rejected Belgachia's appeal. A decision as this was communicated right there to the said Dr. Munshi, as is the evidence of Ashok Kumar Chatterjee, a member of the CAB Working Committee, present in that meeting.

12. What goes in the preceding paragraph is a complete catalogue of all the facts which are material to be proved to entitle "Belgachia", the plaintiff, to succeed — facts each of which CAB, the defendant, would have a right to traverse: just the definition of "cause of action" (with a little adaptation) by Bret, J., in *Cooke v. Gill*, (1873) 8 CP 107. Or take the definition by Fry, L. J., in *Read v. Brown*, (1888) 22 QB 128:

"Everything which, if not proved, gives the defendant an immediate right to judgment must be part of the cause of action."—

a definition which, as *Gajendragadkar, J.*, then presiding over a division of the Bombay High Court in *Baroda Oil Cake Traders v. Parshottam Narayandas*, ILR

(1954) Bom 1137=AIR 1954 Bom 491, puts it, has become a classic on the subject. "Belgachia" fails to prove any one of the facts catalogued in the preceding paragraph at its peril. Peril — because such failure gives CAB, the defendant, an immediate right to judgment. This being the cause of action for the suit in hand, it becomes plain that the appropriate Calcutta Court has, — and the Sealdah Court has not, — the territorial jurisdiction to try it, unless there be anything to the contrary.

13. It is said, on behalf of "Belgachia", the petitioner before me, that there is something to the contrary. To one more definition of "cause of action": it is a bundle of essential facts necessary to be proved by the plaintiff in order to succeed in his suit: *Gajendragadkar, J.*, in the *Baroda Oil Cake Traders* case, ILR (1954) Bom 1137=AIR 1954 Bom 491 (supra). The facts set out in paragraph 11 ante do make this bundle. But, "Belgachia" says, another fact enters this bundle: that on February 19, 1968, it received CAB's letter dated February 17, previous, at 25 Indra Biswas Road, within the territorial limits of the Sealdah Court's jurisdiction, as averred in paragraph 23 of the plaint. It is that letter by which CAB Secretary Koley communicated to "Belgachia" the Working Committee's decision dated February 15, 1968, upholding the Tournament Committee and rejecting "Belgachia's" appeal. The original letter is exhibit 2. It is to the address of

"The Hony. General Secretary,
Belgachia United Club,
Club Pavilion, Tala Park,
Calcutta-37."

No Indra Biswas Road is here. But that does not matter. Because Tala Park too appears to be within the Sealdah Court's jurisdiction. What matters is that such communication forms no part of the cause of action which was complete by the unanimous resolution of the Working Committee in its meeting at Eden Gardens, Calcutta, on February 15, 1968 — a resolution "Belgachia's" representative present in the meeting, namely, Dr. Munshi, was posted with almost then and there, as sworn to by CAB member Ashok Chatterjee, to deny which Munshi does not pledge his oath. Indeed, "Belgachia" calls no witness at the hearing of the issues directed by Chatterjee, J.

14. True it is that Ashok Chatterjee says on cross-examination: CAB does intimate officially and in writing the result of the appeal to the club concerned. So what? Does it thereby become part of the cause of action, the last essential fact in the bundle of facts, that make cause of action, being the rejection of "Belgachia's" appeal and communication of such

rejection to its representative Munshi Test it in the light of universally accepted definitions that go before. Say, at the trial "Belgachia" proves all the essential facts set out in paragraph 11, but does not prove this letter. Will its suit fail? Will it give CAB an immediate right to judgment? Certainly not. Or, is it a material fact to be proved to entitle "Belgachia" to succeed? The same answer No. The material facts are those paragraph 11 lists. To prove those facts is to prove the suit, as laid, unless there be any infirmity which goes to its root. (More of which hereafter in paragraph 19 et seq infra.) A letter as this is, at best, the written evidence of the last essential fact of the bundle of facts which make cause of action. As Lord Esber, M. R., puts it in (1888) 22 QB 128 (supra) Cause of action does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. That then is the test. The last fact to be proved is the rejection of "Belgachia's" appeal. The evidence to prove it is the oral testimony of Munshi present in the meeting of the Working Committee on February 15, 1968 and the written document in the shape of the letter dated February 17 1968 received by "Belgachia" at the Club Pavilion, Talla Park, Exhibit 2. Let not evidence of a fact be confused with the fact itself.

15 CAB's letter of February 17, 1968, is evidence of a fact in the bundle of facts which make the cause of action. It is not a fact in that bundle. The reason why it is pleaded as part of the cause of action may well be the analogy furnished by that class of case on contracts by correspondence, where the mere posting of the offer or the receipt of the acceptance by post is held to be part of the cause of action. *Engineering Supplies, Ltd. v. Dhandhanian and Co.*, ILR 58 Cal 539=(AIR 1931 Cal 659), is one such case, followed by others apart from the fact that, in the *Engineering Supplies, Ltd.*, case, ILR 58 Cal 539=(AIR 1931 Cal 659) there was a CIF contract under which the goods had to be delivered at Calcutta, where, therefore part of cause of action did arise, the view that the posting of the offer or the receipt of the acceptance is part of the cause of action, can no longer be regarded as good law. The law now is an offer is made, not where it is sent from, but where it is received. The law now is the acceptance is complete, not where or when it is received, but so soon as the letter of acceptance is put into the post-box or the telegram is handed in for despatch. *Bhagwandas Goverdhandas Kedia v. Girdharilal Parshotamdas & Co.*, (1966) 1 S.C.A. 166=(AIR 1966 SC 543, approving the *Baroda Oil Cake Traders* case, ILR (1954) Bom 1137

=AIR 1954 Bom 491 (supra), where the *Engineering Supplies, Ltd.*, case, ILR 58 Cal 539=(AIR 1931 Cal 659 (supra), is dis-sented from, and where a matter as this: the posting of the offer or the receipt of the acceptance: is relegated to the realm of *res gestae* as distinguished from cause of action.

16. So, such analogy, if at the back of the pleading which makes receipt of CAB's letter on February 19, 1968, part of the cause of action cannot help matters forward for "Belgachia". Nor can *Debabrata Basu v. Institute of Chartered Accountants*, AIR 1952 Cal 189. There the plaintiff, a Chartered Accountant, charged his articled clerk a premium of Rs. 2000/- — a sum which he would not refund, in spite of a regulation prescribing just that: refund within a period stipulated. The articles of apprenticeship, executed in Calcutta, were despatched from Calcutta to Delhi for registration. They were despatched so, to the Secretary of the Council of the Institute of Chartered Accountants. The Institute refused to register the Articles which, it was maintained, offended against the regulation concerned. That led to the suit for, amongst others, a declaration that the impugned regulation had come on the edge of Section 30 of the Chartered Accountants Act 1949. The objection as to jurisdiction of the Calcutta Court was negatived on three considerations. (i) execution of the articles of apprenticeship in Calcutta, (ii) despatch thereof from Calcutta to Delhi accompanied by a request for registration, and (iii) communication by the Institute to the plaintiff in Calcutta of the refusal to register. Each of the first two facts does form part of the cause of action. So does the last fact which the plaintiff did not know right at Delhi, by having been present at the deliberations of the Council, but came to know only on receipt of such communication, just the opposite of what is ~~seen here~~. "Belgachia" knew of its appeal having come to little, right at the Eden Gardens, Calcutta, on February 15, 1968. As the learned Appellate Judge correctly points out, in *Debabrata's* case, AIR 1952 Cal 187, "the last communication was an integral part of the whole chain of facts constituting the cause of action." Not so, however, in the case in hand. "Belgachia", in a meeting of its executive committee on February 17, 1968 — two days ahead of the receipt of the letter now made a point of so much, — passed a resolution — resolution No 11 — authorizing Secretary Ujjal Talukdar "to take all necessary measures, including measures under legal procedure of Indian Judiciary, in connection with the abandoned game in CAB 2nd Division League, between George Telegraph and ours, against the decision of CAB Working Committee". See Annexure "B" to

Secretary Ujjal Talukdar's affidavit dated April 20, 1968, in the Court of appeal below. It is, therefore, proved to demonstration that "Belgachia" knew of CAB Working Committee's decision not on February 19, 1968, when that letter was received, but earlier, even on February 17, 1968, on its own showing. And on its adversary's showing, "Belgachia" was told of the Working Committee's decision the very day it was made, that is, on February 15, 1968, when its cause of action was complete.

17. Even an infinitesimal fraction of a cause of action will be part of the cause of action and confer jurisdiction on the Court within the territorial limits of which that little occurs: *Munirangappa v. Venkatappa*, AIR 1965 Mys 316. This salutary and obvious interpretation of Section 20, clause (c), of the Procedure Code is not denied. What is denied, in the facts of the case, is that any part of the cause of action arose within the territorial limits of the Sealdah Court.

18. I, therefore, find no error, far less any jurisdictional error, on the part of the learned Appellate Judge in having come to the conclusion that the learned Munsiff lacks jurisdiction to entertain the suit. Necessarily, I have no jurisdiction, under Section 115 of the Procedure Code, to interfere with the finding so come to. So, a temporary injunction by a Court in a suit, which it has not even the jurisdiction to entertain, appears to be out of the question. On this consideration alone, the rule is bound to fail.

19. There is another consideration yet leading to the same conclusion. Let it be assumed that "Belgachia's" suit is a suit of civil nature. But that will not convert a Court into a Court of appeal, seized of a full-fledged appeal as it were, from the decision of a domestic tribunal as the CAB or its Working Committee is. Not that a tribunal as this can do anything it likes, throwing everything to the winds. But the jurisdiction of the Court is of a very limited character. Generally speaking, the Court can set aside the decision of a domestic tribunal on one of the three basic considerations set out below:

A. when the tribunal oversteps the limits of its jurisdiction:

B. when it violates the principles of natural justice:

C. when it acts dishonestly, actuated by bias, bad faith and the like.

20. This is the law laid down by a long line of cases, such as, to cite but a few, *Lennox Arthur Patrick O'Reilly v. Cyril Cuthbert Gitters*, 54 Cal WN 124= AIR 1949 PC 313, *State Medical Faculty of West Bengal v. Kshiti Bhusan Dutt*, 64 Cal WN 842=(AIR 1963 Cal 31), *T. P. Daver v. Lodge Victoria*, AIR 1963 SC 1144, and *Sri Gopal Jalan & Co. v. Sin-*

ghania Brothers, AIR 1965 Cal 531. Translate such law to the facts that emerge in the case in hand. That the CAB acted within its jurisdiction does not appear to be arguable even. Rule 20, captioned "Protest and Appeal", of the CAB League and Knock-out Rules, at pages 10 and 11, admits of a dichotomy. By clause (a) thereof is provided the lodging of a protest and the manner of lodging it to the "Tournament Sub-Committee". By clause (b) thereof is provided inter alia the lodging of an appeal, and the manner of lodging it too, from the decision of the "Tournament Sub-Committee", to the CAB Working Committee. Rule 21 of the Memorandum of Rules of the CAB provides for as much too:

"No appeals shall lie against any Sub-Committees except the Tournament Committee relating to their decisions on protests." : page 24.

Again, one of the functions of the Tournament Committee is "to hear and dispose of complaints and protests in connection with matches": vide Rule 21 (v) (d) at page 27 *ibid.* And then comes Rule 39 (pp. 41 & 42 *ibid.*) specifically providing for an appeal to the Working Committee from the decision of the Tournament Committee and laying down that the appellate decision of such a body "shall be final and binding to (on ?) the parties concerned." The conclusion must, therefore, be that the CAB and its committees acted within their jurisdiction.

21. Now comes the second consideration rested on violation of, or adherence to, the principles of natural justice. One has only to read the proceedings, as minuted, of the meeting of the Working Committee of the CAB on February 15, 1968, in order to be convinced what pains the members took, individually and collectively, to thrash out all the divers considerations touching "Belgachia's" appeal. A domestic tribunal, not bound by the rules of evidence, and, indeed, ignorant of such rules, is never to be equated with a Court of law, wedded to just that: the law of evidence. Yet the minuted proceedings reveal a high standard, so much so, that the impression left on an unbiased mind, after a perusal thereof, is the impression of the Chairman acting admirably as a judge would, and the members participating in the deliberations, no less admirably, as counsel, well-posted with their briefs, would. Here is a resume of such proceedings, under suitable headings, with such comments, as commend themselves to me:

I. Appeal barred in limine?

On the foot of Rule 21 of the CAB Memorandum and Rules and Rule 20 of the CAB League and Knock-out rules a preliminary point was raised about the admissibility of "Belgachia's" appeal. The Chairman heard the members, who had

spoken on the point, and ruled that the appeal was admissible and should be considered by the Working Committee.

II. Further and better information.

CAB Secretary told the members, on a point of information, that the Tournament Committee had unanimously decided to consider all the matches of January 14, 1968, as drawn, finished as they could not be, after start, due to rains. So, the disputed match only, between "Belgachia" and George Telegraphs, was not reckoned as drawn. All the matches played that day were. It is a point to be remembered.

III. Replay of the disputed match, abandoned on January 14, 1968

The burden of the appeal is replay only not anything else, such as violation of this rule or that, now sought to be made a capital of. See the original undated letter of appeal where the date of the match is wrongly put as December 14, 1967. Naturally, a point arose in the course of discussions in the meeting of the Working Committee: why not a replay, if both "Belgachia" and George Telegraphs were willing to have the match played again? But that was not the only match played on that day. So, no discrimination could perhaps be made, and was made, in favour of these two teams, to the exclusion of others. About George Telegraphs having expressed willingness to play over again, nothing is on record over the signature of George Telegraph's office-bearer "Belgachia's" written appeal attributes such willingness to them. And the particular member of the Working Committee, presumably taking his cue from that, raised the point: 'why not a replay, if both were willing to go in for it?' The accent is on 'if'. That apart, taking the worst view of the matter against CAB, "Belgachia" and George Telegraphs were only thinking about themselves; but CAB's committees were thinking, as indeed they had to, about all.

IV. Replay and Rules.

A replay was recommended by some and opposed by others, each quoting rules on the stand taken. Four views were put forward—

First: Rule 2 of the Match Regulations (page 12), by clause (a), sub-clause (ii), provides for a 3-hour play by each team in a one-day match, clause (b), sub-clause (i) providing for alteration of the time-limit of 3 hours, when one of the two competing sides turns up late. "Belgachia" having been deprived of this minimal of 3 hours, "equity and fairness of sport" did call for a replay of the abandoned match.

Second, a call as this in the name of equity and fair play was resisted on the ground that Rule 2, clause (a), sub-clause (ii), bears:

"Each side should ordinarily bat for three hours", and emphasis was laid on the word "ordinarily".

Third, the Tournament Committee had no right to divide the points to the two clubs for such unfinished matches, the CAB League and Knock-out rules being silent about such a contingency. In support of the stance taken, Law 22 of MCC Laws of Cricket was referred to.

Fourth, Came the reply that Law 22 would indicate just the opposite. Reliance was placed on Rule 1: Laws of the Game, of the Match Regulations at page 12 of the booklet: The CAB League & Knock-out Rules—

"1. Except as provided in these rules, the official Laws of Cricket by MCC shall govern the competition."

The whole of Law 22 of the MCC Laws of Cricket was quoted:

"The Result,

22.— A match is won by the side which shall have scored a total of runs in excess of the scored by the opposing side in its two completed innings; one-day matches, unless thus played out shall be decided by the first innings. A match may also be determined by being given up as lost by one of the sides or if the case governed by Law 17. A match not determined in any of these ways shall count as a Draw"
Law 17, in so far as it is material here bears

"At the start of each innings and of each day's play and at the end of any interval the Umpire at the Bowler's end shall call 'Play', when the side refusing to play shall lose the match."

It was, therefore, contended that the impugned, abandoned match should count as "drawn", the CAB League and Knock-out Rules providing for no such contingency, and, what is more, prescribing, by Rule 1 (quoted above), that MCC Laws (Law 22 here) would govern the matter.

Indeed Law 22 fits the facts here so nicely. It was a one-day match. It could not be played out. It could not be decided either, by the first innings. Indeed, the "Game had to be stopped by the Umpire", due to rains, as the plaint, by paragraph 9, avers. It was not determined by having been given up as lost by one of the sides. It was not a case of any one of the two sides refusing to play after the call "Play" by the Umpire. Ergo, it was not a match not determined in any of these ways. The ineluctable conclusion could therefore only be that the impugned, abandoned match would count as a "Draw".

V. "Belgachia's" representative heard. What is minutely records:

"The representative of the Belgachia United Club was then called at the meet-

ing and was asked to give his viewpoints in support of his appeal."

Who that representative is evidence discloses: Dr. Manab Munshi (paragraphs 11 and 13 ante.).

22. After these illuminating minutes, with no rebutting oral testimony on oath, in spite of the excellent opportunity for that given by Chatterjee, J., it is very bold to contend that there has been infraction of the principles of natural justice. A fairer consideration of the pros and cons of the point at issue could not have been there. No wonder, the Working Committee resolved unanimously:

That the decision taken by the Tournament Committee be upheld."

"Belgachia's" appeal thus stood rejected.

23. It is, however, said: 'But the Tournament Committee gave us no hearing and came thereby on the edge of the principles of natural justice.' "Belgachia's" undated letter of appeal, Exhibit C, however, makes no point of it. So, this procedural right, if that appears to have been waived, as indeed it can be. In AIR 1963 SC 1144 (supra), a notice short of 14 days, as prescribed by the rules, was not complained of and regarded as waived. That apart, hearing or no hearing, Law 22 of the MCC, which rules the matter, is the answer and clinches the point. A replay there could not be.

24. Now, the third consideration, referred to in paragraph 29 ante, remains. Did the CAB act honestly? The proceedings of the Working Committee's meeting on February 15, 1968, proclaim honesty. Dishonesty, which is but a synonym of mala fide, is sought to be spelt out in another way. CAB President Amarendra Nath Ghose is the president of Satya Sandhi Club, also in Group "E" of the Second Division League. A replay would have given "Belgachia" a chance of becoming the Group champion of Group E "in preference to the said Satya Sandhi Club" and the Second Division Champion too with "the honour of being promoted to the First Division". The insinuation, therefore, is that the hidden hand of Amarendra Nath Ghose is there in the rejection of "Belgachia's" appeal for a replay. This is, of course, denied in the affidavit in opposition as "absolutely misconceived, mala fide, and malicious". To say the least, there must be first-rate evidence to enable the court to arrive at so serious a finding. But there is not a suspicion of evidence even. "Belgachia", be it said at the risk of repetition, having called no witnesses in the trial Court. It becomes, therefore, impossible for a court to find dishonesty, on the materials it has had put before it.

25. There is another way of looking at the problem: does the decision come to by the CAB Working Committee ride

rough-shod over the very Rules creating the CAB and its Working Committee both? If it does, it is for the court to intervene and set aside such illegality. An approach as this rests on *Lee v. Showmen's Guild of Great Britain*, (1952) 1 All ER 1175, where a committee, the domestic tribunal there, misconstrued Rule 15 (c) in finding that the plaintiff had been guilty of "unfair competition" within the meaning of that rule. That being so, it was held, the committee had acted ultra vires and its decision to expel the plaintiff was void. This, then, is one class of case where the decisions of the domestic tribunals, based on a misconstruction at law, are upset by the Courts, the other class being what has come to be known as club cases, where the opinion of a domestic tribunal on a matter which is primarily one of opinion, the Courts do not interfere with.

26. It is therefore urged on behalf of "Belgachia" that certain rules of the CAB League and Knock-out Rules have been broken: such as Rule 11 about the confidential report on Umpiring by the captain of each team, Rule 12 providing for appointment of Umpires, the emphasis being on the plural number, Rule 13 on the fitness of the pitch, ground and light, to be decided by the umpires (plural number again); giving thereby ample jurisdiction to the Court to undo what has been done by the CAB Working Committee. But what was the appeal by "Belgachia" about? Replay, replay and replay; not violation of this rule or that. So, here again, on the authority of the Supreme Court decision in *T. P. Daver's* case, AIR 1963 SC 1144 (supra), the procedural rights flowing from these rules appear to have been waived, nothing to say of the fact that such deviation, if that, from the rules, and misconstruction thereof, are not one and the same thing.

27. On merits, the letter dated January 15, 1968, Exhibit A, (not dated January 18, 1968, as mistyped in Annexure A to Secretary Koley's affidavit of March 25, 1968, in the Court of appeal below), of Umpire Arun Sarkar tells. At 11-10 a.m. or thereabouts on January 14, 1968, when the impugned match was on, the play had to be suspended for 20 minutes, on an appeal from the batting side ("Belgachia") "against weather and light." Play resumed, "it started raining heavily" at or about 12.00 p.m. Both sides appealed. And the match had to be suspended again at 12.05 p.m. By then the ground had become "absolutely unfit and dangerous from the players' point of view." Even the captains agreed to abandon the match for the day. The Umpire concludes: "The condition of the ground went beyond recovery; further resumption was not possible."

28. Captain Pradip Kumar Bose of "Belgachia" and Leg-Umpire Mukul Banerjee of the impugned match answer Umpire Arun Sarkar by an affidavit each, sworn to on April 20 1968 Based on the same pattern, all they say in answer is: 'Umpire Arun Sarkar stopped the match at 1205 hours without consulting them, the captain of George Telegraph Sports Club and the two batsmen at the crease, and left the ground never to come back' This is but a poor answer, not denying even the sorry state, to which the ground was reduced, so clearly and categorically stated by Umpire Arun Sarkar and not traversing too his statement that both sides had appealed and that the captains of the two teams had agreed to abandon the match for the day. If they had agreed so as looks patent enough, — for all the matches of that day were abandoned — why should they be consulted over again? And lack of consultation is the only point which Captain Pradip Bose and Leg-umpire Mukul Banerjee make in their affidavits. Such affidavits secure marks for dexterity but not for straightforwardness. On top of that the averment in the plaint is there to say it again "The said Game had to be stopped by the umpire due to rains" So on merits too, 'Belgachia' appears to have nothing like a case to go to trial.

29 There is another consideration yet, Rule 5 of the Memorandum and Rules of CAB provides inter alia.

"(a) The Association shall consist of cricket-playing clubs, associations or organizations as may be affiliated thereto" 'Belgachia' is one such club. What is Rule 39 like has been noticed, paragraph 20. The appellate decision of the CAB Working Committee shall be final and binding on the parties concerned. Now, turn to Rule 40 which bears.

"Interpretation of Rules

40 The Committee shall be the sole authority for interpretation of these rules and of the bye-laws and regulations made thereunder and its decision taken under the rules or upon any question or interpretation or upon any matters affecting the Association and not provided for in these rules or bye-laws or regulations made thereunder shall be final and binding on the members."

30 Thus, it is plain to be seen that the source of CAB's powers is the contract on the foot of which "Belgachia" has become one of its members. And by such contract "Belgachia" is bound. Not that either Rule 39 or Rule 40 completely ousts the jurisdiction of the Courts, as rightly contended on behalf of the petitioner. It does not. The Court's jurisdiction is always there but subject to limitations recorded in the foregoing lines. In facts and at law, "Belgachia

has failed to bring itself within any one of those limitations. First and last, the object of so many rules, only some of which I have been referred to and gone by, is to play cricket. To make a bee-line for the nearest Court, on grounds this litigation reveals, is not playing cricket. All the facts and circumstances weaved together compel me to hold that 'Belgachia', the petitioner in this rule, has no *prima facie* case in support of the right claimed, and cannot, therefore, have the discretionary relief of a temporary injunction, wrongly granted by the Judge in the Court of first instance and rightly refused by the Judge in the Court of Appeal below.

31. In the result, the rule fails and do stand discharged with costs. Hearing fee — 30 gold mohurs.

The records be sent down with the utmost expedition.

BDB/DVC,

Rule discharged.

AIR 1969 CALCUTTA 232 (V 56 C 40)

N C. TALUKDAR, J

Ganesh Chandra Seal, Petitioner v Pabitra Kumar Dey, Opposita Party
Criminal Revn. No 734 of 1968, D/- 8-8-1968

(A) Penal Code (1860), Ss. 420 and 379 — Registered partnership existing between complainant and accused — Yet offences under Ss 420 or 379 not ruled out.

An existing partnership between the complainant and the accused will not rule out the commission of offences under Ss 420 and 379 by the accused with respect to Partnership property. It cannot therefore be said that in view of such partnership proceedings against the accused for offences under S 420 are unwarranted. AIR 1951 Cal 69 (FB) Foll.

(Para 4)

(B) Penal Code (1860), Ss. 420 and 379 — Mens rea — Accused owner of taxi — Accused also having requisite token, insurance certificate, blue book and R.T.A. permit — Registered partnership for running taxi existing between complainant and accused — Evidence not showing criminal mind on the part of accused — Proceedings against accused under S 420 not maintainable.

Where an accused, owner of a taxi and also having the requisite token, insurance certificate, blue book and R.T.A. permit, is charged with offence under S 420 Penal Code but a registered partnership exists between the complainant and the accused for running the taxi and the evidence does not show a criminal mind on the part of the accused, the proceedings

HL/KL/D858/68

against the accused are not maintainable.

(Para 4)

A motor vehicle is not just an ordinary "chattel-personal" and rights and obligations attached thereto are for being observed not in their breach. A dispute between the parties based on a registered partnership can better be determined in a civil court. A criminal proceeding connotes and predicates dishonesty on the part of the accused. In view of the relationship between the parties and on the evidence there being no criminal mind on the part of the accused, the proceedings against him are not maintainable.

(Para 4)

Cases Referred: Chronological Paras

(1951) AIR 1951 Cal 69 (V 38)=55

Cal WN 541=52 Cri LJ 723

(FB), Bhuban Mohan v. Surendra

Mohan

4

Sanat Kumar Mukherjee and Jahar Lal Roy, for Petitioner; Surathi Mohan Sanjal and Biman Kanti Basu, for Opposite Party.

ORDER:— This Rule is for setting aside a charge dated 2-5-68 framed under Section 420 of the Indian Penal Code and for quashing the proceedings based thereupon, being case No. C 870 of 1966, pending in the Court of Shri J. C. Ghosh, Magistrate, 1st Class, Alipore.

2. The facts leading on to this Rule are short and simple. The accused-petitioner is the owner of a taxi-cab bearing number W.B.T. 2286 having the requisite insurance-certificate, the tax-token and the blue-book in his name. He also has the necessary R. T. A. permit in his favour. A registered partnership was entered into between the petitioner as also the complainant opposite party on 20-1-62 for the purpose of running the taxi and to carry on business in transport. There was difference between the parties over the terms and conditions and the complainant's case is that the petitioner took over the taxi on 20-5-66 from the driver of the opposite party and is since then in possession thereof. A diary was lodged at the Shampukur Police-Station on the same date. The vehicle was seized and both the parties filed their respective claims before the Police Magistrate at Alipore. The Police Magistrate after hearing both the sides and on a perusal of the relevant papers, made over the custody of the taxi to the present petitioner on 30-5-66. The case of the petitioner is that he had bona fide taken over the taxi from the complainant-opposite party because of the breach of the terms and conditions of the registered agreement and there was no dishonesty on his part. A petition of complaint was filed by the complainant-opposite party under Section 411 of the Indian Penal Code against the petitioner on 28-5-66 and the Police Magistrate at Alipore was pleased

to direct the Tollygunge Police to enquire and report. The report ended in favour of the accused-petitioner and the complainant filed a naraji thereto and upon a judicial enquiry which followed, the accused-petitioner was ultimately summoned under Section 379, I. P. C. The case was thereafter transferred to the file of Shri J. C. Ghosh, Magistrate, 1st Class, Alipore, for disposal. In course of the trial six witnesses were examined on behalf of the prosecution including the complainant-opposite party (P. W. 1), his driver (P. W. 6), the Manager of the New India Bailing Company (Private) Limited (P. W. 5), a salesman witnessing the partnership deed (P. W. 2) and two formal witnesses belonging to the police. The trying Magistrate ultimately by his order dated 2-5-68 framed a charge against the accused-petitioner under Section 420, I. P. C. It is this charge and the proceeding based thereupon that have been impugned and form the subject-matter of the present Rule.

3. Mr. Sanat Kumar Mukherjee, Advocate (with Mr. Jahar Lal Roy, Advocate) appearing on behalf of the accused-petitioner has made a two-fold submission. Mr. Mukherjee has contended in the first place that in view of the registered partnership between the parties and the nature of the allegations made relating to the terms and conditions thereof, the dispute is essentially of a civil nature and the present proceedings are unwarranted and untenable. The next contention of Mr. Mukherjee is that the petitioner is the registered owner of a motor-vehicle possessing the requisite token, blue-book and insurance-certificate as also the R. T. A. permit and there is no dishonest taking on his part or any mens rea at the inception to bring the case either within the ambit of the offence charged, viz., under Section 420, I. P. C. or under Section 379, I. P. C. or under any other penal provision of the Code.

4. I have heard the arguments advanced by the learned Advocates appearing on behalf of both the parties and I have also been taken through the evidence on record. So far as the first contention of Mr. Mukherjee is concerned as to the non-maintainability of the present proceedings on the ground of an existing registered partnership between the parties is, upon ultimate analysis, untenable. In the first place, an existing partnership between the parties would not rule out offences under Section 420 or 379, I. P. C. Moreover, as has been observed by their Lordships of the Full Bench in the case of Bhuban Mohan v. Surendra Mohan, 55 Cal WN 541=(AIR 1951 Cal 69) (FB) a partner cannot be charged under Section 406, I. P. C. in respect of partnership property jointly

belonging to him and the complainant excepting in cases where by special agreement fiduciary obligations have been cast. In view of the said observation and in view of the allegations that have been made in the present case on behalf of the complainant, I do not agree with Mr. Mukherjee and his contention in this behalf accordingly falls. I find, however, that there is considerable force behind the next argument put forward by Mr. Mukherjee with regard to the absence of any criminality in the present case in view of the facts and circumstances on the record. It cannot be overlooked that the accused-petitioner, upon ultimate analysis, is the owner of the taxi cab, bearing number W B T. 2286 having the requisite token, insurance-certificate, the blue-book as also the R.T.A. permit. A motor-vehicle is not just an ordinary "chattel-personal" and rights and obligations are attached thereto which are meant for being observed not in their breach. If some money has been advanced by the accused-petitioner on the basis of a registered agreement, that has been entered into between the parties, the relief that ultimately lies with him is elsewhere. A proceeding in a Criminal Court connotes and predicates dishonesty on the part of the accused-petitioner and I find that in the circumstances of the present case the same is non est. A dispute between the parties based on a registered partnership agreement may better be determined in the Civil Court. In this connection a reference may be made to the evidence of P. W. 1, the complainant himself. In his examination-in-chief he has clearly stated that he entered into a partnership deed with the accused in respect of the cab in question and the same was registered. The deed has been proved as Exhibit 1. Later on in terms of the agreement the cab was being run and that on 20-5-66 his driver came back and reported to him that an unknown person had taken away the taxi from him. A diary was lodged and the present proceedings followed. P. W. 2, Dipi Chatterjee also refers to the partnership-deed between the parties in respect of the taxi-cab in question. P. W. 5 who is the Manager of the New India Bailing Co. (Private) Ltd. is a material witness. He admitted that his company let out on a hire-purchase agreement to the accused-petitioner, Ganesb Chandra Seal, an Ambassador car which was converted into a taxi, viz., W B T. 2286. The complainant-opposite party was the guarantor in the said hire-purchase agreement. The receipts for the monthly payments have been filed in this case and it is the case of the complainant-opposite party that although the receipts bear the name of the accused-petitioner because he is the registered owner of the

taxi-cab, the money was in fact paid by him. The evidence of P. W. 5, Jagdish Narayan Todt, also supports that when he states that excepting the loan instalment which was for Rs. 526 60 P. the other instalments were paid by P. K. De. The last witness is P. W. 6, the driver. The evidence given by him is rather curious. He is said to have left the car to change a ten-rupee note and when he came back he found another person also, apart from the original passenger, to be seated in the taxi and the said gentleman claimed the taxi to be his own. He further states that he went to the Sham-bazar Police Station to lodge a diary and informed the complainant-opposite party of the incident. His evidence further is that he only drove the taxi for about two months. Having traversed the evidence as referred to above, it is difficult for me to hold that there was any blame-worthy mind on the part of the accused-petitioner at the inception and the dispute that undoubtedly appears to exist between the parties is one which can better be determined by the Civil Court. As I have already observed, a motor-vehicle is not just another "chattel-personal" and the owner thereof has got some rights as well as liabilities. In view of the relationship between the parties and in view of the nature of the evidence on record, I hold that there is considerable force behind the argument advanced by Mr. Mukherjee in this behalf and the same accordingly succeeds.

5. In the result, I make the Rule absolute set aside the charge as framed by Shri J. C. Ghosh, Magistrate, 1st Class, Alipore, on 2-5-68 under Section 420 I.P.C. in case No. C.870 of 1966; and I quash the proceeding based thereupon.

JRM/D.V.C.

Petition allowed.

AIR 1958 CALCUTTA 234 (V 58 C 45)
R. N. DUTT AND T. P. MUKHERJI, JJ.
 Narayan Chandra Ghosh, Petitioner v
 The State of West Bengal and others,
 Respondents.

Criminal Misc. Case No. 186 of 1967,
 D/- 26-7-1968.

Public Safety — Preventive Detention Act (1950). Ss. 11-A, 13 and 14 — Detention order expires on expiry of 12 months from date of detention — Interim bail by Court or release on parole by Government cannot operate as suspension of detention order: AIR 1936 All 107, Dissenting. (Para 4)

Cases Referred: Chronological Paras (1936) AIR 1936 All 107 (V 23) = 36 Cri LJ 155, Emperor v. Masuria 4

ILJL/E15/68

Mrs. Mukti Maitra, for Petitioner; S. N. Banerjee and Anil Kumar Sen, for Respondents.

R. N. DUTT, J.:— This is an application under Section 491 of the Code of Criminal Procedure for a Writ in the nature of Habeas Corpus against the detention without trial of Baidyanath Ghosh under sub-section (2) of Section 3 of the Preventive Detention Act.

2. The detenu, Baidyanath Ghosh was taken into custody on July 7, 1967 on the basis of a detention order made by the District Magistrate, Birbhum on the same day under Section 3 (2) of the Preventive Detention Act, 1950.

3. This application under Section 491 of the Code was made on July 28, 1967, when this Rule was issued. Subsequently, on an application on behalf of the detenu, on September 28, 1967, the detenu was released on interim bail pending the hearing of the Rule. The Rule could be taken up for hearing only today.

4. Mrs. Maitra, on behalf of the petitioner submits that the maximum period of detention, viz., one year has since expired and so the order of detention has lost its force and has expired by efflux of time. Mr. Sen on the other hand submits that the period during which the detenu has been on bail should be deducted in calculating the period of one year from the date of detention and so the order of detention cannot be said to have either lost its force or expired by this time. The decision on this question rests on the interpretation of the relevant sections of the Preventive Detention Act, viz., Sections 11A, 13 and 14. Under Section 11A the maximum period for which any person may be detained without trial in pursuance of any detention order shall be 12 months from the date of detention. The detenu in this case has been detained with effect from July 7, 1967. So the period of one year has expired on July 6, 1968. On a literal interpretation, therefore, it must be said that the detention order has lost its force and the maximum period of detention has expired. But Mr. Sen argues that the detention order should be taken to have remained suspended (for) the period during which the detenu has been on bail under orders of this Court. He relies on the principle incorporated in Section 426 of the Code that when a convicted person makes an appeal and is released on bail the sentence of imprisonment remains suspended during the period of bail. Mr. Sen also refers to the decision in *Emperor v. Masuria*, AIR 1936 All 107 where it has been said that even apart from the provisions of Section 426 of the Code, when a person sentenced to imprisonment on failure of executing a bond under Section 123 of

the Code is granted bail on appeal, the sentence of imprisonment remains suspended during the period he remains on bail. Section 426 of the Code provides that when a person sentenced to imprisonment files an appeal, the Appellate Court may order that the execution of the sentence be suspended. Here the Appellate Court itself suspends the execution of the sentence. The same principle applies in the case of sentence of imprisonment on failure to execute bonds under Section 123 of the Code. These are cases of sentence of imprisonment. But the detention under the Preventive Detention Act is not imprisonment but preventive detention and the maximum period of such detention cannot exceed 12 months from the date of detention. Once the detention order is made effective by taking the detenu into custody, the period of 12 months starts to run out from the date of detention. The Court has power to grant him interim bail. But, that does not operate as suspension of the detention order because, under the Preventive Detention Act itself, the detention order has to expire on the expiry of 12 months from the date of detention. This will be clear from Section 13 (2) of the Act which is as follows:—

"13 (2). The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made."

The Legislature, therefore, contemplated 'expiry of the detention order' and Section 11A makes it clear when the detention order expires, that is, on the expiry of 12 months from the date of detention. If the 'detention order' expires after the lapse of 12 months from the date of detention, then, though the detenu has been on bail under orders of Court, the 'detention order' cannot remain alive after the lapse of 12 months from the date of detention. Section 14 also makes it clear. Under Section 14, the Government has a right to release the detenu on parole. But the law does not provide that when the Government releases the detenu on parole, the detention order will survive even after the expiry of 12 months from the date of detention or, in other words, Section 14 makes it clear that, even if a detenu is released on parole by the Government, the detention order will expire with the expiry of 12 months from the date of detention. The same principle should apply when instead of the detenu being released by the Government on parole the detenu is released by orders of the Court because of the basic fact

that the 'detention order' expires on the expiry of 12 months from the date of detention. We are, therefore, unable to accept the contention of Mr Sen and we hold that, since 12 months have expired from the date when the detenu was taken into custody, the 'detention order' must be said to have lost its force, in other words must be said to have expired.

5 The present Rule has, therefore, become infructuous and stands discharged. The detenu is discharged from his bail bond.

6 This order will govern Criminal Miscellaneous Cases Nos. 190 191, 265, 317, 333, 341, 343, 344, 351, 353 356, 417, 428 448, 450 and 498 of 1967 as the same principle of law is involved because in all these cases 12 months have expired from the respective dates on which the respective detenus were taken into custody.

7 T P MUKHERJI, J.—I agree.
RSK/DVC Order accordingly.

AIR 1969 CALCUTTA 236 (V 56 C 42)

B N BANERJEE AND K. L. ROY, JJ

Commissioner of Income-tax, Applicant
v M/s. Central India Industries, Morar,
Respondent.

Income-tax Ref. No 155 of 1963, D/-
15-11-1967

Income-tax Act (1922) S 2 (6A) — Dividend paid in form of shares of a limited company — Valuation of shares cannot be made by adopting market rate, and the quantum of dividend cannot be determined at a rate higher than rate at which dividend was declared, especially when there is no attempt to defraud revenue. (Paras 7, 8, 9)

Cases Referred Chronological Paras
(1961) AIR 1961 SC 1038 (V 48)=

1961-41 ITR 275, Kantilal Manilal
v Commr of Income-tax, Bombay 4, 5
B L. Pal with D K. Sen, for Ap-
pellant Dr Debi Pal, for Respondent.

BANERJEE, J.:— This reference, under Section 66 (1) of the Income-tax Act, has been made in circumstances hereinafter related.

2. During the accounting year ended on March 31 1959 (the assessment year being 1959-60) the assessee held 4,58,071 shares in a company known as Palani Investment Corporation Ltd. and became entitled to receive as dividend Rs. 1,83,228 40 P at the rate of 40 P per share, namely the declared rate of dividend. This dividend was paid to the assessee in the form of,

- | | |
|---|-----------------|
| (a) 13,087 shares of Gwalior Rayon and Silk Manufacturing Co Ltd., @ Rs. 10/- per share | Rs. 1,30,870/- |
| (b) 416 shares of Hind Cycles Ltd. @ Rs 125 per share | Rs. 52,000/- |
| (c) In cash | Rs. 358/40 |
| | Rs. 1,83,228/40 |

The Income-tax Officer valued the shares of Gwalior Rayon and Silk Manufacturing Co Ltd. and Hind Cycles Ltd., at the market rate, namely, at Rs. 14.60 p per share for Gwalior Rayon and Silk Manufacturing Co Ltd. and at Rs 128 50, per share, for Hind Cycles Ltd. and came to the conclusion that the total shares, received by the assessee in the aforesaid two companies, were equivalent in terms of money to Rs. 2,44,526/- Since the assessee had shown the value of the shares at Rs. 1,82,870/- only be added back the difference between Rs. 2,44,526/- and Rs. 1,82,870/- namely, Rs. 61,656/- to the assessee's income as dividend.

3 On appeal by the assessee, the Appellate Assistant Commissioner dismissed the appeal with the observation that the money's worth of the shares received by the assessee represented the assessee's income and came under the definition of dividend as in Section 2 (6A) of the Indian Income-tax Act.

4. On the further appeal to the Appellate Tribunal, the assessee succeeded. The Tribunal observed.

"A dividend, in its ordinary meaning, is a distribution of the share of profits or incomes of a company given to its shareholders. The definition thereto as laid down under Section 2 (6A) of the Act, however, gives an extended meaning to that expression inasmuch as it includes in its connotation such other receipts also as are set out in the definition. One such is laid down under sub-clause (a) of the said Section 2 (6A), which reads as follows—

"Any distribution by a company of accumulated profits whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company"

In order, therefore, to bring any distribution within the category of dividend it must be proved as a fact that what was distributed by a company was its accumulated profits. In the instant case, no such thing has been done. On the contrary although the department is trying to value the share scrips, according to the market value when they have reached the hands of the assessee, in the hands of the distributing company, however, the said share scrips have been accepted to be of the value put upon them by the distributing company. The department,

obviously, cannot adopt two standings of value in respect of the same item.

The departmental Representative also placed reliance upon the decision of their Lordships of the Supreme Court in the case of Kantilal Manilal, (1961) 41 ITR 275=(AIR 1961 SC 1038). The relevant observation, upon which great stress has been laid by the Departmental Representative, reads as follows:—

"If instead of selling the right in the market and then distributing the proceeds, the mills directly transferred the right, the benefit in the hands of the shareholders was still dividend." In that case the right to purchase shares by the assessee was equated to the distribution of dividends inasmuch as the transferee-holders thereof actually transferred them for much higher value than the one for which they had got them. It was under such circumstances that the value of the right shares, as indicated by the sale price was taken to be the actual dividend received by the transferee. In the instant case, however, no such position arises. Here the assessee-company has received the dividend, partly in the form of cash and partly in the form of share scrips, the latter being kept intact with the assessee itself. It cannot, therefore, be said that the assessee was selling the shares to himself for a higher price, namely, the market value. One cannot trade and earn profit out of one's self. We, therefore, hold that the value of the share scrips as adopted at the annual general meeting of the shareholders of the distributing company must be taken to be the value of the said share scrips when they reached the hands of the assessee-company. The question of a further valuation cannot arise." In the view taken the Tribunal ordered deletion of the sum of Rs. 61,656/- from assessment.

5. Aggrieved by the order of Tribunal, the Revenue asked for and obtained a reference to this Court on the following point:

"Whether, on the facts and in the circumstances of the case, the Tribunal rightly excluded the sum of Rs. 61,656 from being assessed as an extra dividend income of the assessee?"

In contending for a negative answer to the question, the learned Counsel for the Revenue relied upon the decision of the Supreme Court in Kantilal Manilal v. Commissioner of Income-tax, Bombay (1961) 41 ITR 275=(AIR 1961 SC 1038). What happened in that case was that the Bank of India, which had passed a resolution for increasing its share capital, offered new shares of Rs. 50 each to its existing shareholders in the proportion of one new share for every three shares held by them, at a premium of Rs. 50. The Navjivan Mills

Ltd., which held 5,000 shares in the Bank and which became entitled to 1,666 new shares, purchased 66 shares in the Bank and pursuant to a resolution of its board of directors, distributed the right to purchase the remaining 1,600 shares among its shareholders in the proportion of two shares of the Bank for each share held by them in the Mills. The appellants who held 570 shares in the Mills and became entitled to purchase 1,140 new shares of the Bank, agreed to the allotment of those shares and ultimately transferred them to a private company. The assessment of the appellants was reopened under S. 34(1)(a) of the Indian Income-tax Act, on the footing that release by the Mills of shares of the Bank of India amounted to a distribution of dividend and the value of the right released in favour of the shareholders was taxable. The reassessment made on the above footing was unsuccessfully disputed by the assessee and the matter was ultimately taken before the Supreme Court. In delivering the judgment of the Supreme Court, Shah, J., upheld the stand taken by the Revenue, namely, what the appellant got was dividend liable to tax, with the following observation:—

"It was open to the mills to sell the right to the shares of the Bank of India in the market, and to distribute the proceeds among the shareholders. Such a distribution would undoubtedly have been distribution of dividend. If instead of selling the right in the market and then distributing the proceeds, the mills directly transferred the right, the benefit in the hands of the shareholders was still dividend."

The Supreme Court further observed:—

"Dividend need not be distributed in money; it may be distributed by delivery of property or right having monetary value. The resolution, it is true, did not purport to distribute the right amongst the shareholders as dividend. It did not also take the form of a resolution for distribution of dividend; it took the form of distribution of a right which had a monetary value. But by the form of the resolution sanctioning the distribution, the true character of the resolution could not be altered. We are, therefore, of the view that the High Court was right in holding that the distribution of the right to apply for and obtain two shares of the Bank of India (at half their market value) for each share held by the shareholders of the mills amounted to distribution of dividend."

In this case, the amount received by the assessee is admittedly dividend. There is also no dispute that dividend may be paid in cash or in kind. Thus, the Supreme Court decision does not take us further than what is admitted in this case.

6. The question for our consideration is when dividend is paid in the form of property, as in this case in the form of shares of a limited company, can such property be valued at the market rate and the quantum of dividend determined at a rate higher than the rate at which the dividend was declared. In other words, can it be said what was received by the assessee was not dividend at the declared rate but something more?

7. Now, the material portion of Section 2 (6A) of the Indian Income-tax Act, defining dividend, reads:

"Dividend includes:

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company"

In order therefore, to bring any distribution within the category of dividend, it must appear what was distributed by the company was its accumulated profit. It does not appear that in the hands of Pilani Investment Corporation Ltd., the accumulated profit, in the shape of shares of Gwallor Rayon and Silk Manufacturing Co., Ltd. and Hind Cycles Ltd., was taken by the Income-tax Authorities at a figure higher than figure put upon them by the Corporation. On the contrary, the Tribunal found, the share scrips in the hands of the Corporation were accepted to be of the value put upon them by the Corporation. If the accumulation be of a particular value, it cannot assume a different value on distribution.

8. Then again, the assessee was entitled to dividend at the rate declared by Pilani Investment Corporation Ltd. It could not aspire for more and had no right to anything more. It may be that what it got was more favourable than cash payment. But that is fortuitous.

9. Let us examine it from another point of view. If the shares, received by the assessee, as dividend in kind, happened to be of lesser market value than what was put on them by the dividend declaring company and if the assessee received the same in full satisfaction of the dividend declared, could it take the stand that it received less than the dividend declared? The answer must be in the negative because it is always open to everybody to receive a smaller payment in satisfaction of larger debt. If this be the legal position it does not stand to reason why by receiving dividend in kind, at the price put thereon by the distributing company, an assessee should stand the risk of having received more, because the price put by the distributing company was found to be lower than the market rate. If there be collusion or attempt to defraud the revenue in such a

matter be involved, then different consideration may apply. But where, as in this case the accumulated profits, in the hands of the distributing company, namely, the value of shares, have been evaluated at the same figure by the Income-tax Authorities, as done by the distributing company while declaring dividend, there is no justification for valuing the distribution at a different figure.

10. Further, the assessee is entitled to a certificate of deduction of income-tax on the dividend declared. If the amount of dividend declared be subsequently taken to be more than what was declared, that "more remains uncovered by the certificate and the assessee doubly loses, namely, his income is enhanced and he does not get the coverage of the certificate.

11. For all these reasons, we are of the opinion, that in the facts and circumstances of the instant case, the question should be answered in the affirmative.

12. The assessee is entitled to costs.

13. K. L. ROY, J.—I agree.

RSE/D V.C.

Reference answered.

AIR 1969 CALCUTTA 238 (V 56 C 43)

P B MUKHARJI, J

Turner Morrison & Co. Ltd. Plaintiffs
v. Hungerford Investment Trust Ltd., Defendant.

Suit No 2005 of 1965, D/- 24-7-1968.

(A) Civil P. C. (1908), O. 1, R. 10 (2) — Addition of parties — Principles of — Suit for recovery of money between two subsidiary companies — Holding company cannot intervene or choose to join either of subsidiaries.

Court's power to add parties under O. 1, R. 10 (2) is guided by the well settled principle that the only reason which makes it necessary to add the name of a party to an action is so that the party may be bound by the result of the trial and the question to be settled must be a question which cannot be effectually and completely settled unless that party is so joined. (Para 31)

In a suit filed by a subsidiary company against another subsidiary company for recovery of money, the holding company, which controls both the plaintiff and the defendant as its subsidiaries, cannot choose to join one of the subsidiaries as against the other. Neither can it join as an independent defendant and can intervene in the fight between its own subsidiaries. (Paras 16, 27)

(B) Companies Act (1956), Ss. 4 and 34 — Holding company and its subsidiaries

KL/LL/F335/68

— Status of — Each is separate legal entity subject to provisions of Company Law.

Holding company and subsidiaries are incorporated companies and each is a separate legal entity. Each has a separate corporate veil. Because a company is a holding company, that does not mean that holding company and the subsidiary companies within it, all constitute one company. Except to the extent that the statute indicates the nature of holding company and the subsidiary company, the corporate veil still remains. If they did not remain then there would be no point in calling them subsidiary companies of another holding company. AIR 1963 SC 1811 & (1967) 71 Cal WN 854, Foll.

(Para 21)

(C) Contract Act (1872), S. 62 — Party to contract transferring its liability to third person — Consent of other party to contract is essential.

A party to a contract cannot transfer his liability thereunder without the consent of the other party and such liabilities can only be transferred by a tripartite agreement which in such cases will amount to novation. AIR 1962 SC 1810, Foll.

(Para 20)

(D) Companies Act (1956), Ss. 255, 425 (2) read with Ss. 484 to 497 and S. 515 — Removal and replacement of Liquidators and Directors — Mode of.

Liquidators and Directors can only be removed or replaced in the manner laid down by the Companies Act and not by private agreement between persons who do not represent the company as shareholders or contributors but who are third parties.

(Para 22)

Cases Referred: Chronological Paras

- (1967) 71 Cal WN 854=(1967) 2 Com LJ 106, In re Rivers Steam Navigation Co. Ltd. 21
 (1967) 71 Cal WN 897=(1967) 2 Com LJ 158, Inland Steam Navigation Worker's Union v. Rivers Steam Navigation Co., Ltd. 21
 (1963) AIR 1963 SC 1811 (V 50)=
 (1963) 2 SCJ 605, State Trading Corporation Ltd. v. Commercial Tax Officer 21
 (1962) AIR 1962 SC 1810 (V 49)=
 (1963) 3 SCR 183, Khardah Co., Ltd. v. Raymon & Co., (India) Private Ltd. 20
 (1958) AIR 1958 SC 886 (V 45)=
 1959 SCR 1111, Razia Begum v. Sahebzadi Anwar Begum 28
 (1958) 1958 PD 174=1958-2 WLR 725, Miguel v. Result 31
 (1956) 1956-1 QB 357=(1956) 2 WLR 372, Amon v. Raphael Tuck and Sons Ltd. 31
 (1953) AIR 1953 Mad 618 (V 40)=
 1952-1 Mad LJ 473, Paramasivam Pillai v. Adilakshmi Ammal 28

- (1952) 1952-1 All ER 572=1952 AC 582, United States of America v. Dollfus Co. 29
 (1950) 1950-2 All ER 605, Dollfus Co. v. Bank of England 28, 29
 (1931) AIR 1931 Mad 357 (V 18)=
 60 Mad LJ 229, Ramaswami Chettiar v. P. M. A. Vellayappa Chettiar 23
 (1923) AIR 1923 Mad 521 (V 10)=
 44 Mad LJ 322, Rajaratnam Iyer v. Katsyasundaram Iyer 30
 M. N. Banerjee and Sen, for Plaintiff;
 Mukherjee, for Defendant.

ORDER:— This is an application on behalf of Brahmaputra Tea Co. Ltd. to be added as a party defendant in this suit and for stay of the suit until the disposal of this application. The application is dated 17-7-68. The grounds of this application are the petition of Brahmaputra Tea Co. Ltd., the applicant, verified by an affidavit of Bejoy Kumar Mundra, a Director of the applicant Company affirmed on 17-7-68 and also the plaint and proceedings in the present suit.

2. The substance of this application is the submission that the petitioner Brahmaputra Tea Co. Ltd. is a necessary party to the suit. In order to show that it is a necessary party to the suit, the applicant relies on mainly two agreements, one dated 16-1-68 and the other dated 27-1-68.

3. The first agreement of 16-1-68 is between Nirmaljit Singh Hoon and Sukhdev Varma. By this agreement Mr. Hoon agrees to sell and Mr. Varma agrees to buy Mr. Hoon's entire interest in the companies mentioned in the agreement for the sum of £ 225,000 payable on (a) 15-2-68, (b) 31-12-68, (c) 31-12-69 and (d) 31-12-70, the first of such payment being £ 75,000 and the rest of the instalments at the rate of £ 50,000. There is no list of companies as such by name described to show Mr. Hoon's entire interest in such companies which was being sold by Mr. Hoon. It is however stated in the recital of this agreement that Mr. Hoon and Mr. Varma have been and are associated in the ownership of Romanigo Holdings S.A.H., a company incorporated in Luxembourg. This Romanigo has subsidiary companies incorporated in England, Singapore and India. It is further stated in the recital of this agreement that the most important companies which are subsidiaries of Romanigo are The Turner Morrison and Grahams Group of Companies Ltd., Hungerford Investment Trust Ltd. (in voluntary liquidation) and Turner Morrison & Co. Ltd. Turner Morrison & Co. Ltd., is the plaintiff in this suit in this Court and Hungerford Investment Trust Ltd. (in voluntary liquidation) is the defendant in this suit. Mr. Hoon is said inter alia to be one of the Liquidators of the defendant Hungerford Invest-

ment Trust Ltd. (in voluntary liquidation)

4. It is provided in this agreement of 16-1-68 that time is the essence of the agreement and if any single payment, as specified, to be made by Mr Varma, is not made on the due date the agreement shall forthwith be made null and void by virtue of the default and any payments already made by Mr Varma shall be forfeited and Mr Varma shall be deemed to have relinquished irrevocably to Mr Hoon every part of his interest in Romanco

5. The second agreement dated 27-1-68 was one between Sukhdev Varma and Brahmaputra Tea Co Ltd., the present applicant. Here also it is acknowledged and recited in the agreement that Mr Hoon is one of the Liquidators of the defendant company Hungerford Investment Trust Ltd. (in voluntary liquidation). It recites the agreement of 16-1-68 between Mr Hoon and Mr Varma. This agreement of 27-1-68 however shows that in consideration of the payment of a sum of £ 325 000 by the applicant Brahmaputra Tea Co Ltd. to Mr Varma, Mr Varma agreed to assign, sell and/or transfer to Brahmaputra Tea Co Ltd. the right, title and interest in that said agreement dated 16-1-68 and in addition Mr Varma's right, title and interest in the said companies. The payment of the consideration for this second agreement dated 27-1-68 was also staggered as follows: (a) 15-2-68, (b) 31-12-68, (c) 31-12-69, (d) 31-12-70, (e) 30-9-71 and (f) 31-3-72 — the first of such payment to be made for £ 75 000 and the rest in instalment at the rate of £ 50 000 each. While the payment of the consideration under the first agreement dated 16-1-68 was to conclude by 31-12-70 the payment of the consideration under the second agreement of 27-1-68 was earned beyond 31-12-70 until 31-3-72. The difference in the consideration viz. £ 225 000 under the first agreement of 16-1-68 and £ 325 000 under the second agreement of 27-1-68 is explained by the fact that in the latter agreement not only the right, title and interest in the agreement of 16-1-68 but also Mr Varma's own right, title and interest in these companies were transferred. Here also in the second agreement of 27-1-68 it is plainly stated that in the event of the applicant Brahmaputra Tea Co., Ltd. failing to pay in terms of the agreement, the right, title and interest intended to be assigned by the second agreement shall revert back to Mr Varma or to Mr Hoon as provided in the said agreement of 16-1-68. It is also provided in the second agreement of 27-1-68 by Cl. 10 thereof that in case Mr Varma within six months from the date transferred the right, title and interest in the defendant Hungerford Invest-

ment Trust Ltd., (in voluntary liquidation) free from all encumbrances including Hoffman Bank on payment of £ 225 000 by the applicant Brahmaputra Tea Co in the manner provided by the agreement of 27-1-68, then the applicant Brahmaputra Tea Co., agrees to release, if Mr Varma desires, all its right, title and interest in other companies, in favour of Mr Varma and in that event the applicant Brahmaputra Tea Co., would not be required to pay £ 100 000 being the last two instalments under this agreement of 27-1-68.

6. The applicant company relies on these two agreements to show that it is a necessary party in the present suit in this Court in which this application is made in further support of this application the applicant company relies on the Statement of Claim in an action in the Q. B. D. London. Now, this action in the Queens Bench Division was brought by this very applicant Brahmaputra Tea Co., Ltd., as the plaintiff and three defendants viz., Narmaljit Singh Hoon, Sukhdev Varma and Star International Ship Owners Ltd., in this London action the plaintiff Brahmaputra Tea Co. Ltd., the applicant before me claimed the relief for specific performance of the agreement dated 16-1-68 and 27-1-68. The action in the Q. B. D. is pending. It was instituted in the Q. B. D. on or about 10-4-68 while this present suit was pending in this Court. It is needless to say that in that action in the Q. B. D. the plaintiff applicant company's prayer is for the return of the sum of £ 75 000 on the ground that the money was paid on a consideration which has wholly failed.

7. It would be necessary now to refer to the suit which is pending here and in which this application is made by the applicant company to be joined as a party defendant.

8. This present suit in this Court before me was brought by Turner Morrison & Co. Ltd., as the plaintiff against the defendant Hungerford Investment Trust Ltd. (in voluntary liquidation). The suit was instituted as early as 15-11-65. The Written Statement in this suit was filed on 7-4-66 and the discovery and inspection having been completed the suit was on the Daily List for disposal and while the suit was being opened on behalf of the plaintiff Turner Morrison & Co. Ltd., this applicant moved this application to intervene on 17-7-68.

9. The nature of this suit between Turner Morrison Co. and Hungerford Investment Trust Ltd., can now be briefly noticed. It claims a decree for Rs. 127 67 052 60 p., a declaration that the plaintiff has a first and paramount lien on 2295 shares held by the defendant in the plaintiff company and on all divi-

dends payable to the defendant in respect thereof. It prays for other incidental reliefs. The substance of the plaintiff's claim in this suit is that this sum of money is the total of various sums which the plaintiff had paid to the Indian Income-tax Authorities in respect of taxes owed to such authorities by the defendant company in respect of assessment years, covering roughly a period from 1940-41 to 1955-56. Most of these payments were made before 1961. The last of such payment of taxes as shown in the Annexure A to the plaint was on 19-1-63. It is alleged in the plaint that the plaintiff company made all these payments as Agent and/or on behalf of or for the benefit of the defendant and the plaintiff claims to be entitled to or to be indemnified or reimbursed in full for such payments. It is pleaded in the plaint that these payments were made in respect of tax liability of the defendant under Section 23A of the Indian Income-tax Act which is said to be on the "deemed dividend."

10. The defence as contained in the written statement of the defendant takes a number of grounds. Before stating these grounds of defence, it is clearly stated in paragraph 1 of the written statement that up to 1956 the defendant was a hundred per cent shareholder of the plaintiff company and by an agreement concluded in December 1955, the defendant company agreed to sell 49% of its share-holdings in the plaintiff-company to one Haridas Mundra giving him also the option to purchase the balance of 51% share of the plaintiff-company on the terms and conditions mentioned in that agreement. The situation therefore is that the plaintiff-company in this suit, viz., Turner Morrison & Co. Ltd., is a company 49% of whose shares were under this agreement agreed to be sold to Haridas Mundra with the option to him to purchase the balance of the shares. This company as plaintiff filed this suit in this Court against the defendant-company which is pending here for the last three years from 15-11-65. The Brahmaputra Tea Co. Ltd., who is present applicant coming now to intervene, has Bejoy Kumar Mundra, the son of Haridas Mundra, as a Director.

11. Proceeding with the defence of the defendant-company Hungerford Investment Trust Ltd., (in voluntary liquidation), what the defence states briefly is as follows. The plaintiff paid income-tax on behalf of the defendant-company under Section 23A of the Indian Income-tax Act on deemed dividend on the share-holding of the defendant-company but the plaintiff-company never actually or in fact distributed or paid the dividend to the defendant-company. It is also pleaded by the defendant that after the

sale of the 49 per cent shares to Haridas Mundra and registration of the same in favour of his nominee the British India Corporation and after the 25th February, 1967, when Haridas Mundra obtained a decree for specific performance in suit No. 600 of 1961 between Haridas Mundra v. Mrs. Therasa Turner and others, the plaintiff started in collusion and conspiracy with Haridas Mundra to set up an alleged lien on the shares of the defendant-company with a view to assist the said Haridas Mundra to enjoy the 51 per cent share without making any payment for the same. It is further alleged in the written statement that besides the said 2,225 shares the defendant was always the registered owner of the balance share of 2,204 out of the total shares of 4,500 of the plaintiff until the same was sold and transferred in the name of the nominee of Haridas Mundra as aforesaid. It is alleged that the plaintiff did not render any proper account to the defendant and never distributed the dividend to the defendant in spite of demands. It is also pleaded that the plaintiff neither paid any tax under S. 23A of the Income-tax Act at all nor made any payments of dividend to the defendant. In fact, the defendant-company makes the averment that it had to institute a suit for accounts and recovery of balance of Rs. 22,640,000/- due from the plaintiff which is the subject-matter of another pending suit No. 129 of 1960 in this Court. In the circumstances, the written statement denies that the sums claimed by the plaintiff can at all constitute a debt or liability to the defendant of the plaintiff within the meaning of Article 22 of the Articles of Association of the plaintiff company. It is said that in suit No. 600 of 1961 filed by Haridas Mundra in this Court, the plaintiff being a party defendant to the suit filed its written statement and never claimed any alleged lien or charge on the said 2,295 shares. The written statement also takes the plea of limitation. It is said by the defendant in its written statement that no lien was ever claimed or shown in the balance-sheet of the plaintiff under Section 370 of the Indian Companies Act. There are many other grounds set out in paragraph 18 of the written statement. But the brief survey of the written statement indicates these facts, relevant for the purposes of this application. Mr. Mukherjee for the defendant wishes it to be recorded that the allegations in the petition are not admitted.

12. The whole question now on this application is whether the applicant Brahmaputra Tea Co. Ltd., is either a necessary or proper party to such a suit. The general powers of the Court to add a party are sufficiently indicated in Order 1, Rule 10 (2) of the Civil Proce-

dure Code. It provides that the Court may at any stage of the proceedings either upon or without the application of either party and on such directions as may appear to the Court to be just, order to add the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually, and completely to adjudicate upon and settle all the questions involved in the suit. What the Court has to see in such an application is whether the applicant Brahmaputra Tea Company is a party who should have been joined as a defendant or whose presence the Court considers necessary in order to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit.

13 Now taking the questions involved in the suit which have been sufficiently described above in the analysis of the plaintiff and the written statement the question arises what is the interest of the applicant to come in and intervene in such a suit. The plaintiff in this suit claims to be reimbursed for taxes which it is supposed to have paid for and on behalf of the defendant company. Prima facie the applicant company has no interest to come and intervene in this controversy. All that the applicant wants to say is this that by reasons of these two agreements dated the 16th January, 1968 and 27th January 1968 it has purported to acquire the interest of Romanigo which is said to be the holding company of these two subsidiary companies, the plaintiff and the defendant in this suit. Therefore it claims a right to be joined as a party. Now if the applicant-company is right in its submission there then by reason of that fact alone it is not a necessary party at all in this suit. If both the companies, namely the plaintiff and the defendant, are the subsidiaries of Romanigo then the applicant's acquisition of Romanigo interest will put them in control of both of them. It is therefore not necessary to intervene as a party on the side of one against the other. Secondly the position of Romanigo as a holding company means this that under Section 4 of the Companies Act, 1956 a company subject to certain limitations which I shall presently describe, shall be deemed to be a subsidiary of another if, but only if (a) that the other controls the composition of its Board of Directors or (b) that the other holds more than half in nominal value of equity share capital or (c) the first mentioned company is a subsidiary of any company which is that other's subsidiary. Now the limitation is that in determining whether one company is a subsidiary of another (a) any shares held or powers exercisable by that other company in a

fiduciary capacity shall be treated as not held or exercisable by it, (b) subject to the provisions of clauses (c) and (d) of Section 4 (2) of the Act, any shares held or powers exercisable — (i) by any person as a nominee for that other company (except where that other is concerned only in a fiduciary capacity, or (ii) or by a nominee for a subsidiary of that other company not being a subsidiary which is concerned only in a fiduciary capacity — shall be treated as held or exercisable by that other company. It is expressly provided under sub-section (6) of Section 4 of the Companies Act that in case of a body corporate which is incorporated in the country outside India, which is the case with Romanigo a subsidiary or holding company of the body corporate under the law of such country shall be deemed to be a subsidiary or holding company of the body corporate within the meaning and for the purposes of the Indian Companies Act also whether the requirements of this section are fulfilled or not. The applicant of course has not produced the Articles of Association of Romanigo or its memorandum. I am told by Mr. M. N. Banerjee learned Counsel for the applicant that Romanigo was incorporated on or about the 20th May, 1963. All the tax liability for which the plaintiff is claiming reimbursement in this present suit is in respect of years long before Romanigo was born as an incorporated company. On the plaintiff before me the last of the alleged payment of tax was on the 19th January, 1963 as indicated above, and therefore such liability was incurred before the incorporation of Romanigo. Incidentally it may be noticed here that the plaintiff-company before me was incorporated on the 4th July, 1913 and the defendant-company I am told was incorporated in June 1930, under the laws of Singapore.

14. The applicant's reliance on the two agreements dated the 16th January, 1968 and the 27th January, 1968 to support his present claim for intervening in this suit as a defendant has now to be analysed. It is clear that the parties to these agreements namely (1) Mr. Varma (2) Mr. Hoon and (3) the applicant are not as such any parties at all in the present suit before me. The two agreements as their dates indicate show the time in which they were born. They were born when this suit or litigation was going on and they were born when the defendant-company was in voluntary liquidation. The defendant-company went into voluntary liquidation on the 10th August, 1956. With notice of these facts of (1) a pending litigation in this suit and (2) the voluntary liquidation of the defendant-company, the agreements dated the 16th January, 1968 and the 27th January, 1968, were entered into without joining

the plaintiff or the defendant as parties to such agreements. If the applicant is right in his contention that Romanigo was the holding company and both the plaintiff and the defendant were subsidiaries, when both Mr. Varma and Mr. Hoon, who were parties to the said agreement were fully aware of these two facts viz., (1) the present suit and (2) voluntary liquidation of the defendant-company. In fact, the agreement expressly declared that both Mr. Hoon and Mr. Varma are associated with Romanigo holdings and therefore they must have known of the present litigation and the intending purchaser Brahmaputra Tea Co., of the Romanigo interest of these persons was equally on notice of both the facts of the pending litigation in the present suit and the voluntary liquidation of the defendant company. Prima facie, therefore, the agreements are subject to the results of these two facts. On the one hand, the shares of the company in voluntary liquidation were being transferred by the liquidator. On the other hand, full notice was there in the present suit about the plaintiff's claiming to be reimbursed in respect of the tax liability of the defendant in this present suit.

15. Pursuing the matter further on this point, it is necessary to note the event which the applicant company itself created immediately after entering into the agreement of 27-1-68. What it does is that although the applicant company knew that this suit was pending and although it was supposed to acquire the entire interest of the holding company Romanigo, yet it did not come in at that stage to be joined as a party defendant in this suit. What it did was to go to the Queens Bench Division in London and filed an action there for specific performance against parties to the agreement and excluding both the plaintiff and the defendant. It is therefore clear that the applicant even on the strength of these two agreements dated 27-1-68 and 16-1-68 did not think that it had acquired any claim or right to intervene in the present suit until its rights under those agreements were determined by an action for specific performance in London. Now, the London action for specific performance, as already noticed, was started on 10-4-68. Even then, the applicant had not cared to discover that it had any claim or right to intervene in the pending suit here before me. Now, the London action which the applicant-company itself has initiated can result in two consequences. The London action might fail or might succeed. If the London action fails, then the applicant-company has no right whatever to intervene on the strength of this agreement on which he is relying to come in as a party defendant to the present suit. If

the London action succeeds, the applicant would get a decree for specific performance in which event his London decree will not in the least be affected by any Calcutta decree that may be passed in the present suit, for the Calcutta decree cannot bind the applicant. The position, therefore, is this that if the applicant's London action fails, then his inclusion as a party defendant in this suit will be wholly improper and unjustified. I do not think that this Court should add a party in such circumstances on the speculation that the applicant's London action might succeed even though knowing all the facts and with notice of all the facts the applicant-company initiated the London action without joining the plaintiff or the defendant. Addition of a party in such circumstances would be merely a speculative addition which the Court should not grant. A Calcutta decree in this Calcutta suit where the applicant is not a party cannot bind the applicant and the applicant cannot be prejudiced in any manner by whatever happens in this Calcutta suit. Whatever be the result of the Calcutta suit, it will remain open to the applicant-company to challenge it, if at all its interests in any way, are affected in any eventuality.

16. If the applicant-company's reliance on these agreements dated 27-1-68 and 16-1-68 is intended to show that the applicant-company having acquired Romanigo interests as the holding company, which now controls both the plaintiff and the defendant as its subsidiaries then there is no answer to the question that the applicant is equally interested both in the plaintiff and the defendant and I for one cannot understand how it can choose to join one of the subsidiaries as against the other, viz., either join the plaintiff against the defendant or join the defendant against the plaintiff or remain as an independent defendant trying to intervene in the fight between its own subsidiaries. I consider it to be illogical and illegal by all canons of law and procedure.

17. There is also another cogent reason why the applicant's contention cannot succeed. Clause 5 of both the agreements dated 16-1-68 and 27-1-68 show that the agreement is contingent. The first payment of £ 75,000 is not enough. Any future default even in 1970 or 1972 forfeits the rights under the agreement. I have already indicated these clauses. Clause 5 of the agreement of 16-1-68 clearly stipulates that even the default of a single payment on the due dates specified in the agreement shall forthwith render the agreement null and void and such default would even forfeit any payments already made by Mr. Varma and further Mr. Varma shall be deemed

to have relinquished irrevocably to Mr. Hoon every part of his interest in Romanigo. Equally, clause 5 of the agreement dated 27-1-68 clearly stipulates that in the event Brahma-putra Tea Co., the present applicant, fails to pay in terms of that agreement, the right, title and interest intended to be assigned by that agreement shall revert back to Mr. Varma or Mr. Hoon as provided in the agreement of 16-1-68. It will, therefore, be wholly improper in my opinion to include somebody as a party to this suit on the strength of these agreements where the rights would be forfeited by the very party wanting to be included in the suit. In other words, the rights of applicant Brahma-putra Tea Co., are at best inchoate and have not matured under the two agreements mentioned above.

18. Mr. M. N. Banerjee for the applicant has drawn my attention to what is called the Indemnity clause in both the agreements. Clause 7 of the Indemnity in the agreement of 16-1-68 provides that both Mr. Hoon and Mr. Varma "undertake to execute such share transfers, Resignations, Indemnities and other documents as shall be reasonably required to give effect to this agreement" and CL 6 of this agreement provides that upon Mr. Varma paying to Mr. Hoon the first payment of £75,000 not later than 15-2-68, Mr. Varma or his assignees shall forthwith indemnify Mr. Hoon against any claims which may be made against Mr. Hoon arising out of the indemnities given by Mr. Hoon on 7-6-63 to the executors of Nigel Turner (deceased) and John Turner (deceased). "But there again it is provided that "in case Mr. Hoon reverting to management and control under Clauses 1, 4 and 5, the claims and indemnities shall revert to Mr. Hoon."

19. Clause 7 of the agreement of 27-1-68 similarly provides that upon Brahma-putra Tea Co., paying to Mr. Varma the first payment of £ 75,000 in terms of the said agreement dated 16-1-68, the Brahma-putra Tea Co., or its assignees shall indemnify Mr. Hoon against any claims which may be made against Mr. Hoon arising out of the indemnities given by Mr. Hoon on 7-6-63 to the executors of Nigel Turner (deceased) and John Turner (deceased) and thereupon the Brahma-putra Tea Co., shall also be entitled to all benefits that may arise from such indemnities or original purchases of Turners' interest in the said companies. This indemnity is, in my opinion, quite irrelevant for the purpose of the present application. This is an indemnity given to the executors of Nigel Turner (deceased) and John Turner (deceased). In any event, the existence of such an indemnity does not alter the nature or character of the present suit which the

plaintiff has brought against the defendant for recovery of taxes alleged to have been paid by the plaintiff for the benefit of the defendant.

20. Mr. Mukherjee, appearing for the defendant and opposing this application, submits that Varma's obligations under Clauses 1, 2, 4, 8, 9 and 10 of the agreement dated 16-1-68 between Mr. Hoon and Mr. Varma could not be transferred or assigned by the agreement of 27-1-68 as purported to be done under Clauses, D. E. and Clause 1 without Mr. Hoon joining the agreement of 27-1-68. In other words, his submission is that the obligations under an agreement as distinguished from the rights thereunder cannot be transferred without consent of the person concerned. By the agreement of the 16th January, 1968, Mr. Varma takes the obligation to pay to Mr. Hoon £ 2,25,000 and to pay interest thereon (vide clauses 1 and 2 of the agreement). By clause 4 Mr. Hoon and Mr. Varma irrevocably appoint Mr. Carnes and Mr. Ricard to act as their attorneys under that agreement and Mr. Carnes as the stakeholder of the documents of title. Mr. Varma also undertakes the obligation along with Mr. Hoon to terminate the litigation between Mr. Hoon and Mr. Varma (vide clauses 8 and 10). It is the defendant's submission, how could these obligations of Mr. Varma under this agreement of the 16th January, 1968, be transferred to a third party, the applicant Brahma-putra Tea Co. Ltd., without Mr. Hoon's consent. Mr. Mukherjee in support of this point relied on the statement of law in 8 Halsbury, 3rd Edition page 258, Article 451 that a party to a contract cannot transfer his liability thereunder without the consent of the other party and such liabilities can only be transferred by a tripartite agreement which in such cases will amount to novation. That principle is well settled by numerous decisions such as *Khardah Co. Ltd. v. Raymon & Co., (India) Private Ltd.*, AIR 1962 SC 1810 at p. 1817. It is unnecessary for me to pursue this point of assignment of alleged liabilities having regard to the view that I have already expressed on the points of merits in this application.

21. On behalf of the applicant Brahma-putra Tea Co. Ltd., reliance has been placed on clause 6 of the agreement dated the 27th January, 1968. This clause provides inter alia that on payment of £ 75,000 by the Brahma-putra Tea Co. Ltd. Mr. Carnes the stakeholder shall thereafter retain the custody of the documents of title and shall have full authority to act on behalf of Romanigo in the management of the subsidiary companies, particularly in connection with the appointment and/or dismissal of Directors and Liquidators acting therein on the in-

struction of Brahmaputra Tea Co. Ltd. and not on those of Mr. Hoon and Mr. Varma in accordance with the said agreement dated the 16th January, 1968. It is said on behalf of the applicant that this clause gives him a right to intervene as a party in this suit. For the defendant it is submitted that far from giving any right this clause does not help the applicant to lift the corporate veil. I have indicated already what the statute says about a holding company and a subsidiary company. But it must be stated that a holding company or the subsidiaries are incorporated companies in this context and each is a separate legal entity. Each has a separate corporate veil. Because a company is a holding company, that does not mean that holding company and the subsidiary companies within it all constitute one company. They do not. Except to the extent that the statute indicates the nature of holding company and the subsidiary company the corporate veil still remains. If they did not remain then there would be no point in calling them subsidiary companies of another holding company. Then they would all be one company and one corporate personality. That they definitely are not under the Companies Act and the Companies Law. Reference may be made to the State Trading Corporation Ltd. v. Commercial Tax Officer, AIR 1963 SC 1811 and in *Re, Rivers Steam Navigation Co. Ltd.*, (1967) 71 Cal WN 854 and (1967) 71 Cal WN 897. It will be unnecessary to discuss any further the theories of corporate personality and the cases thereunder.

22. It is also contended for the defendant that clause 6 of the agreement dated the 27th January, 1968, is in plain violation of the Companies Act for there can be no such right to nominate Directors and Liquidators as contemplated in clause 6 of the agreement of the 27th January, 1968. It is said to be in violation of Section 255 of the Companies Act in respect of Directors and Section 425 (2) read with Sections 484 to 497 and particularly Sections 491 and 492 along with Section 515 of the Companies Act in respect of the Liquidators. Liquidators and Directors can only be removed or replaced in the manner laid down by the Companies Act and not by private agreement between persons who do not represent the company as shareholders or contributors but who are third parties. Section 512 dealing with the powers and duties of Liquidator in voluntary winding up read with Section 457 (c) of the Companies Act would seem to indicate that the Liquidator has no power to sell shares of the company without sanction of the Board as clause 6 purports to do that Mr. Carmes will act on the instructions of the Brahmaputra Tea Co.,

the applicant and not of Mr. Hoon or Mr. Varma under clause 6 of that agreement of the 27th January, 1968.

23. It has been further contended on behalf of the defendant that there is no explanation given in the petition for the delay in making this application and to come in just when the suit is on the daily list and about to be disposed of. It will be necessary now to discuss the respective submissions made by the parties on the point of delay.

24. If the applicant Brahmaputra's case is that its alleged rights accrued only after the agreements of 16th January, 1968 and the 27th January, 1968, as is its case, then from January, 1968, till the 17th July, 1968, when the present application was made, for this period of six months, there is no reason or explanation for the delay. On the contrary, if these two agreements of January, 1968, conferred any rights on the applicant Brahmaputra Tea Company, then such rights did not provide it with any cause for making an application here in this suit to be joined as party defendant but led it to file a suit in the Queen's Bench Division for specific performance to enforce those agreements. The London suit for specific performance, therefore, can only mean that the defendants in that suit including Mr. Hoon and Mr. Varma have refused to perform these agreements and that is why the Brahmaputra Tea Co., Ltd., filed the London action for specific performance. If again, on the other hand, the applicant's case is that its rights did not arise before the first payment of £ 75,000 was made on the 15th February, 1968, even then the delay is not explained from 15th February, 1968, till the 17th July, 1968 and even then it remains as a fact that after the 15th February, 1968, the applicant chose to file a London action for specific performance which it did on the 10th April, 1968. A copy of the statement of claim in the London action for specific performance has been annexed to the present petition where there is no prima facie proof or even allegation that there was any written demand or notice for enforcing the agreements of January, 1968, against either of the two defendants in London, Mr. Hoon or Mr. Varma, nor is there any pleading in that statement of claim in London specifying the date when the defendants are supposed to have refused to perform the agreements. Mr. Mukherjee for the defendant in this suit before me has criticised this delay and has characterised this suit as a mala fide abuse of the process of the Court with the idea of preventing this suit being heard. His criticism is that Mr. Haridas Mundra is already the owner of 49 per cent of the shares of the defendant-company and also

controls the plaintiff-company and be questions the motive of the applicant, controlled by Mundra, why the applicant company being in control of both the plaintiff and the defendant companies would be trying to frustrate the defendant's defence in this suit. His submission is that the applicant company wants to keep the suit pending to use as a screen to show that a large claim is pending against the defendant-company.

25 It is unnecessary for me to decide the question of mala fides at the present stage. It is enough for me to say that the delay has not been explained at all by the applicant and there is no explanation given by the applicant-company why it waited, with full knowledge of all the facts and circumstances of this pending litigation between the plaintiff and the defendant-companies, to make this eleventh hour application when the suit was on the daily list for disposal and when, in fact, the plaintiff had opened its case for the trial. I need only add that Mr D N Das, learned Counsel for the plaintiff does not even support the present application and he has stated so to this Court. I can well imagine the embarrassment of the plaintiff-company to choose sides with regard to this present application.

26. Mr M. N. Banerjee, learned Counsel for the applicant, has stated to this Court that so far as Mr Varma is concerned, he is a bankrupt. In fact, the bankruptcy proceedings are proceeding in London. Mr Banerjee says that a receiving order was made against Mr Varma in London on the 6th October 1967 and Mr Varma was adjudicated bankrupt on the 12th December 1967. Mr Banerjee also makes a statement to this Court that an appeal is supposed to be pending against the order of adjudication against Mr Varma. Whatever that may be, it only means this that the agreements of the 16th January 1968 and the 27th January 1968 and specially the latter under which the applicant-company was buying the interest of Mr Varma — Mr Varma was a bankrupt — show that the applicant-company by its agreement dated 27th January 1968 was trying to purchase the interest of a bankrupt and was agreeing to pay Mr Varma £ 3 25 000 — a procedure unheard of and inconceivable in bankruptcy proceedings. It comes to this that the applicant-company is resting its present claim in this application to join as a party-defendant in this suit on the strength of an agreement with a bankrupt against whom he has filed a suit for specific performance in the London Court which is supposed to be pending and whose future therefore is uncertain depending on the results of the proceedings in London.

27 As I have said before Courts power to add parties under Order 1 Rule 10 (2) of the Civil Procedure Code is guided by the well settled consideration that the presence of the party intended to be added before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. On the facts stated above and for the reasons and circumstances discussed, I am satisfied that the presence of the applicant is not at all necessary to adjudicate effectually and completely upon and to settle any of the questions involved in the present suit. The suit is by the plaintiff-company to reimburse it self for having paid the income-tax for and on behalf of the defendant-company on deemed dividends. This question of payment of income-tax is not at all a subject-matter of the alleged agreements for the London suit on which the applicant-company is relying in the present application. On these facts and circumstances I am satisfied that not only the presence of the applicant is unnecessary but its presence will be improper in this suit, embarrassing, irrelevant and prejudicial to the trial of this suit.

28 Having regard to the well settled principles under Order 1 Rule 10 (2) of the Civil Procedure Code, it is, in my view unnecessary to make any detailed reference to the case law on the point. Out of deference to the arguments at the Bar I shall only briefly mention the cases cited before me. Mr Banerjee referred to four cases (1) *Paramasivam Pillai v Adilakshmi Ammal*, AIR 1953 Mad 618 (2) *Ramaswami Chettiar v P. M. A. Vellayappa Chettiar* AIR 1931 Mad 357 (3) *Razia Begum v Sahebzadi Anwar Begum*, AIR 1958 SC 886 and (4) *Dollfus Co v Bank of England*, (1950) 2 All ER 605. The first two Madras cases relate to joint family property, partition and ownership. They have no application whatever to the facts of the present case. The Supreme Court decision arose in respect of a declaration whether a person was the legally wedded wife and in my view has no application to the facts of this case.

29 The English case in (1950) 2 All ER 605 expresses the view that in determining whether or not the applicants had a proprietary right in the subject-matter of the action sufficiently could entitle them to be joined as defendants, the true test lay not so much in an analysis of what were the constituents of their rights, but rather in what would be the result on the subject-matter of the action if their rights could be established. Far from helping the applicant it is really against the applicant of the present case before me. It is not a question of the

applicant's proprietary right in the subject-matter of the action. The applicant has no proprietary right whatever in the subject-matter of the present suit before me. I have also stated that the results of this Calcutta suit are immaterial to the applicant and the applicant's rights, even if any, are in no way affected by any decision in the suit between the plaintiff and the defendant before me. In this connection, it must be stated that a reference was made to the case in the House of Lords under the title — *United States of America v. Dollfus Co.*, (1952) 1 All ER 572. But that is not an appeal from 1950-2 All ER 605.

30. Mr. Sen following Mr. M. N. Banerjee for the applicant in a brief and able argument on the Company Law aspect of this application drew my attention to the decision of a learned Single Judge of Madras in *Rajaratnam Iyer v. Kalasyasundaram Iyer*, AIR 1923 Mad 521, but that case also has no application to the facts of the present case before me for there the reversioners were said to be proper though not necessary parties. Protection of the reversion certainly is a very well-known plea to intervene in a suit where the reversion is affected. But applicant's rights under the alleged agreements of January, 1968, cannot in any way be affected by the decision of the present suit before me.

31. Mr. Mukherjee for the defendant opposing this application on the other hand drew my attention to the decision in *Miguel v. Result*, (1958) PD 174. It lays down very clearly and succinctly the main principles with regard to addition of parties. Willmer, J., who delivered the judgment lays down the principle that the only reason which makes it necessary to add the name of a party to an action is so that the party may be bound by the result of the trial and the question to be settled must be a question which cannot be effectually and completely settled unless that party is so joined. By the recent judgment of Devlin, J., in *Amon v. Raphael Tuck and Sons Ltd.*, (1956) 1 QB 357 all the previous English authorities have been reviewed. Willmer, J., in the decision of 'The Result' took the same view as Devlin, J., did to come to the conclusion which I have just stated.

In my judgment the applicant is neither a necessary, nor a proper party in the present suit.

For these reasons, I dismiss this application with costs.

DVT/D.V.C.

Application dismissed.

AIR 1969 CALCUTTA 247 (V 56 C 44)

T. P. MUKHERJI, J.

M/s. Polsan Ltd. and others, Appellants
v. Corporation of Calcutta, Respondents.

Criminal Appeal No. 399 of 1966, D/-6-2-1968.

(A) Prevention of Food Adulteration Act (1954), S. 17 (1) Proviso — Accused in-charge of office of company as persons in charge of and responsible to company for conduct of its business — Commodity manufactured by company at a place different from that of office — Accused not concerned with manufacture — Conviction of accused for adulteration of commodity is not justifiable. (Para 6)

(B) Prevention of Food Adulteration Act (1954), Ss. 16 (a) (i) and 7 (i) — Sample taken from sealed tin of ghee brought out of cold storage — Sample containing more moisture and oleic acid than standard prescribed in Rules — Such increases within possible ranges of variation under such circumstances — Conviction for adulteration illegal — (Prevention of Food Adulteration Rules (1955), Appendix I, A 11.14).

Where a sample of ghee, taken from a sealed tin brought out of cold storage, contains more moisture and oleic acid than the standard prescribed in A 11.14 of Appendix I to the Prevention of Food Adulteration Rules, but the increases are within the possible range of variation under such circumstances, conviction for adulteration of ghee is illegal.

(Paras 8 and 11)

Since the tin is brought out from cold storage, moisture will be attracted to the ghee from the atmosphere. The moisture having come from outside due to an act of nature, should be eliminated in determining the quality of the ghee in the tin. The oleic acid and moisture contents are interrelated and an increase in moisture content will lead to a corresponding increase in the oleic acid content.

(Paras 7, 8 and 10)

The defence is not required to prove its case with that exactitude as that of the prosecution. If the defence appears to be reasonable and probable, the Court is bound to give effect to it. The increases being within the possible ranges of variation under such circumstances, the defence is highly reasonable and probable and has to be given effect to. Thus, such conviction is illegal. (Paras 8, 9 and 11)

N. C. Banerjee and Arun Kumar Mukherjee, for Appellants; Purnendu Sekhar Basu, for Respondents.

JUDGMENT:— Appellant No. 1 M/s. Polson Limited and appellants Nos. 2 and 3, employees of the firm at Calcutta, filed this appeal against their conviction under Sections 16 (1) (a) (i)/7 (i) of the Prevention of Food Adulteration Act by

a Municipal Magistrate at Calcutta. Appellant No 1 has been sentenced to pay a fine of Rs. 2,000/- while appellants 2 and 3 have been sentenced to pay a fine of Rs. 1,000/- each, in default, to simple imprisonment for three months. The subject matter of the prosecution was ghee which on chemical analysis was found to be adulterated in the sense that the moisture content therein and the oleic acid content also, exceeded the standard as prescribed in A 1114 of Appendix I to the Rules framed under the P F A. Act. The standard for moisture content prescribed for West Bengal is 0.3% while that prescribed for oleic acid is 3%. The result of analysis in the present case disclosed a moisture content of 1% and oleic acid content of 4.2%. The learned Magistrate on a finding that the sample did not conform to the standard prescribed by the Rules under the P F A. Act convicted appellant No 1 the company and also appellants 2 and 3 as persons in charge of and responsible to the company for the conduct of the company's business. The conviction of appellants 2 and 3 was obviously made under Section 17 of the P F A. Act.

2. The defence of appellant No 1 at the trial was that the sample was taken from a sealed tin which along with other tins was kept in cold storage, that the removal of the tin from the cold storage to a dry place resulted in an increase in the moisture content of the ghee inside and the increase in the moisture content necessarily led to an increase in the oleic acid content in the ghee. The defence of appellants 2 and 3 was that they do not have anything to do with the manufacture of the ghee which is done outside Calcutta that they are employees in the office of the firm and are not responsible for the quality of the ghee or butter that is manufactured by the company.

3. The learned Magistrate accepted the result of the chemical analysis and as that disclosed a variation from the standard prescribed, found that the sample was adulterated. He also found appellants 2 and 3 responsible for the affairs of the company and on its findings he made the order of conviction and sentence which is the subject-matter of the present appeal.

4. Mr Banerjee appearing in support of the appeal contends first that in any event there is nothing on record to prove that appellants 2 and 3 were in charge of and were responsible to the company in the matter of the quality of the product and that in any case in view of what these two appellants stated in course of their examination under Section 342 of the Code of Criminal Procedure, it should have been held that the offences if any could have been committed with-

out their knowledge and in spite of their due diligence in the matter. The second contention of Mr Banerjee was that the increase in the moisture and oleic acid contents has been satisfactorily explained in the evidence of the chemical analyst P W 4 and of the defence witness examined in the case.

5. Mr Basu appearing for the Corporation of Calcutta argued that as soon as the result of the chemical analysis discloses a variation from the standard, the Court has no other course open but to find the article concerned as adulterated unless a report of the chemical analyst is superseded under Section 13 (5) of the P F A. Act by the report of the Central Food Laboratory.

6. Appellants 2 and 3 may be in charge of the Calcutta office of the company as the persons in charge of and responsible to the company for the conduct of its business. They are initially liable under Section 17 (1) of the Act. The proviso thereto states however that such person in charge will not be liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. The product of Polson & Co, comes from outside Calcutta in sealed tins as it appears from the materials on record. Apparently appellants 2 and 3 have nothing to do with the manufacture thereof. They could therefore have had no knowledge about the method of manufacture nor could they with the best of diligence have prevented adulteration of the product if any in the circumstances of the case, there is no justification for the conviction of appellants 2 and 3 at any rate.

7. According to the chemical analyst's report Ext 7 in the case, there is a variation in the standard of moisture and oleic acid content from what is prescribed in the Rules and what was found on analysis in the present case. This variation normally would go to prove adulteration. The defence case however is that the oleic acid and moisture contents are inter-related and an increase in moisture content will lead to a corresponding increase in the oleic acid of the article in question. This is admitted in the evidence of the chemical analyst P W 4. The further defence case is that the increase in moisture in the present case as indicated in the chemical analyst's report should not necessarily be taken as an increase in the moisture content of the sample of ghee. The increase in moisture is explained by the fact that the sealed tin containing the ghee was kept in cold storage and that on being brought out from a low temperature to a high temperature and on being opened there, an excess of moisture was attracted to

the content of the tin thereby increasing its moisture content. P. W. 4 a chemical analyst was cross-examined on this defence. His answer is as follows:—

"If any butter or ghee is brought out from cold storage to a dry place there may be variation in moisture but that will depend upon the temperature of the dry place. Presence of moisture I agree increases the free fatty (acid?) in fat and oil. Presence of free fatty acid is accelerated by light and heat." To the same effect but more to the point is the evidence of D. W. 1, Dr. A. N. Saha, who is a D. Phil in Science and is a oil technologist. His evidence is to the following effect:—

"If a sealed tin of ghee is brought out from cold storage and kept in normal temperature, the variation of moisture will rest on the degree of temperature of the two places. if a sealed tin of ghee is brought out from a cold storage and is kept open in an open place the moisture will deposit on the cold surface of the material. This will increase the moisture of the stuff, but I cannot say how much moisture will deposit in such a case. In such cases, in my opinion, the percentage may vary from .01 to 1%. The increase of moisture will increase in free fatty acid expressed as oleic acid — the increase may go up to 2 or 3%".

The sample in this case was taken in the month of September. According to D. W. 1 usually the temperature of a cold storage may vary from .0° to 15°C and the normal temperature in Calcutta in the month of September will be between 26 to 28°C.

8. It is thus apparent from the evidence of P. W. 4 and D. W. 1 that under the circumstances in which admittedly the tin of ghee was kept in the case and under which that tin was brought out for the purpose of taking sample therefrom, moisture would be attracted to the ghee from the atmosphere. That moisture was not a part of the ghee in the tin. It came from outside and if that be the position what came from outside can easily be eliminated for the purpose of determining the standard of quality of the stuff that was initially inside the tin. According to D. W. 1 the increase in the percentage of moisture may vary from .01 to 1. The increase in the present case was .07%. So far as oleic acid content is concerned under the circumstances there may be an increase of 2 to 3% according to D. W. 1. The increase in the present case is only 1.2%. The increases thus are within the range of variation deposed to by D. W. 1 and the possibility of increase under the circumstances is also admitted by P. W. 4 in the case.

9. The defence is not required to prove its case with that amount of exac-

titude that is demanded of the prosecution. If the defence appears to be reasonable and probable the Court is bound to give effect thereto. The defence in the present case in view of the totality of the evidence on record appears to be highly reasonable and probable and as such it is liable to be given effect to.

10. So far as Mr. Basu's contention that variation from the standard as prescribed would make the article of Food adulterated, all that need be stated in the facts and circumstances of the present case is that the variation is due to circumstances which intervened due to an act of nature. In the present case an excess of moisture contained in the article of food resulted from an act of nature which drew moisture from the atmosphere thereto and naturally for ascertaining the standard of its quality the amount of moisture that was drawn from outside should be overlooked.

11. In view of the above, the appeal must succeed. The appeal is accordingly allowed. The order of conviction and sentence passed on the petitioners is set aside and they are acquitted. Fines if paid be refunded.

JRM/D.V.C.

Appeal allowed.

AIR 1969 CALCUTTA 249 (V 56 C 45)
B. N. BANERJEE AND K. L. ROY, JJ.

Sardar Ajaib Singh, Calcutta, Applicant v. Commissioner of Wealth Tax, W. B., Respondent.

Matter No. 184 of 1963, D/- 2-8-1967.

(A) Wealth Tax Act (1957), S. 7 (1), (2), (a) — Value of assets how to be determined — Shares of company — Break-up value — Balance-sheet not providing for bad or doubtful debts — Deduction on possible non-realisation is not allowed.

In computing the value of the shares of the company on the break-up value method, deduction cannot be made on an estimate of a portion of such loans and advances on the ground of its possible non-realisation. In the break-up value method adopted by the Wealth Tax Officer, in valuing the shares of the company what has to be done is to find out the net value of the assets of the company and deduct therefrom the liabilities of the Company. In determining the net value of the assets such adjustments should be made in the balance-sheet as the circumstance of the case might require. Where in the balance-sheet itself the company has not made any provision whatsoever for any bad or doubtful debts, that means that accord-

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ing to the company the loans and advances were realizable in full, and as such no claim for deduction on the possibility of the loans and advances not being realised in full can be allowed. (Para 6)

(B) Constitution of India, Art. 141 — Obiter of Supreme Court is binding on High Courts — Effect must be given to — Civil P. C. (1908), Preamble — Judicial precedents — AIR 1964 SC 600, Explained and distinguished. (Para 9)

(C) Wealth Tax Act (1957), Ss. 24, 27 — Question of validity of Act — Tribunal has no jurisdiction to decide it or to refer it to High Court — High Court cannot answer such question under S. 27 — AIR 1961 SC 736, Distinguished, AIR 1966 SC 1089, Followed, AIR 1961 SC 1633, Referred to (Para 11)

(D) Wealth Tax Act (1957), S. 7 (2) (a) — Break-up value of shares of company — Determination of — Tax liability not provided for in balance-sheet cannot be claimed as deduction from value of shares (Conceded) Tax Ref. No 286 of 1962 (Cal) Followed (Para 5)

(E) Wealth Tax Act (1957), S. 7 (2) (a) — Break-up value of shares of company — Determination of — Uncalled liability on shares of certain companies held as investments — Not claimable as deduction from value of shares (Conceded) Tax Ref. No 286 of 1962 (Cal), Followed. (Para 5)

(F) Wealth Tax Act (1957), S. 7 (2) (a) — Break-up value of shares of company — Determination of — Account of claims in suits pending against company — Cannot be claimed as deduction from value of shares (Conceded) Tax Ref. No. 286 of 1962 (Cal), Followed. (Para 5)

(G) Wealth Tax Act (1957) S. 7 (2) (a) — Break-up value of shares of company — Determination of — Amount of profits deemed to have been declared as dividend under S. 23A of Income-tax Act (1922) — Cannot be claimed as deduction from value of shares (Conceded) Tax Ref. No 286 of 1962 (Cal), Followed. (Para 5)

(H) Wealth Tax Act (1957), S. 7 (2) (a) — Break-up value of shares of company — Determination of — Account of penal tax leviable under S. 23A of Income-tax Act (1922) — Not claimable as deduction from value of shares (Conceded) Tax Ref. No 286 of 1962 (Cal), Followed. (Para 5)

Cases Referred Chronological Paras
(1966) AIR 1966 SC 1089 (V 53)=
1966-60 ITR 112, K. S. Venkataraman and Co., (P) Ltd. v State of Madras 6, 11

(1964) AIR 1964 SC 600 (V 51)=
(1964) 5 SCR 683 Moti Ram v. N. E. Frontier Railway 8
(1962) Tax Ref. No 286 of 1962 (Cal), Sardar Sarjit Singh v. Commr. of Wealth Tax 6

(1961) AIR 1961 SC 736 (V 48)=
1960-40 ITR 605, Sardar Baldev Singh v Commr of Income Tax, Delhi and Ajmer 10
(1961) AIR 1961 SC 1633 (V 48)=
1961-42 ITR 589, Commr. of Income Tax, Bombay v Scindia Steam Navigation Co., Ltd. 11

S. R. Banerjee with S. K. Banerji, for Applicant; S. Mukharji with B. Gupta, for Respondent.

K. L. ROY, J.:— This is a reference under Section 27 (1) of the Wealth Tax Act, hereinafter referred to as the Act.

2. The assessee is an individual and the assessment year concerned is 1958-59 for which relevant valuation date is March 31, 1958. On the valuation date, the assessee was the registered holder of 650 ordinary shares of the face value of Rs. 1,000/- each in Messrs. Indra Singh and Sons Private Limited. The Wealth Tax Officer valued these shares at Rs. 3884/- per share as on March 31, 1958 on the basis of the assets and liabilities as disclosed by the balance sheet of that company on that date. The Wealth Tax Officer rejected the assessee's claim for deduction of various amounts in computing the net assets of the company on the basis of its balance-sheet. The assessee's appeal to the Appellate Assistant Commissioner against the order of assessment failed. On further appeal to the Tribunal, the assessee contended that the levy of wealth tax was unconstitutional and beyond the legislative competence of the Parliament and in particular violative of Articles 14, 19, 31 and 265 of the Constitution and the entries in the legislative list of the Union. It was further contended that in determining the break-up value of the shares of Messrs. Indra Singh and Sons Private Limited the following deductions should have been allowed, namely:—

i) Rs. 950,000/-, being the estimated tax liabilities on the profits earned by the assessee for the year ending March 31, 1958, in addition to the provision for taxation already made in the balance-sheet.

ii) Rs. 3,87,500/- being the uncalled liability on shares of certain companies which were only partly paid up

iii) A sum of Rs. 2,47,912/- in respect of the claim pending against the company in certain suits which had been instituted against the company and had not yet been finally decided.

iv) A sum of Rs. 1,14,077/- on account of the aggregate profits deemed to have been declared under the provisions of Section 23A of the Indian income-tax Act, 1922, relating to the years ending March 31, 1952 and March 31, 1953 and a further sum of Rs. 2,36,336/- on account of penal tax under Section 23A on

the company for the year ending March 31, 1955.

(v) A sum of Rs. 6,23,736/- being 10% of the sum of Rs. 62,37,363/- shown in the company's balance-sheet as loans and advances which the assessee estimated to be doubtful or bad.

3. The Tribunal rejected the assessee's claim for deduction of any of the aforesaid items. It also did not accept the assessee's contention that the Wealth Tax Act was in any way ultra vires the constitution.

4. At the instance of the assessee the following questions of law have been referred to this Court by the Tribunal:

"1. Whether, the levy of Wealth-tax was unconstitutional and beyond the legislative competence of the Parliament and violative of Articles 14, 19, 31 and 265 of the Constitution of India and the entries in the Legislative List of the Union?

2. Whether, on the facts and in the circumstances of the case, in determining the break up value of the shares held by the assessee in M/s. Indra Singh & Sons Pvt. Ltd., the following amount should have been deducted from the assets shown in the balance-sheet of the said company as on 31st March 1958:—

(i) Estimated tax liability amounting to Rs. 9,50,000/- which was not provided for in the balance-sheet?

(ii) Rs. 3,87,500/- on account of uncalled liability on the shares of certain companies held as investments?

(iii) Rs. 2,47,912/- on account of claims in certain suits pending against the company?

(iv) Rs. 11,04,776/- representing profits deemed to have been declared as dividend under Section 23A of the Income-tax Act for the years 31st March, 1952 and 31st March, 1953?

(v) Rs. 2,36,336/- on account of penal tax under Section 23A for the year ending 31st March, 1955?

(vi) Rs. 6,23,736/- representing 10% of the total loans and advances for possible bad and doubtful debts?"

5. Mr. S. R. Banerji, the learned Counsel appearing for the assessee, conceded that in view of the decision of this Court in Tax Reference No. 286 of 1962, Re: Sardar Sarjit Singh v. Commissioner of Wealth Tax, the questions Nos. 2 (i), 2 (ii), 2 (iii), 2 (iv) and 2 (v) must be answered in the negative and against the assessee. The said questions are answered accordingly.

6. So far as Question No. 2 (vi) is concerned, Mr. Banerji submitted that though the company in its balance-sheet had considered the whole amount of Rs. 62,37,363/-, being the total loans and advances outstanding, as good, if the

assessee wanted to sell these shares in the open market any prudent buyer would take into account the possibility of a portion of these loans and advances not being realizable. It was, therefore, argued that as under the provisions of the Wealth Tax Act the assets are to be valued at the market value as on the valuation date a reasonable proportion of the loans and advances in the balance-sheet of the company should be allowed as deduction on estimate on the possibility of the loans and advances not being realized in full. We are entirely unable to accept this contention. As pointed out by the Tribunal, the assessee was not in a position to indicate to the Tribunal whether any particular item of such loans and advances had in fact become bad or doubtful. In the balance-sheet itself the company had not made any provision whatsoever for any bad or doubtful debts, which meant that according to the company the loans and advances were realizable in full. In the break-up value method adopted by the Wealth Tax Officer, in valuing these shares what has to be done is to find out the net value of the assets of the company and deduct therefrom the liabilities of the company. In determining the net value of the assets such adjustments should be made in the balance-sheet as the circumstances of the case might require. In this case, as the company itself considered the amount of loans and advances due to it to be good and no part of it was considered to be bad or doubtful, the assessee could not claim that in computing the value of the shares of the company on the break-up value method, deduction should be made on an estimate of a portion of such loans and advances on the ground of its possible non-realization. This question must also be answered in the negative and against the assessee. So far as Question No. 1 is concerned, Mr. S. Mukherjee, learned Counsel for the Revenue, drew our attention to a recent decision of the Supreme Court in K. S. Venkataraman and Co. (P) Ltd. v. State of Madras, (1966) 60 ITR 112=(AIR 1966 SC 1089) and to the observations therein at p. 130 (of ITR)=(at p. 1098 of AIR). That was a case under the Madras General Sales Tax Act and their Lordships had to consider the question as to whether a suit could be filed in a Civil Court claiming refund of sales tax paid in spite of the bar to such suit contained in Section 18A of the said Act. Subba Rao, J., (as he then was), delivering the majority judgment of the Court, referred to the provisions in the Indian Income-tax Act, 1922, regulating functions and the jurisdictions to be exercised by the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal and observed as follows:—

Up to this stage all the three authorities are the creatures of the Act and they function thereunder. They cannot ignore any sources of income on the ground that the relevant provisions offend the fundamental rights or are bad for want of legislative competence. The Act does not confer any such right on them. Their jurisdiction is confined to the assessment of the income and the tax under the provisions of the Act. Whether the provisions are good or bad is not their concern. But it is said that Section 66 of the Act makes all the difference. Section 66 is in two parts. Under Section 66 (1) within the prescribed time on an application made by an assessee or the Commissioner the Appellate Tribunal shall refer to the High Court any question of law arising out of such order if the Appellate Tribunal refuses to state a case on an application filed by either of them the High Court may require the Appellate Tribunal to state the case and to refer the same to it accordingly. On a reference made by the Appellate Tribunal to the High Court the High Court shall decide the questions of law raised thereby and pass its judgment thereon and thereafter the Appellate Tribunal may pass such orders as are necessary to dispose of the case conformably to such judgment. It has been held by this Court that the jurisdiction conferred upon the High Court by Section 66 of the Income-tax Act is a special advisory jurisdiction and its scope is strictly limited by the section conferring the jurisdiction. It can only decide questions of law that arise out of the order of the Tribunal and that are referred to it. Can it be said that a question whether a provision of the Act is ultra vires of the legislature arises out of the Tribunal's order? As the Tribunal is a creature of the statute it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise on the Tribunal's order the High Court cannot possibly give any decision on the question of the ultra vires of a provision. At the most the only question that it may be called upon to decide is whether the Tribunal has jurisdiction to decide the said question. On the express provisions of the Act I can only hold that it has no such jurisdiction. The appeal under Section 66A (2) to the Supreme Court does not enlarge the scope of the said jurisdiction. This Court can only do what the High Court can.*

7 Mr Mukherjee submitted that in view of the aforesaid observations of the Supreme Court, this Court must decline to answer question No 1 on the ground that the Tribunal was not competent to refer the said question to this Court and this Court, under Section 66 could not possibly give any decision on that question.

8 Mr Banerjee submitted that the aforesaid observations of the Supreme Court are obiter as in that case the Supreme Court was only concerned with deciding the question of the maintainability of a suit in a Civil Court challenging an assessment under the Madras Sales-Tax Act irrespective of the bar against such suits contained in that statute. The Supreme Court was not required to pronounce on the scope and jurisdiction of the Tribunal or the High Court under the provisions of Section 66 of the Income-tax Act. He further submitted that an observation of the Supreme Court which was obiter was not binding on this Court and in support of this proposition he cited a decision of the Supreme Court in *Moti Ram v N E. Frontier Railway* AIR 1964 SC 600. There is a paragraph in the Headnote of the Report to the effect that the observations in the judgment of the Supreme Court which are in the nature of obiter dicta cannot be relied upon solely for the purpose of showing that certain Statutory Rules should be held to be valid as a result of the said observations. But in the body of the judgment we could find no authority for the proposition so baldly stated in the Headnote.* All that we could find was a reference to another decision of the Supreme Court in paragraph 46 of the Report and the following observations:

In dealing with this aspect of the matter this Court no doubt came to the conclusion that the termination of Bala-kotiah's services under Rule 3 did not amount to his removal or dismissal but since no argument was urged before the Court in respect of Rule 148 (3), the reference to the said Rule made by the judgment is purely in the nature of an obiter and so we are not prepared to read that statement as a decision that Rule 148 (3) is valid. To read the said statement in that manner would be to ignore the fact that this Court had reversed the conclusion of the High Court that the unpunished order was valid under Rule 148 (3) specifically on the ground that that case had not been made out by

*This proposition is based on the observations in the last seven lines of paragraph 43 of the judgment, on page 615. The error in printing Para 33 under Point (d) of the headnote on p 600 instead of para 43 is regretted.—Ed.

the Union of India and should not have been adopted by the High Court."

9. It does not appear that their Lordships held that an observation which was obiter was not binding. On the contrary what their Lordships said was that as the Court in the previous decision had no occasion to consider that particular Rule, that decision would be in the nature of obiter and would not be binding on the Supreme Court itself in interpreting another Statutory Rule. That case is no authority for the proposition that the observations of the Supreme Court, even if obiter, are not binding on this Court. On the other hand, the observations of the Supreme Court, though obiter, are binding and must be given effect to by the High Courts.

10. Mr. Banerjee next argued that under Section 66, the High Court is bound to answer any question of law referred to it by the Tribunal under the provisions of that section. As in this case, the Tribunal has referred question No. 1, which is undoubtedly a question of law to this Court under Section 66 (1), this Court is obliged to answer that question. In support of this proposition various decisions of the Supreme Court were cited. In *Sardar Baldev Singh v. Commissioner of Income-tax, Delhi* and *Ajmer*, (1960) 40 ITR 605=(AIR 1961 SC 736), the Supreme Court itself decided the validity of Sec. 23A of the Income-Tax Act but that was an appeal to the Supreme Court by special leave under Article 136 and the issue before us was not in issue in that case.

11. In *Commissioner of Income-tax, Bombay v. Scindia Steam Navigation Co. Ltd.*, (1961) 42 ITR 589=(AIR 1961 SC 1633), the Supreme Court had occasion to construe the expression 'any question of law arising out of such order' in Section 66 of the Income-tax Act, 1922. In enumerating what such question could be, the Supreme Court pointed out that when a question is raised before the Tribunal and is dealt with by it is clearly one arising out of its order. Mr. Banerji submitted that as in this case the question of vires of the Wealth Tax Act was not only raised before the Tribunal but was dealt with by it, is a question of law arising out of its order and as such the High Court is bound to answer it under Sec. 66 (3). We cannot also accept this proposition. Undoubtedly, before the decision of the Supreme Court in *Venkataraman's case*, 1966-60 ITR 112=(AIR 1966 SC 1089) (supra) it was generally considered that the Tribunal was competent to decide questions challenging the validity of the Taxing Statute under which the Tribunal was constituted and a decision of the Tribunal on such a question raised a question of law which

could be referred to and be answered by the High Court under Section 66. The decision of the Supreme Court in *Venkataraman's case* must be held to have laid down the correct state of the law and we have to accept the position that the Tribunal was not competent to entertain a challenge as to the vires of the Wealth Tax Act and also that it did not have the jurisdiction to refer Question No. 1 to this Court and this Court could not possibly answer such a question which has become merely academic. Mr. Mukherji did not contest the jurisdiction of this Court to entertain any challenge to the validity of any Taxing Statute in some other jurisdiction, as for instance the Writ Jurisdiction. He submitted that the jurisdiction of the High Court under Section 27 of the Act, being a limited jurisdiction, namely, a special advisory jurisdiction, in the exercise of such jurisdiction the High Court is not entitled to entertain such a question. Mr. Banerji cited several other cases in support of his contention which, in our opinion, are not material for the purpose of deciding this issue. Following the observations of the Supreme Court in *Venkataraman's case*, (supra), we decline to answer Question No. 1.

12. The assessee is to pay the costs of this reference.

13. BANERJEE, J.:— I agree.
GDR/D.V.C. Reference answered.

AIR 1969 CALCUTTA 253 (V 56 C 46)
BIJAYESH MUKHERJI AND
S. K. MUKHERJEA, JJ.

Ramji Dayawahla & Sons Private Ltd.,
Applicant v. Messrs. Invest Import, Res-
pondent.

A. F. O. O. Nos. 110 and 111 of 1964,
(Suit No. 1359 of 1963), D/- 13-9-1968.

(A) Constitution of India, Art. 133 (1)
(c) — Grant of certificate of fitness —
Test — Topic of public importance.

In granting a certificate of fitness for appeal to Supreme Court, correctness or propriety of a decision is not the test to go by, but the public importance of the topic raised in the case.

The litigation arising out of a contract between an Indian Company and a foreign Company, in aid of another contract entered into between the latter and one of the States of India for erection of a thermal power station, which is a valuable possession for a nation, has a special feature which distinguishes it from a litigation based on ordinary commercial transactions between two private in-

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dividuals or bodies. In such a case, it is necessary for our country as a whole to have an authoritative pronouncement from the highest Court of the realm. Such consideration alone makes the case 'a fit one' under Article 133 (1) (c)

(Para 6)

(B) Constitution of India, Art. 133 (1) — Substantial question of Law — What is

In the case of a contract containing an agreement to submit any mutual dispute to foreign arbitration, the construction of the arbitration clause the question as to which law will govern the litigation, namely S 34 of the Arbitration Act of 1940 or S 151 Civil P C and what is the repercussion of one law as against the other on the question of onus to make out a case for a stay of the suit, was the stay of the suit justified in absence of further and better evidence about what the foreign law is question of onus to make out a case of stay of suit and evidence about foreign law, are all substantial questions of law and even if these questions are dealt with in certain manner in the judgment against which certificate of fitness is sought for, it is a ground which warrants the issue of a certificate under Art. 133 (1) (Paras 7, 8 9)

(C) Constitution of India, Art. 133 (1) (c) — 'Judgment, decree or final order' — These must be final — Test of finality — Order of stay of suit for arbitration held was final. AIR 1963 Cal 281, Impliedly Overruled by AIR 1966 SC 1445.

The judgment, decree or final order against which certificate of fitness for appeal to Supreme Court is sought for must be final and not preliminary or interlocutory. There is, however, no one test of finality. Final decree does not mean last decree but decree determining rights finally. AIR 1950 FC 77 & AIR 1968 SC 733 & (1890) 18 Ind App 6 (FC) Relied on. (Paras 10, 11)

Where the question whether the rights of the parties will be determined by the Court in the ordinary way or by arbitration, that is, in a way which is not the court's way of determining rights, is finally determined against the party, the court can never go back upon that determination, and the result of the award, when the arbitrator makes one, is only a consequence of such determination. What matters is determining the rights of the parties finally on the all important question of forum, the established Court of the land, or a domestic tribunal like the arbitrator (Para 13)

The order of stay of a suit disabling the normal Court to function in the ordinary way, and relegating the parties to a non-Court viz., an arbitrator has finality attached to it, irrespective of the decision one way or the other, later, by such non-Court. Therefore, the appel-

late order of stay in the instant case was a final order. AIR 1951 Pat 619, Disting. & Expl., AIR 1960 Cal 582 & AIR 196. Cal 433 & AIR 1963 Cal 405, Rel on, AIR 1963 Cal 281, Impliedly overruled by AIR 1966 SC 1445. AIR 1955 Cal 257 Held obiter (Para 22)

Cases Referred Chronological Paras (1968) AIR 1968 SC 733 (V 55)=

1968 Cri LJ 876, Mohan Lal Maganlal Thakkar v State of Gujarat 10, 14, 20, 21, 23

(1966) AIR 1966 SC 1445 (V 53)= (1966) 3 SCR 198 Ramesh v Gendalal Matilal Patni 14, 21, 23

(1965) 70 Cal WN 199 Ramji Dayawala & Sons Pvt. Ltd. v M/s. Invest Import 3

(1964) AIR 1964 Mad 194 (V 51)= (1964) 1 Mad LJ 25 (FB), Southern Roadways (P) Ltd. v P. M. Veeraswami 14, 21

(1963) AIR 1963 SC 1044 (V 50)= 1963 SCD 659, Michael Golodetz v Serajuddin and Co 8

(1963) AIR 1963 Cal 281 (V 50), Shriram Poddar v Income-tax Officer 23

(1963) AIR 1963 Cal 405 (V 50) Bengal Jute Mills Co Ltd. v Lalchand Duger 2.

(1963) AIR 1963 Cal 433 (V 50)= 67 Cal WN 743, Farben Fabriken Bayer Aktiengesellschaft v Joint Controller of Patents & Designs 23

(1963) AIR 1963 Cal 515 (V 50) Thacker & Press & Directories Ltd. v Metropolitan Bank Ltd. 14

(1963) AIR 1963 Cal 524 (V 50)= 68 Cal WN 197, Pankaj Kumar Pakhra v Nanbala Pakhra 14

(1962) AIR 1962 SC 1314 (V 49)= (1962) 1 Lab LJ 656 Chunilal V Mehta and Sons Ltd. v Century Spinning and Manufacturing Co, Ltd. 6, 8

(1960) AIR 1960 Cal 582 (V 47)= 64 Cal WN 861, Mr Felumeah v S. Mondal 23

(1957) AIR 1957 Cal 727 (V 44)= 61 Cal WN 559 Shorab Merwanji Modi v Mansata Film Distributors 17

(1955) AIR 1955 Cal 257 (V 42)= 95 Cal LJ 160, Union of India v. Nalini Ranjan Guha 24

(1953) AIR 1953 SC 182 (V 40)= 1953 SCR 572, Gaya Electric Supply Co Ltd. v State of Bihar 15

(1951) AIR 1951 Pat 157 (V 38) State of Bihar v Gaya Electric Supply Co Ltd. 15

(1951) AIR 1951 Pat 619 (V 38)= ILR 30 Pat 853, Gaya Electric Supply Co Ltd. v State of Bihar 14, 15, 18, 18

(1950) AIR 1950 FC 77 (V 47)= 1949 FCR 842, Mohammad Amin Bros. Ltd. v Dominion of India 10, 14

- (1933) AIR 1933 PC 58 (V 20)=60
Ind App 76, Abdul Rahaman v.
D. K. Cassim and Sons 14
- (1927) AIR 1927 PC 110 (V 14)=
54 Ind App 126, Raghunath Prasad
Singh v. Deputy Commr. of
Partabgarh 8
- (1920) AIR 1920 PC 86 (V 7)=47
Ind App 124, Firm Ramchand
Manjimal v. Firm Goverdhan Das
Vishandas Ratanchand 14
- (1894) 22 Ind App 1=ILR 17 All
112 (PC), Syed Murjhar Husain v.
Bodha Bibi 12, 17, 23
- (1890) 18 Ind App 6=ILR 15 Bom
155 (PC), Rahimbhoy and Hibi-
bhoy v. Turner. 11, 17, 23
- Sabyasachi Mukherji and Mrs. Maya
Ray, for Applicant; Somnath Chatterjee
and A. Mitter, for Respondent.

BIJAYESH MUKHERJI, J.:— The unsuccessful appellant craves a certificate under Article 133, sub-article (1) of the Constitution for appeal to the Supreme Court.

2. The appellant's is a suit, alleging breaches of contracts, one of which is written and the rest are parol, and claiming recovery of Rs. 4,25,343.00. A. N. Ray, J., stays the suit and all proceedings thereunder, because of the written contract's arbitration clause which bears:

“Any mutual dispute should be settled in mutual agreement; however, both the contracting parties accept the jurisdiction of the Arbitration by the International Chamber of Commerce in Paris with application of Yugoslav materials and economical law.”

The learned Judge dismisses too the appellant's application for injunction restraining the respondent from withdrawing from the Bihar State Electricity Board any money, without keeping a balance of Rs. 4,40,000. The appeals taken against the aforesaid two orders fail. Hence this application for the grant of a certificate, after consolidating the two appeals which have so failed.

3. The decision of the Court of appeal, presided over by G. K. Mitter, J., (then here) and myself, has since come into the reports: *Ramji Dayawahla & Sons Pvt. Ltd. v. Messrs. Invest Import*, (1965) 70 Cal WN 199, making it unnecessary to go over the facts again. It must, however, be mentioned that when the petition for a certificate reaches the stage of hearing, G. K. Mitter, J., is not in this Court, with the result that the Chief Justice assigns the matter to my learned brother and myself. And we hear it.

4. No doubt, the judgment is a judgment of affirmance. But I am satisfied that the appeal does involve substantial questions of law. That apart, the whole of materials, we have had put before us, completely satisfy me too “that the case

is a fit one for appeal to the Supreme Court”, within the meaning of clause (c), sub-article (1) of Article 133 of the Constitution. I proceed to state why I am satisfied so.

5. Much the most important point is that which I dwelt on and decided in paragraph 48 of my judgment in the appeals, G. K. Mitter, J., agreeing:

“Here is a contract solemnly entered into between the appellant, an Indian company, and the respondent, a Yugoslav company, in aid of another contract entered into between the latter and the State of Bihar through its Electricity Board for erection of a thermal power station at Barauni. What a valuable possession for the nation such thermal power station means is plain to be seen. We do not, the Yugoslavs do, know the know-how of erecting a thermal power station. Hence they are here on the role of collaborators to help us make such an invaluable acquisition. And to get it built the authorities spare from their none too adequate resources the requisite foreign exchange for the appellant's managing director, Lalbhai, in order to enable him to proceed to Belgrade with a view to signing the contract which he does, his signature being “only one centimetre away” from the contract's arbitration clause this litigation has a special feature which distinguishes it from litigations founded on ordinary commercial transactions between two private persons. With foreign collaboration we so badly need, one member State of the larger Welfare State (which is India) is adding to the national wealth by having a thermal power station. It is, therefore, not only common sense but also common honesty that no attempt should be made, or if made countenanced, to flee the terms of the contract except in exceptional circumstances which we do not see upon the whole of the materials we have had put before us. It is a relief to find that law marches with common sense and common honesty.”

6. What I am on now is not the correctness or propriety of the decision of mine, agreed to by G. K. Mitter, J. Indeed, in a matter as this, that is not the test to go by. What I am on now is the importance of the topic raised, not yet closed, for all we know and are told, either by any decision of the highest Court of the land or by well settled general principles. See *Sir Chunilal V. Mehta and Sons, Ltd. v. Century Spinning & Manufacturing Co., Ltd.*, AIR 1962 SC 1314 at p. 1318. I confess, the more I consider it, the more I am convinced that the question raised is one of great public importance, so that the foreign collaborators, with whose aid we are out to augment our national wealth and posses-

sions, may know exactly where they stand. To my thinking it will be a mistake to equate the transaction, this litigation evinces, with ordinary commercial transactions between two private individuals or bodies. That being so, what the country as a whole is in bad need of is an authoritative pronouncement from the highest Court of the realm. In my judgment, such consideration alone makes the case 'a fit one for appeal to the Supreme Court', within the meaning of clause (c), sub-article (1), Article 133, of the Constitution.

7. Then, here are some of the substantial questions of law involved in the appeals.

(1) The construction of the arbitration clause in the contract

(2) Which law rules the litigation on hand, with an agreement to submit any mutual dispute to foreign arbitration, — Section 34 of the Arbitration Act (10 of 1940) or Section 151 of the Procedure Code 5 of 1908 — and what is the repercussion of one law as against the other on the question of onus to make out a case for a stay of the suit?

(3) Was the stay of the suit justified in absence of further and better evidence about what the foreign law Yugoslav materials and economical law is — law, of which no knowledge can be imputed to us, and which has got to be proved, as facts are proved, by appropriate evidence (so lacking here)?

8. No doubt, questions as these have been dealt with in a certain manner in the judgment against which a certificate for appeal to the Supreme Court is now sought. But that is not what bulks large here. What bulks large is the grant of a certificate that, though the judgment is a judgment of affirmance, with the amount of the subject-matter of the dispute in the primary Court, and in dispute on appeal, having been not less than Rs 20,000/-, — indeed the stake here is over Rs. 4 lakhs, — the appeal does involve some substantial question of law. The questions of law formulated in the preceding paragraph appear to be substantial, by any standard, as between the parties. Raghunath Prasad Singh v Deputy Commissioner of Partabgarh, (1927) 54 Ind App 126 = (AIR 1927 PC 110) and the case of AIR 1962 SC 1314 supra. In *Michael Golodetz v Serajuddin & Co.*, AIR 1963 SC 1044 the power under Section 34 of the Arbitration Act was taken as inherent in the Court. So, whether Section 34 simpliciter applies or not, apart from the Court's inherent power, appears to be still at large, the question of onus necessarily trailing behind Section 34 applying the respondent to the appeals gets a stay, on the foot of the arbitration agreement, unless the appellant satisfies the court the other way about.

that no stay is called for. Section 151 applying, it will be for the respondent to the appeals to satisfy the court that to allow the suit to continue is to abuse the process of the court.

9. Thus, the ground covered so far warrants the issue of a certificate under Article 133, sub-article (1), of the Constitution. But there is said to be one formidable hurdle that the judgment sought to be proceeded against does not finally determine the rights of the parties, it simply stays the suit, leaving the final determination to the International Chamber of Commerce at Paris. True it is that in the absence of a final determination we cannot issue a certificate the petitioner prays the Court for. But, it is argued the stay means that the suit cannot be proceeded with. It is, in effect, taking off the plaint which becomes dead for all purposes. Here is therefore final determination of the right of the forum, the International Chamber of Commerce at Paris, instead of the Court. To that, the rejoinder is no matter what the forum is — and that is so immaterial — dispute still remains a dispute to be finally adjudicated upon, and finality there will be only when there is an award not before.

10. The collocation of the words "Judgment, decree or final order" in Article 133, sub-article (1) of the Constitution goes to show that, other things being there, an appeal lies only from a judgment, decree or order which is final. Necessarily no appeal lies from a judgment, decree or order which is not final, that is to say, which is preliminary or interlocutory just what is pointed out in *Mohammad Amin Brothers Ltd v Dominion of India* AIR 1950 FC 77, in the context of Section 205 sub-section (1) of the Government of India Act, 1935 (25 & 26 Geo V, Ch 42) where the same words occur. But what is the test of finality? No one test is there. No one test can be there vide the majority judgment in *Mohomal Maganlal Thakkar v State of Gujarat*, AIR 1968 SC 733. The test will vary according as the real question, which is the burden of the judgment, decree or order, varies.

11. Some 78 years ago from today with a view to ascertaining whether the stamp of finality was there or not, the nature of the proceedings and the real question before the Court were looked into. Such was the case of *Rahimbhoy and Hibbhoy v Turner*, (1890) 18 Ind App 6 where in an accounting suit the defendant denied his liability to account to the plaintiff. The High Court affirmed his liability and directed an account. But then only accountability was decreed and accounts had yet to be taken. So long they were not taken, the decree

the forms and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with "the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper-appals shall, so far as they can be made applicable, apply to an objection under this rule."

Where a decree is partly against one suitor and partly against another, one of such parties being satisfied with his partial success, may not prefer an appeal within limitation, but, on the other party appealing, may like to reopen the adverse part of the decree. In the larger interest of the cause of justice, it is in such circumstances that the party satisfied with partial success is granted another opportunity of challenging the part of the decree against him upon his opponent preferring an appeal, of which notice is served on him. In order to avail of this right, he has to take cross-objections within one month from the date of service on him of notice of the hearing of his opponent's appeal.

In this background, the question arises as to what is the effect of the present appellant's appeal in the lower Appellate Court having been dismissed as barred by limitation.

From one point of view he may be held not to have preferred any appeal but from another point of view, it may be held that having himself chosen to prefer an appeal and having failed in his endeavour to successfully assail the impugned decree, even though on account of bar of limitation, in fairness, he should not be allowed to have a second chance of reopening the controversy in the garb of cross-objections. This aspect has not been fully developed at the bar and I would, therefore, be disinclined to express any considered opinion on the point. I should, however, like to point out that it would have been more in consonance with the practice if the learned Additional District Judge had not disposed of the cross-objections before disposing of H. Mohd. Muslim's appeal. The cross-objections are to be

heard and, as a general rule, the Court is expected to dispose of both the appeal and the cross-objections together by one judgment and the decision should be incorporated in one decree. The appellant's learned counsel has, however, not made any grievance of this procedure and I need say nothing more on it.

One point does seem to require notice. H. Mohd. Muslim's appeal was finally disposed of on 6-12-1965 when it was dismissed affirming the decree appealed from and that decree has obviously now become final. No challenge is directed against the judgment and decree disposing of that appeal. If the present appeal is allowed and the cross-objections are sent back for reconsideration, it would lead to a somewhat extraordinary situation, for the appeal in which the cross-objections were preferred, has been finally disposed of more than two years ago affirming the decree of the trial Court on the merits and the Court would now be called upon to vary that decree.

As a matter of fact, on the peculiar circumstances of this case, fresh disposal of the cross-objections would entail the possibility of two decrees, which have become final, being varied by the same Court, namely, the Court of the Additional District Judge. This situation seems to me to be somewhat extraordinary and also not in accordance with the normal practice and the apparent scheme of the relevant law of procedure. It may be remembered that by means of a deeming fiction, the cross-objections are, for certain purposes, treated as a memorandum of appeal, but they are neither registered as an appeal nor are they clothed with an independent status as such. They do not constitute a separate independent cause or writ but largely draw their source of survival from the competence of the appeal in which they are taken and the exceptions to this dependence are provided in sub-rule (4) of Rule 22.

Rule 22 is indeed a part of the procedural scheme consisting of this rule and Rule 22 of Order 41 and is obviously inspired by the larger cause of justice as observed earlier. The cross-objections are, therefore, expected to be disposed of along with the appeal in which they are taken and after the final disposal of that appeal, it may, as a general rule, be difficult to deal with the cross-objections as if they constitute an independent appeal. In the absence of any binding precedent or of any clear provision of law, therefore, I am disinclined, as at present advised, to countenance such a position as is suggested by the appellant and to remit the case to the lower Appellate Court for adjudicating on the cross-objections on the merits after the final disposal of the appeal, even if

otherwise such a course were legally permissible and called for

8. The legality of the view taken by the lower Appellate Court in regard to the competency of the cross-objections directed against the co-respondents has not been challenged by the appellant's learned counsel. He has, however, argued that the cross-objections were in fact directed against the appellant in the lower Appellate Court. I have gone through the cross-objections dated 20-12-1963 and I find that out of 15 grounds of cross-objections, the only challenge against the appellant in that Court is contained in the last two hand-written lines in ground No 14. Those two lines read as under

"Neither defendant No 8 the present appellant, nor the plaintiff can have a decree of ejectment against the present objector-respondent No. 9 (defendant No 6)

As the judgment of the lower Appellate Court shows, this point does not appear to have been argued before that Court, for, had it been argued, it may be presumed that the learned Additional District Judge would have considered it and expressed his opinion as to why this ground could not be considered to be directed against H. Mohd. Muslim, the appellant in the lower Appellate Court.

I have compared the grounds contained in the memorandum of appeal presented by the present appellant in the Court of the Senior Subordinate Judge, which memorandum was returned to him for being presented to the Court of the District Judge and was actually so represented, with the grounds of his cross-objections and I find that the typed grounds in both the memorandum are practically similar word for word except for the additional hand-written lines in the cross-objections as noticed earlier. To me, it seems that both the appeal and the cross-objections were intended to be exclusively directed against the judgment and decree of the trial court only in so far as they were in favour of the plaintiffs and the newly added challenge in paragraph 14 of the cross-objections must be deemed not to have been argued before the lower Appellate Court.

Now, if this ground was not pressed before the lower Appellate Court, which means that it was given up, then obviously it is difficult to find fault with the view taken by the Courts below. The argument, that in the cross-objections taken against the appellant, incidental relief may also be claimed against a co-respondent, even if permissible, is met by the contention that under the mere pretext of directing the cross-objections

on an unsubstantial point the cross-objections against the appellant and a co-respondent cannot be allowed in essence to contest only the decree made in favour of other co-respondents. The cross-objections are taken in an appeal and it is the particular appellant alone who may be taken to have facilitated his opponent on equitable grounds contained in Rule 22 to re-open the finally concluded controversy against him, but to expose the decree in favour of the other co-respondents to a challenge in this manner after the expiry of limitation for appeal, would in my opinion, be most unjust to them because they would have no opportunity of taking cross-objections against the cross-objecting respondents. But as, in my view, this challenge contained in the last part of ground No 14 in the memorandum of cross-objections was not urged in the Court below it cannot be relied upon in support of the present appeal.

This appeal accordingly fails and is dismissed with costs.

BDB/D V.C.

Appeal dismissed.

AIR 1969 DELHI 130 (V 56 C 20)

I. D. DUA, C. J.

Chief Controlling Revenue Authority and another, Petitioners v Fertilizer Corporation of India Ltd. and others, Respondents

Civil Revn. No. 406-D of 1962, D/- 20-9-1966 from order of Sub J., 1st Class, Delhi D/- 16-4-1962.

(A) Court-fees and Stamps Valuations — Court Fees Act (1870), Ss. 26, 27 (b) — Rules under, framed by Delhi Government and notified on 29-3-1954 are ultra vires its rule-making power — Insistence on exclusive use of stamp with name of Delhi State printed over it is illegal.

The rules framed by the Delhi State Government and notified on 29-3-1954 in the Government Gazette (Delhi State) dated 8-4-1954 are outside the rule-making power of the Government. Neither S 26 nor S 27(b) authorise the appropriate Government to make rules providing that a Court-fee stamp which is not over-printed with the name of certain State would not be usable in the courts of that State CR No. 482-D of 1956 D/- 5-1-1959 (Punj), and AIR 1959 Punj 629, Foll. (Paras 3, 4)

(B) Court-fees and Stamps Valuations — Court Fees Act (1870), Pre-Interpretation of the Act should be liberal.

Courts should put a liberal interpretation on fiscal statutes like the Court Fees Act so as to lessen and not to add to the burden of litigation. The Court

KL/AM/F52/68

Fees Act is notorious for bad drafting and it is an artificial statute showing hardly any principle in its scheme.

(Para 3)

(C) Court-Fees and Suits Valuations—Court Fees Act (1870), S. 13 — Return of plaintiff for proper presentation to competent Court of another State — Court-fee purchased in former State can lawfully be received in Court in latter State.

Where a plaintiff bearing court-fee is returned by Civil Court of one State, for presentation to a competent Court of another State, the Court-fee purchased by the plaintiff for use in Civil Court of the first State can lawfully be received in the Civil Court of the latter State, as proper Court-fee stamps.

(Paras 3, 4)

Unless there is a specific bar in the Court-fees Act or any statutory rules lawfully framed against the use of court-fee stamps purchased by a citizen in one State from being used in another State in the Union of India, there is no legal justification for depriving a citizen from using these stamps in a State other than that of the purchase. The various States in the Union of India are not foreign countries and there is no law providing that court-fee purchased in one State can be valid in law only in that State and cannot be used in a different State. Justice is not sold by the States in Indian Republic. Nor entry No. 3 of List II of the 7th Schedule of the Constitution contemplates that payment of price of the court-fee into the coffers of the particular State, the Courts of which are lawfully approached by a citizen seeking justice, is a constitutional condition precedent. C. R. No. 482-D of 1956 D/- 5-1-1959 (Punj), Foll.

(Para 4)

Cases Referred: Chronological Paras
(1959) AIR 1959 Punj 629 (V 46),
Bhuramal Din Dayal v. Imperial
Flour Mills Ltd. 3
(1959) CR No 482-D of 1956 D/-
5-1-1959 (Punj), State of Punjab
v. R. B. Madho Parshad 3
(1953) CR No 147 of 1951 D/- 24-4-
1953 (Punj), M. Gohi Mal v. Pun-
jab National Bank Ltd. 2
(1927) AIR 1927 Bom 257 (V 14)=
ILR 51 Bom 236, Ganesh Tavan-
appa v. Tatyia Bharmappa 3
(1926) AIR 1926 Pat 408 (V 13)=
8 Pat LT 33, Naresh Chandra v.
Charles Joseph Smith 3
(1912) ILR 35 Mad 567 = 21 Mad
LJ 533 (FB), S. Visweswara
Sarma v. T. M. Nair 3
(1895) ILR 19 Bom 145, Anna Purna
Bai v. Lakshman Bhikaji 3
S. S. Chadha, for Petitioners; M. S.
Vohra, for Respondents.

ORDER: It is a matter of surprise that the Chief Controlling Revenue Authority

and the Delhi Administration through the Chief Controlling Revenue Authority should have considered it necessary to approach this Court on revision under section 115, Code of Civil Procedure, against the order of a learned Subordinate Judge dated 16-4-1962 holding that the court-fee purchased by the plaintiff in Punjab, when the plaintiff bearing that court-fee was returned by a Hoshiarpur Civil Court for being presented to a competent Court at Delhi, can lawfully be received in the civil courts at Delhi as proper court-fee stamps.

2. The learned Subordinate Judge in his order relied on an unreported decision by a Division Bench of the Punjab High Court in Mr. Gohi Mal, etc. v. Punjab National Bank Ltd, etc. C. R. No. 147 of 1951 D/- 24-4-1953 (Punj). In that case, the court-fee stamps had been purchased in Lucknow and were used on a plaintiff filed in a Court at Delhi. The objection that these court-fee stamps could not be lawfully used in Delhi Courts was repelled by G. D. Khosla and R. C. Soni JJ.

3. On revision in this Court, Shri S. S. Chadha the learned counsel appearing on behalf of the petitioners before me, has very strongly submitted that when the Division Bench decision was given in April, 1953, then the rules framed by the Delhi State Government and notified on 29-3-1954 in the Government Gazette (Delhi State) dated 8-4-1954 were not in existence, with the result that that decision must be held to be obsolete and no longer binding in view of the later rules. The learned counsel was, however, constrained to admit that there are two later Single Bench decisions of the Punjab High Court which directly go against him. One of these decisions was given by S. B. Kapoor, J. in State of Punjab v. R. B. Madho Parshad, C. R. No. 482-D of 1956 D/- 5-1-1959 (Punj) in which the rules relied upon by Shri Chadha were considered and the decision given against the challenge to the validity of the plaintiff bearing court-fee stamps purchased at Gurgaon and later used in Delhi Courts. The learned Judge observed as under:

"It is well settled law that where a Court after receiving a plaintiff and cancelling the stamp affixed thereto returns the plaintiff for presentation to the proper Court under Order VII, Rule 10 of the Code of Civil Procedure, 1908, the latter Court to which the plaintiff is represented is bound to give credit to the fee already levied by the former Court." For this view, reliance was placed on S. Visweswara Sarma v. T. M. Nair, (1912) ILR 35 Mad 567 (FB) and Ganesh Tavanappa Burde v. Tatyia Bharmappa, AIR 1927 Bom 257. While dealing with the

rules cited before S. B. Kapoor J and I may point out that the same rules have now been relied upon by Shri Chadha, the learned Judge, after reproducing the relevant portions of Ss. 26 and 27 of the Court-fees Act, observed thus:

"Rai Bahadur Har Parshad on behalf of the plaintiff has rightly contended that neither section 27 nor section 27 (b) authorise the appropriate Government (which in this case was the Government of Delhi) to make rules providing that a court-fee stamp which is not over-printed with the word 'Delhi' would not be usable in the Delhi Courts. In the interpretation of the statutes it is a cardinal principle that a rule which relates to a matter not arising under the provision of the Act must be held to be ultra vires of the Act. A somewhat similar point came up for consideration before the Patna High Court in *Naresh Chandra v Charles Joseph Smith*, AIR 1926 Pat 408. In that case, the words for use in the High Court only were impressed on the back of court-fee stamps affixed on the plaint in a certain suit. After the stamps had been punched, they were rejected by the Subordinate Judge on the ground that they bore on the back the words 'for use in the High Court only'. The learned Judge observed that the words impressed on the back of the stamp may have some significance for administrative purposes, but they were not capable of invalidating the stamps themselves."

Reliance by the learned Judge was also placed on *Anna Purna Bai v Lakshman Bhukaji*, (1895) ILR 19 Bom 145 for the view that section 26 of the Court Fees Act does not authorise the making of a direction that the court-fee stamps should bear the words 'court-fees'. This decision was followed by me in *Bhura Mal Din Dayal v Imperial Flour Mills Ltd.* AIR 1959 Punj 629. There, I had occasion to observe that Courts should put a liberal interpretation on fiscal statutes like the Court Fees Act so as to lessen and not to add to the burden of litigation. I also pointed out that the Court Fees Act was notorious for bad drafting and it was an artificial statute showing hardly any principle in its scheme. If that be the true position, then I am wholly unable to justify any objection to the court-fee which was purchased at Hoshiarpur in the present case from being used in Delhi.

4. Shri Chadha has very eloquently argued that every State is entitled to realise revenue on court-fee and, therefore, merely because a citizen happens to pay court-fee in Punjab, he should not be held entitled to come to Delhi and seek justice without paying court-fee to the State of Delhi. This argument

has not impressed me at all. Unless there is a specific bar in the Court-Fees Act or any statutory rules lawfully framed against the use of court-fee stamps purchased by a citizen in one State from being used in another State in the Union of India, I do not find any legal justification for depriving a citizen from using those stamps in a State other than that of the purchase. The various States in this Union are not foreign countries and my attention has not been drawn to any provision of law by the learned counsel for the petitioner which would show that court-fee purchased in one State can be valid in law only in that State and cannot be used in a different State. Justice, it must not be forgotten is not sold by the State in this Republic. Payment of price of the court-fee into the coffers of the particular State the Courts of which are lawfully approached by a citizen seeking justice, is not a constitutional condition precedent as has been sought to be suggested by a reference to entry No 3 in List II of the Seventh Schedule of the Constitution. To insist on a citizen paying court-fee twice over for seeking justice in the same cause can be justified only on a clear and specific provision of law validly made. None has been cited in the present case except the rules mentioned above. The correctness of the decisions holding those rules to be outside the rule-making power has not been questioned and I have not been persuaded in this case to disagree with the view taken in those decisions.

5. I need not say anything on the preliminary objection raised on behalf of the respondent that the Chief Controlling Revenue Authority should not be heard in this case on revision in support of the challenge to the court-fee paid by the plaintiff. On revision under section 115 C. P. C., this Court can suo motu scrutinise the record of a case and make suitable orders. It is therefore, unnecessary to express any considered opinion on the challenge to the locus standi of the two petitioners who have filed this revision, though I cannot help observing that the facts and circumstances of this case were not of such paramount importance as to impel the two petitioners to approach this Court for the purpose of fixing a double liability on the plaintiff. The State of Delhi might well, in its judicious discretion, have felt satisfied with the order of the Court below. Indeed, it seems to me that this revision was directed to be filed presumably in ignorance of the two decisions cited above which have held the field since 1959. I have ignored the earlier Bench decision given in April, 1953 because, accordingly to Shri Chadha, the principle laid down therein would not hold good after the rules relied upon by him.

6. Even assuming the view of the Court below was not quite correct, I would still have declined to interfere on revision in this case for more reasons than one. Not only is the decision of the Court below eminently just, but after the lapse of six years, to interfere on revision on this ground, would hardly be consonant with the cause of justice, as I am informed that the proceedings in the Court below have already ended in a decree.

7. This revision, for the reasons given above, fails and is dismissed with costs.

DVT/D.V.C. Revision dismissed.

AIR 1969 DELHI 133 (V 56 C 21)

(HIMACHAL BENCH AT SIMLA)

JAGJIT SINGH, J.

Amar Nath, Petitioner v. Alfa, Respondent.

Criminal Ref. No. 18 of 1968, D/- 22-4-1968.

Criminal P. C. (1898), S. 397 (1)—Conviction of accused in two separate trials — Sentence in subsequent trial can be ordered to run concurrently with previous one. AIR 1925 Lah 334, Dissented from; AIR 1926 Nag 426 and AIR 1951 Raj 68 and AIR 1924 Rang 307, Rel. on. (Paras 4, 8)

Cases Referred: Chronological Paras

(1951) AIR 1951 Raj 68 (V 38),

Surja v. The State 7

(1926) AIR 1926 Nag 426 (V 13)=

27 Cri LJ 807, Mahadeo v. Emperor 7

(1925) AIR 1925 Lah 334 (V 12)=

26 Cri LJ 731, Batan Singh v. Emperor 2

(1924) AIR 1924 Rang 307 (V 11)=

25 Cri LJ 1310, Emperor v. Nga 7

Po Thauang

K. C. Pandit, for Petitioner.

ORDER: The respondent in this case, Alfa by name, was tried separately in two cases under section 16 (1) (a) (i) of the Prevention of Food Adulteration Act, 1954. Against him complaints were filed by a Food Inspector for selling adulterated milk. One of those cases was decided by the Magistrate, First Class, Chamba, on November 7, 1967 and the respondent was sentenced to six months' rigorous imprisonment and fine of Rs. 1,000/-. The second case was decided on November 13, 1967 and the sentence awarded was six months' rigorous imprisonment and fine of Rs. 500/-. While deciding the second case the learned Magistrate ordered that the sentence of imprisonment shall run concurrently with the sentence in the

previous case which was being undergone by the convicted person.

2. A revision was filed by the Food Inspector concerned in the court of the Sessions Judge, Kangra. Shri Chet Ram, the learned Sessions Judge, made a report recommending setting aside of the order of the Magistrate by which he had directed that the subsequent sentence shall run concurrently with the previous sentence. According to the learned Sessions Judge as the cases against the respondent were separate ones and were decided on different dates the sentence in the case decided on a latter date could not be ordered to run concurrently with the sentence which was already being undergone in the case which was decided earlier. Batan Singh v. Emperor, AIR 1925 Lah 334 was relied upon in support of that view.

3. Section 397 of the Code of Criminal Procedure, hereafter referred to as the Code, reads as under:

"(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

4. It will be seen that section 397, as it now stands, gives power to a Court to direct that a subsequent sentence shall run concurrently with a previous sentence. Before the amendment of the Code in the year 1923, except where several sentences were passed at one trial or where in the case of a youthful offender, section 32 of the Reformatory Schools Act, 1897 (VIII of 1897) applied, there was no provision by which a subsequent sentence could be made to run concurrently with a previous sentence. Section 397, prior to its amendment in that year, was in the following terms:

"When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or trans-

portation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced.

Provided that if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced.

5 By Amendment Act XVII of 1923 the words "unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence" were added at the end of the first paragraph of section 397 of the Code and it was only thereafter that it became competent for a Magistrate in cases tried separately and even decided on different dates to which section 32 of Act VIII of 1897 did not apply, to order that the subsequent sentence shall run concurrently with a previous sentence.

6 Section 397 of the Code was substituted by a new section by the Amendment Act of 1955 but sub-section (1) which is the relevant provision for purposes of this case remained substantially the same as the old section after the amendments made in the year 1923.

7 In Mahadeo v Emperor, AIR 1926 Nag 426 as a result of separate trials the accused were sentenced in one case under sections 457 and 411 and in the other case under section 401 of the Indian Penal Code. It was held that in view of the provisions of section 397 of the Code the sentences could be ordered to run concurrently. A reference may as well be made to Surja v The State, AIR 1951 Raj 68 and Emperor v Nea Po Thauang AIR 1924 Rang 307. With great respect I am of the opinion that the view taken in Batan Singh's case was not correct. No reference was made to the provisions of section 397 as they existed after the amendments made in the year 1923. It seems that the addition to that section of the words "unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence", made by the Amendment Act XVII of 1923, were not brought to the notice of the Court.

8. Under section 397 of the Code it was competent for the Magistrate, First Class, Chamba, to order that the subsequent sentence shall run concurrently with the previous sentence. Shri K. C. Pandit, learned counsel for State, also did not support the recommendation made by the learned Additional Sessions Judge.

9 The order made by the learned Magistrate was within his competence.

No interference is, therefore, called for. The reference is, accordingly, declined. DVT/DVC. Reference rejected.

AIR 1969 DELHI 134 (V 56 C 22)
(HIMACHAL BENCH AT SIMLA)
HARDAYAL HARDY, J

Moti Ram, Petitioner v Smt. Rittoo, Respondent.

C. M. P. No. 154 of 1967, D/- 17-9-1968

Registration Act (1908), S 69 (1) (b) (as amended by Indian Registration (Punjab Amendment) Act (1961)) — Punjab Document Writers Licensing Rules (1961), R 3(2) — Sub-rule (2) is in excess of rule-making powers conferred under S 69 (1) (bb) and so ultra vires.

Sub-rule (2) of Rule 3 is ultra vires inasmuch as it travels beyond the limits prescribed for rule-making authority by clause (bb) of sub-section (1) of S 69.

(Para 15)

Section 69 of the Registration Act confers power on the Inspector-General to frame rules but the rules made by him must be consistent with the Act and they must also be strictly in accordance with the authority conferred by the statute.

(Para 11)

The object of the rules framed under Section 69 (1) (bb) is to regulate the practice and profession of document-writers. The use of the expression in the offices of the registering officers may not be strictly construed to include only those persons who shall be permitted to act as document-writers by accommodation being provided to them in those offices and may well include even other persons who may not be sitting in the offices of registering officers but may still be writing documents which ultimately come up for registration. But the ambit of the rules can by no means be extended to prohibit all persons other than licensed document writers from writing such documents.

(Para 11)

The rule-making power under this clause certainly permits the laying down of the condition that after the publication of the rules no person shall practice as a document-writer except under a licence granted by the Licensing Authority. It also brings within its sweep the eligibility of persons to be licensed and other matters incidental thereto but there is certainly no warrant for a rule which provides that no registering officer shall accept any document for registration which is not written by a licensed document-writer or by the executant himself. As such the rule has nothing

to do with regulating the practice and profession of document writing and it also amounts to the creation and imposition of an additional requirement which is not to be found in the Act itself. (Para 11)

K. D. Sud, for Petitioner; B. Sita Ram, for Respondent.

ORDER: The petitioners Motiram and Brijlal have filed this application under Article 227 of the Constitution in which they pray that the order of the Sub-Registrar, Banjar, District Kulu dated August 18, 1966 whereby he refused to register the will executed by Mst. Dilbaroo on December 13, 1965 and confirmed on appeal by the Registrar, Kulu District by his order dated January 16, 1967 be set aside and a direction be issued to the Sub-Registrar to admit the said document for registration. The brief facts as stated in the order of the Registrar are that Mst. Dilbaroo was the owner of certain property. She died on December 22, 1965. The petitioners alleged that before her death she had made a will bequeathing the property to them. After the death of Mst. Dilbaroo the petitioners presented the will before the Sub-Registrar, Banjar, District Kulu under Sections 40 and 41 of the Indian Registration Act, 1908 for registration. Smt. Rittu Devi daughter of Mst. Dilbaroo deceased opposed the registration of the will and filed her written statement on January 29, 1966 but she did not raise any objection on the ground that the will was not written by a licensed deed-writer.

2. The petitioners examined 5 witnesses before the Sub-Registrar including Devi Singh (PW-1) who is the scribe of the will and Jaishi Ram and Man Singh who had attested the will. Mohan Singh Prohit who had performed the last religious rites of the deceased was also produced as a witness. The Sub-Registrar however refused to accept the will for registration on the ground that Devi Singh who had written the will was not a licensed document writer. The order of the Sub-Registrar was confirmed on appeal by the Registrar, District Kulu and has now been challenged by the petitioners in this Court.

3. The Sub-Registrar has declined to accept the will for registration on the basis of Rule 3 framed by the Inspector-General of Registration, Punjab in exercise of the power conferred on him by clause (bb) of sub-section (1) of S. 69 of the Indian Registration Act, 1908. The said rule reads as under:

"3. Persons by whom documents may be written—

(1) After a month of the publication of these rules in the official Gazette no person shall practise as a document-

writer except under a licence granted by the Licensing Authority.

(2) No registering officer shall accept any document for registration which is not written by a licensed document-writer or the executant himself."

4. Learned counsel for the petitioners has argued that sub-rule (2) of Rule 3 is ultra vires inasmuch as it is in excess of the rule-making power of the Inspector General of Registration under Section 69 of the Registration Act. In order to appreciate the argument of the learned counsel it is necessary to set out the history of this rule. It appears that formerly there was no check on the writing of deeds and applications falling under the Indian Registration Act and also on the fees charged by the deed-writers. Often, people with little experience and knowledge of the laws on Stamp and Registration, used to write out those documents at very high rates. To remedy this evil the Indian Registration Act was amended by enacting the Indian Registration (Punjab Amendment) Act, 1961 in its application to the State of Punjab. One of the amendments introduced by the said Act was to amend Section 69 of the Indian Registration Act, 1908 by inserting in sub-section (1) of Section 69 of the principal Act, after clause (b), the following clause, namely:

"(bb) declaring what persons shall be permitted to act as document-writers in the offices of registering officers, regulating the issue of licences to such persons, the conduct of business by them, the scale of fees to be charged by them and determining the authority by which breaches of such rules shall be investigated and the penalties which may be imposed."

5. Pursuant to the powers conferred by the aforementioned Section 69 the Inspector-General of Registration, Punjab with the previous approval of the Governor of Punjab made certain rules called the Punjab Document Writers Licensing Rules, 1961. Clause (1) of R. 3 prohibits persons from practising as document-writers except under a licence granted by the Licensing Authority. Clause (2) prohibits the registering officer from accepting any document for registration which is not written by a licensed document-writer or the executant himself.

6. Sub-rule (2) of Rule 1 excludes the application of these rules to legal practitioners. Rule 4 lays down conditions of eligibility for being licensed as document-writer or, if licensed, to continue as a document-writer. Rule 5 prescribes academic qualifications necessary for obtaining a licence. Rules 6 and 7 deal with holding of a special examination and with applications for permission to take

that examination. Rule 8 provides for scrutiny of applications to sit in the examination while Rule 9 prescribes the syllabus for special examination. These rules are followed by rules for issuing licences, prescribing the highest fees chargeable by document-writers, conditions of licence and penalties for breach of conditions of licence.

Rule 2 (b) defines a document. It reads '(b) document' means a document written for presentation to a registering officer and includes an application for copy inspection, search, extension of period and issue of summons or warrants and an application under section 73 or a memorandum of appeal under S 72 of the Act. Rule 2(c) defines a document writer. It reads—

(c) document writer means a person holding a licence for practising as a writer of documents for hire.

7 Examination of these rules makes it clear that the will presented by the petitioners is a document within the meaning of that term as defined in Rule 2(b). There is also no doubt that if Rule 3(2) is a valid rule the Sub-Registrar was perfectly justified in refusing to accept the will presented by the petitioners for registration as the same is admittedly not written by a licensed document writer or by the executant herself.

8 The question for consideration however is whether Rule 3(2) is a valid rule.

9 The contention of the learned counsel for the petitioner is that the conditions necessary for the presentation of a will for registration are laid down in Sections 40 and 41 of the Indian Registration Act. Under Section 40(1) the will may be presented for registration by the testator or after his death by any person claiming to be his executor or otherwise under the will. Under Section 41(1) a will when presented for registration by the testator has to be registered in the same manner as any other document. The condition that the will must either be written by the executant by himself or by a licensed document-writer is not one of the conditions which is necessary for the purpose of presentation and registration of the will. If the will is presented for registration by the testator it is to be registered in the same manner as any other document, i.e. that the registering officer may satisfy himself by following the procedure laid down in Section 35 of the Act and he may make an enquiry as to the minority or sanity of the testator etc. But when the will is presented for registration by any other person entitled to present it the registering officer is bound to register the same under sub-section (2) of Section 41 if he is satisfied that the will was executed by the testa-

tor, that the testator is dead and the person presenting the will is under Section 40 entitled to present the same.

10 In the present case all these requirements were satisfied. The petitioners who had presented the will were entitled to present the same under Section 40 of the Act. They also led evidence to show that the will was executed by the testatrix and that she was dead. The requirements of Sections 40 and 41 of the Act having thus been satisfied there is no other requirement of the Act which still remained to be satisfied and thus stood in the way of the document being accepted for registration.

11 Section 69 of the Registration Act confers powers on the Inspector-General in frame rules but the rules made by him must be consistent with the Act and they must also be strictly in accordance with the authority conferred by the statute. Clause (bb) of sub-section (1) of Section 69 permits the framing of the rules declaring what persons shall be permitted to act as document-writers in the offices of the registering officers regulating the issue of licences to such persons the conduct of business by them, the scale of fees to be charged by them and determining the authority by which breaches of such rules shall be investigated and the penalties which may be imposed. The object of the rules therefore is to regulate the practice and profession of document-writers. The use of the expression 'in the offices of the registering officers' may not be strictly construed to include only those persons who shall be permitted to act as document-writers by accommodation being provided to them in those offices and may well include even other persons who may not be sitting in the offices of registering officers but may still be writing documents which ultimately come up for registration. But the ambit of the rules can by no means be extended to prohibit all persons other than licensed document-writers from writing such documents.

The rule-making power under this clause certainly permits the laying down of the condition that after the publication of the rules no person shall practise as a document-writer except under a licence granted by the Licensing Authority. It also brings within its sweep the eligibility of persons to be licensed the academic qualifications for obtaining a licence the holding of an examination, the scale of fees to be charged the conditions subject to which a licence may be granted and the penalties for breach of those conditions but there is certainly no warrant for a rule which provides that no registering officer shall accept any document for registration which is

not written by a licensed document-writer or by the executant himself. As such the rule, in my opinion, has nothing to do with regulating the practice and profession of document writing and it also amounts to the creation and imposition of an additional requirement which is not to be found in the Act itself.

12. Learned counsel for the Registrar argued that the policy and object of the Registration Act is to prevent fraud and to ensure conditions that the documents and deeds which purport to be executed by persons are actually executed by them. According to Section 52 (1) (c) of the Indian Registration Act, 1908 all documents registrable under the Act are copied in relevant books before they are returned to the executants. Documents written by unlicensed document-writers often raise problems of authenticity and genuineness. The rules framed are therefore consistent with the object of the Act. Just as the Courts of law refuse to grant audience to any person who is not a legal practitioner to appear and plead the case of a litigant in much the same way the impugned rule prohibits registering officer from accepting documents written by unlicensed document-writers.

13. The analogy between the case of a licensed document-writer and a legal practitioner, is in my opinion wholly inept. The embargo in the case of a person other than a legal practitioner is created by a statute and is in express terms. It is not there under any general principle of law or by virtue of a rule made under a statute without there being any prohibition in the statute itself. Its validity is therefore referable to the presence of power in the relevant statute and not to the rule *de hors* the statute.

14. In the present case sub-rule (2) of Rule 3 obviously travels outside the powers conferred by clause (bb) of sub-section (1) of Section 69 as it nowhere provides that the registering officers shall refuse to accept documents written by persons other than licensed document-writers. The scope of rule-making authority is strictly confined to rules declaring what persons shall be permitted to act as document-writers, the licensing of such persons and other matters incidental thereto.

15. I therefore agree with the learned counsel for the petitioners that sub-rule (2) of Rule 3 of the Punjab Document Writers Licensing Rules, 1961 is *ultra vires* inasmuch as it travels beyond the limits prescribed for rule-making authority by clause (bb) of Sub-section (1) of S. 69 of the Indian Registration Act, 1908. Since the registration of the document has been refused by the registering officer on this ground also the order made by him and confirmed on appeal by the

Registrar is set aside and the Sub-Registrar, Banjar is directed to proceed with the registration of the document in accordance with the provisions of Sections 40 and 41 of the said Act.
YPB/D.V.C. Order accordingly.

AIR 1969 DELHI 137 (V 56 C 23)

L. D. DUA, C. J.,
AND S. N. SHANKER, J.

Nand Kishore Chela Mal, Petitioner v. Commissioner of the Municipal Corporation of Delhi, and others, Respondents.

Criminal Original No. 44 of 1968, D/-24-9-1968.

(A) Contempt of Courts Act (1952), S. 3 — Disobedience of Orders of Court — Knowledge of such order by contemner has to be proved beyond all reasonable doubt — Benefit of doubt should be given to contemner.

(Para 8)

(B) Contempt of Courts Act (1952), S. 3—Disobedience of orders of Court— Action should be taken only when it is called for in the interest of justice — Allowance has to be made for errors of judgment — Deliberate lapse and contumacious conduct ought to be punished.

The Court while considering and dealing with the offence of contempt of Court, acts both as an accuser and a Judge and the procedure adopted is also somewhat summary. It is, therefore, highly necessary that the Court should proceed with caution and deliberation and should take action only when it is called for in the interests of the administration of justice. The Court must make all allowances for errors of judgment and difficulties arising from the attending circumstances in a given case. Punishment under the law of contempt for disobeying the orders of the Courts is called for when the lapse is deliberate and in defiance of the authority of the Court. It is only when a clear case of contumacious conduct not explainable otherwise arises that the contemner should be punished. The casual manner in which some of the departments of local self-government are known to function, unsatisfactory and open to serious criticism as it is, has to be taken into account when determining the question of the offence of contempt in the sense of the lapse being conscious and deliberate. (Para 8A)

(C) Contempt of Courts Act (1952), Ss. 1 and 3 — Party initiating proceedings for contempt for the purpose of securing the execution of Court's order for its benefit — Such a resort should be discouraged—Order by Court directing Municipality to demolish certain pre-

KL/LL/F54/68

mises — Partial demolition carried out— Contempt proceedings against Municipality to compel it to demolish the whole structure so that the tenants of the complainant could be evicted — Tendency deprecated. (Para 10)

B N Kirpal, for Petitioner S N Chopra for Respondents

JUDGMENT Nand Kishore has presented an application under section 3 of the Contempt of Courts Act against all or any of the respondents for having committed gross contempt of this Court. The four respondents to this application are

- (1) Commissioner of the Municipal Corporation of Delhi,
 - (2) Shri J N Singh, Deputy Commissioner Municipal Corporation of Delhi,
 - (3) Shri S C. Talwar Zonal Engineer (Dangerous Buildings) Municipal Corporation of Delhi, and
 - (4) Shri S C. Vaish, Senior Overseer Municipal Corporation of Delhi.
- The short ground on which gross contempt of this Court is stated to have been committed is that in L.P.A. 108 of 1987 a Division Bench of this Court on 9-8-1968, reversed the order of a learned Single Judge, dismissing the applicant's writ petition, and, allowing the writ petition, directed the Municipal Corporation to carry out the demolition of the remaining portion of the house in question as required by section 348 (1) of the Municipal Corporation Act, within a reasonable time. The present application came up for preliminary hearing on 4-9-1968 when I directed notice to go for 8-9-1968. On that date of hearing Shri R N Tikku appeared on behalf of the respondents and asked for time, with the result that we adjourned the case to 9-9-1968 on which date Shri Bishamber Dayal appeared for the respondents and stated at the bar that the order of this Court had actually been complied with. The case was, however adjourned to the following day. On 10-9-1968 Shri Bishamber Dayal stated at the bar that the remaining portion of the house in question had been demolished as directed by this Court, whereas Shri B. N Kirpal asserted to the contrary.

According to Shri Kirpal, only the roof of the rooms had been demolished but the walls stood intact. There were also some karries on the walls supporting some corrugated sheets. The respondents were in view of this disagreement, directed to file detailed affidavits by 16-9-1968 and in the meantime we appointed Shri Yogeshwar Dayal, an Advocate of this Court, as a Commissioner to go and inspect the site and report whether or not demolition, as ordered by this Court, had been effected. On 16-9-1968, Shri S N Chopra appeared for the respondents and produced four affidavits in

reply sworn by the four respondents. According to the affidavit of respondent No 1 it was on 7-9-1968 that he was for the first time informed about the order of this Court dated 9-8-1968 and the building in question was demolished on 8-9-1968. The demolition of the one-sixth portion was carried out in the same way as demolition of the five-sixths portion had been carried out in October-November 1966 in conformity with the provisions of section 348 Delhi Municipal Corporation Act. After the decision by the Letters Patent Bench, however, Shri R N Tikku, Advocate, who appeared for the Municipal Corporation both in the writ petition and the Letters Patent Appeal, advised filing an appeal to the Supreme Court. But this part of the affidavit is of little consequence in view of the assertion that the order of the Letters Patent Bench was carried out on 8-9-1968.

2 According to the affidavit of respondent No 2 Shri S N Singh, Shri R N Tikku had on 13-8-1968 advised that an appeal should be filed to the Supreme Court against the order of the Letters Patent Bench and a certified copy of the impugned order was applied for on 31-8-1968. The suggestion to file an appeal to the Supreme Court was approved by the law Officer of the Corporation on 4-9-1968 but before the matter could be proceeded further notice of the present application was received in the Law Department of the Corporation on 5-9-1968. The notice sent by Shri B N Kirpal dated 15-8-1968 was received in the Central Office of the Municipal Corporation of Delhi on 20-8-1968, from where it was sent to the Municipal Engineer on 22-8-1968 where it remained till 11-9-1968 when it was personally collected from there by Shri S C. Vaish, respondent No 4. Respondent No 1 according to this affidavit, also saw the file for the first time on 7-9-1968 and approved the engagement of Shri Bishamber Dayal and on that very day the Legal Adviser of the Delhi Municipal Corporation advised that one-sixth portion of the building in dispute should be demolished as directed by the Letters Patent Bench. On 8-9-1968, the demolition was carried out in accordance with this Court's order.

3. In so far as the first two respondents (the Commissioner of the Municipal Corporation and Shri J N Singh, Deputy Commissioner Municipal Corporation) are concerned, the petitioner has very frankly conceded that they cannot be held guilty of contempt of this Court. We accordingly discharge the rule against them and direct that the petitioner should pay costs for both these respondents which we assess at Rs. 250/- for both. The learned counsel

for the petitioner has, however, urged that the order of this Court has not been fully complied with and that for this non-compliance, respondents Nos. 3 and 4 are responsible. According to him, merely removing the roof of the two rooms is not enough and that all the four walls should have been demolished. Shri Kirpal has drawn our attention to some portions of the affidavits filed by respondents Nos. 3 and 4 in answer to this application for the purpose of showing the inconsistent positions taken by them. Shri S. C. Talwar, Zonal Engineer (Buildings) has stated in his affidavit as follows:

"3. That the roofs including Karies were totally demolished on 9-8-1968 as aforesaid, but, the karies and tin sheets have been apparently put up subsequently by the tenant of the demolished portion after the demolition action was over. The back and the side walls of the premises in dispute are walls common also to properties belonging to others. If these walls had been demolished, the other properties were bound to be affected. It may also be mentioned here that the side walls and the front walls of the 5/6th portion of the premises demolished in 1966 as aforesaid are still intact.

4. That the deponent removed the danger by demolishing the dangerous portion of the premises and he has done his duty in compliance of the orders of this Hon'ble High Court and in conformity with section 348 of the Municipal Corporation of Delhi Act." In paragraph 2, Shri Talwar has stated that one-sixth remaining portion of the premises was demolished on 9-8-1968 in the same manner in which five-sixths of the portion had been demolished earlier in October-November, 1966.

4. Shri S. C. Vaish, Section Officer has deposed in the following terms:

"3. That I have fully complied with the directions of the Hon'ble Court as contained in its judgment dated 9-8-1968.

4. I carried out the demolition action complying with the directions of this Hon'ble Court in conformity with the provisions of section 348 of the Delhi Municipal Corporation Act, 1957. The demolition of the 1/6th portion of the premises was carried out exactly as the demolition of the 5/6th portion of the premises in 1966. I did not take action with regard to the back and side walls of the premises as they are common walls of the other houses and if the demolition action had been taken against those walls also, the other premises might have been affected. Nor was the demolition of the said walls necessary within the meaning of this Hon'ble

Court's directions. I removed the karies of the rooms and verandah comprised in 1/6th portion of the premises except two karies which were wholly inside the common walls.

5. That I may also humbly submit that in the 5/6th portion of the premises the partition walls were left out and in the demolition of 8-9-1968, the partition walls were also left intact in the same way as they were left in the 5/6th portion of the premises. They are still intact there at the site in the 5/6th portion of the premises.

** ** *

7. That I again inspected the spot on 10-9-1968 when I found that the malba had been cleared and the karies replaced and covered with tin sheets."

Our attention has also been drawn to the report submitted to this Court by Shri Yogeshwar Dayal who was appointed a Commissioner by this Court for the purpose of inspecting the building in question. Inter alia, he has reported that on inspection he found the roof of the room and the verandah in dispute to have been demolished, but the roof of the room was found covered with corrugated sheets resting on 8 wooden karries. Two side karries were old ones fixed in the walls, whereas the rest of the six karries were loose and appeared to be lying in old places. These six karries were not fitted with mortar, cement or stone. The front wall of the room with its door was intact. So were the back and the side two walls. The roof of the verandah which had been demolished was also lying covered with wooden karries resting on the front wall of the room and three pucca arches in front of the verandah which were also intact.

5. We consider it appropriate at this stage to turn to the circumstances in which this Court made its order dated 9-8-1968. In 1967, Nand Kishore, claiming to be the owner of the building bearing Municipal No. 6022, Gali Arya Samaj Mandir, Naya Bans, Ward VII, Delhi, presented to this Court an application under Articles 226/227 of the Constitution impleading the Municipal Corporation of Delhi, Shri N. N. Tandon and Shri Ram Kishan Dass as respondents. It was averred that on 20-8-1966, a notice was found pasted on house No. 6022 purporting to be made under S. 349, Delhi Municipal Corporation Act, declaring the said building to be dangerous and fit to be demolished. Previously, a notice had been issued for demolition of this building, in which only some portions of the building were stated to be dangerous.

A civil suit was thereupon filed by the petitioner, but when the notice dated 20-8-1966 was issued, it was considered futile to pursue it. The suit was accord-

ingly not pursued and the same was dismissed on 21-9-1966. After notice, no action was taken by the Municipal Corporation to demolish the building but on some people living in the vicinity having approached respondent No 1 the demolition work was started by stages. The entire first floor and part of the ground floor, except certain portion, was demolished. The undemolished portion was in the occupation of Shri Ram Kishan Dass respondent No 3 in the writ proceedings, who was a tenant under the petitioner. The allegation in the writ petition was that this portion was not demolished because of some collateral influence exercised by some influential persons in the interest of respondent No 3 whose occupation of this portion was sought to be safeguarded. The prayer in the writ petition was for a writ of mandamus to respondent No 1 to carry out its duty to demolish the undemolished structure.

6 A learned Single Judge of this Court dismissed the writ petition.

7 On appeal, a Letters Patent Bench of this Court reversed the order of the learned Single Judge and directed respondent No 1 to carry out the demolition of the remaining portion of the house bearing Municipal No 6022, Gali Arya Samaj Ward No VII, Naya Bani, Delhi as required by section 348 (1) of the Delhi Municipal Corporation Act, 1957 within a reasonable time.

8 The direction, it may be pointed out, was given to respondent No 1 the Municipal Corporation of Delhi. It is unfortunate that the present Commissioner of the Municipal Corporation should not have been intimated of the pendency of the Letters Patent Appeal to which the Municipal Corporation of Delhi was a party through the Commissioner of the Corporation. This appeal was presented in this Court in October, 1967 and was admitted in the same month with a direction that it be heard at a very early date. In any event, as soon as the order was made by the Letters Patent Bench on 9-8-1968 one would have expected the counsel for the Municipal Corporation and the officers concerned of that body to have brought to the notice of the Commissioner the contents of the order made by this Court. This was unfortunately not done as is obvious from the affidavit of respondent No 1. That, however does not affect our decision in discharging the rule against respondents Nos. 1 and 2 on the concession rightly made by the learned counsel for the petitioner dropping this charge against them. In order to sustain the charge of contempt of Court for disobeying the Court's order, knowledge of such order has to be proved beyond all reasonable doubt and in

case of doubt, benefit ought to be given to the person charged.

8A. Now, in so far as respondents Nos. 3 and 4 are concerned they have taken the plea of compliance with the order, the only controversy raised at the bar being whether or not the order has been fully complied with. In our view, it is not necessary in the present proceedings to decide as to whether the extent of demolition admittedly carried out amounts to a complete demolition of the structure. The petitioner, it may be pointed out, had been trying to get the premises now in controversy vacated by the tenant and the tenant on his part had been trying his best to counteract the steps taken by the landlord for his eviction. Five-sixths portion of the building in question was demolished under section 348 of the Delhi Municipal Corporation Act, 1957 and, according to respondents Nos. 3 and 4, the remaining one-sixth portion has also been demolished in the same way.

Indisputably, the roofs of the rooms have actually been demolished and, according to the report of Shri Yogeshwar Dayal also, some of the karnes appear to have been recently fixed. On the material on the record, therefore, we are unable to hold that respondents Nos. 3 and 4 have deliberately disobeyed the orders of this Court so as to render them liable to be punished for contempt of Court. It has always to be borne in mind that the Court, while considering and dealing with the offence of contempt of Court, acts both as an accuser and a Judge and the procedure adopted is also somewhat summary. It is, therefore, highly necessary that the Court should proceed with caution and deliberation and should take action only when it is called for in the interests of the administration of justice. The Court must make all allowances for errors of judgment and difficulties arising from the attending circumstances in a given case. Punishment under the law of contempt for disobeying the orders of the Courts is called for when the lapse is deliberate and in defiance of the authority of the Court. It is only when a clear case of contumacious conduct not explainable otherwise arises that the contemner should be punished. The casual manner in which some of the departments of local self government are known to function, unsatisfactory and open to serious criticism as it is, has to be taken into account when determining the question of the offence of contempt in the sense of the lapse being conscious and deliberate.

In our opinion, the fact that the order of this Court was not brought to the notice of the learned Commissioner with

the expected promptitude, and the further fact that the notice sent by Shri B. N. Kirpal remained with the Municipal Engineer from 22-8-1968 to 11-9-1968, merely disclose a lamentable slovenly method of discharging their official duties on the part of the various officers of the Corporation. We are unable to compliment them either for their efficiency or for their sense of responsibility. But however, inexcusable their lapse departmentally, we are not convinced that this is evidence of contumacious conduct on their part or of any desire to disobey or flout the orders of this Court. The remedy for the laxity shown by the officers of the Corporation in dealing with this matter lies in reform and suitable punishment of those officers departmentally and not in punishment under the law of contempt.

9. In the affidavits produced by the respondents, a suggestion has been thrown as if the question of filing an appeal to the Supreme Court against the order of the Letters Patent Bench was being considered. Now, though this ground was not in the forefront of the arguments in defence of failure to carry out the order of this Court, an oblique indication was thrust in the persuasive address of the respondent's learned counsel Shri Chopra that an appeal to the Supreme Court was contemplated, and for this purpose, a certified copy of the order was applied for on 31-8-1968. It is, however, noteworthy that on 6-9-1968, Shri Tikku, who appeared for the respondents, did not state that the respondents were not submitting to the order of the Letters Patent Bench because they were contemplating an appeal to the Supreme Court. Even Shri Bishamber Dayal on 9-9-1968 did not take up this position and he merely stated that the order had been complied with. The sole defence up to that stage was that the order had been complied with. But this apart, we are of the opinion that if the respondents were desirous of filing an appeal, then in view of the nature of the order and the circumstances of the case, steps to that effect should have been taken with reasonable diligence and this Court should have been approached without unreasonable delay with a prayer for the requisite interim relief.

To treat the matter with indifference has not created a happy impression in this Court. It is certainly not worthy of the august body like the Corporation of the capital of our Republic. The Municipal Corporation of Delhi and its officials are expected by the people to be an ideal Corporation from the point of view of efficiency, sense of duty, integrity, due compliance with lawful

orders and desire to deal fairly and judiciously with the citizens. Lapses in this respect only serve to promote in the minds of the citizens feelings of scepticism towards our democratic system of local self-government, which may, in due course, develop into feelings of frustration.

10. There is also another aspect to which we would like to advert. The petitioner has very zealously pursued this application and has tried to persuade us to punish respondents Nos. 3 and 4 for contempt of Court. In our opinion, the petitioner had performed his duty when he brought to our notice the facts contained in the application. Thereafter, it was a matter between this Court and the alleged contemnors and the petitioner had no personal right which he could have safeguarded by getting the respondents punished for contempt of Court. The petitioner's desire to have one-sixth portion of the building completely razed to the ground so that he may get rid of the tenant — and this strike us as his main dominant purpose for moving us—is not at all persuasive enough for the purpose of considering whether or not to punish these two respondents for contempt of Court: Resort to such proceedings for the purpose of securing execution of the Court's orders for the benefit of a private litigant is not, generally speaking, to be too readily encouraged. As to what further steps the petitioner would be entitled to take for the purpose of razing the demolished building to the ground, is a matter with which this Court is not concerned in these proceedings, and certainly this Court is disinclined to allow contempt proceedings to be used as an instrument for clearing the debris or the demolished building from the site in question. Judicious restraint and evenly-balanced judgment, in cases like the present, serve to preserve the serene and magnanimous dignity and majesty of the Court better than punishing the alleged contemnors.

11. On a consideration of all the circumstances of the case, as observed earlier, we do not think respondents Nos. 3 and 4 are guilty of any punishable contempt with the result that we are constrained to discharge the rule against them as well. They are, however, directed to bear their own costs of these proceedings.

GGM/D.V.C.

Rule discharged.

AIR 1969 DELHI 142 (V 56 C 24)

I. D. DUA, C. J. AND S. K. KAPUR J

Radhey Shyam Sawhney and others
Petitioners v Bawa Joginder Singh Bhalla
and others, RespondentsCivil Revn. 397 of 1967 D/- 24 9 1968
against order of Sub J 1st Class Delhi,
D/- 13-9-1967

(A) Civil P C. (1908) Ss 121 122, 127 and O 37 R 1 (d) (Pun)—O 37 R 1 (d) validly amended by Punjab High Court continues to apply to Courts of District Judges and Subordinate Judges in Union Territory of Delhi even after appointed day i.e. 30 10 1966 — Ss 121 and 127 do not alter this position so long as power to amend under S 122 is not exercised by Delhi High Court — (Constitution of India Art. 245)

Order 37 Rule 1 (d) has been validly amended by the Punjab High Court in exercise of its delegated powers under Section 122 Civil P C. When power is given to a Subordinate Authority to legislate conditionally and the conditions have been fulfilled the legislation becomes absolute AIR 1927 Lah 174 and AIR 1942 Lah 201 and (1879) ILR 4 Cal 172 (PC) Applied. (Paras 2 and 3)

Order 37 Rule 1 (d) so validly amended continues to apply to the Courts of the District Judges and of Subordinate Judges in the Union Territory of Delhi even after the appointed day i.e. 30 10-1966 notwithstanding the creation of the Delhi High Court so long as the Delhi High Court does not take any action under section 122 Civil P C to alter or amend it. The Courts of the District Judges and of Subordinate Judges of the First Class in the Union territory of Delhi having been expressly included in the amendment made by the Punjab High Court in Rule 1 of Order 37 nothing contained in sections 121 and 127 would automatically repeal this part of Rule 1 or render this part of the amendment ineffectual or inoperative with effect from the appointed day Section 127 Civil P C cannot be construed, in the absence of clear indication, to lay down that as soon as the High Court making rule is replaced by another High Court the rule validly made and applied to the proceedings in certain specified Courts in a given locality would lose its vitality in regard to them.

(Paras 4 5)

(B) Delhi High Court Act (26 of 1966), S 7 — Scope and object — Section does not exclude applicability of law in force with respect to practice and procedure in Courts subordinate to Delhi High Court.

Section 7 Delhi High Court Act is intended to apply the law in force immediately before the appointed day with

respect to practice and procedure in the High Court of Punjab with necessary modifications, to the High Court of Delhi, to which obviously such rules were not, and could not be applicable before the appointed day, because the High Court of Delhi did not exist before the appointed day. This section, on its plain reading does not seem to contemplate the negative by excluding the applicability of the law in force immediately before the appointed day with respect to practice and procedure in the Courts of the District Judges and Subordinate Judges of the First Class in the Union Territory of Delhi. (Para 4)

Cases Referred Chronological Paras
(1960) AIR 1960 Madh Pra 130

(V 47)—1960 Jab LJ 514 Munnillal

Kallash Chandra v Akabai 1

(1942) AIR 1942 Lah 201 (V 29)=

ILR (1943) Lah 569 Dr Kishan

Singh v Bachan Singh 3

(1927) AIR 1927 Lah 174 (V 14)=

ILR 8 Lah 156 Bhondumal v

Mahomed Ahmad Mushtak Ahmad 2

(1879) ILR 4 Cal 172=3 Cal LR 197

(PC) Empress v Burah 3

A. C. Sehgal, for Petitioners: Pishori Lal, for Respondents.

DUA, C. J. This case has been placed before us pursuant to my order of reference dated 14 11-1967 which may be read as a part of the present order. The only question requiring authoritative determination is whether the amendment made in Rule 1 of Order 37 of the Code of Civil Procedure by the Punjab High Court is still operative in the Courts of the District Judges and Subordinate Judges of 1st Class in the Union Territory of Delhi. The submission eloquently pressed by Shri Sehgal on behalf of the defendant petitioner is that under section 7 of the Delhi High Court Act No 26 of 1966 the Delhi High Court alone has the power to make rules and orders with respect to practice and procedure and all rules made by the Punjab High Court with respect to such practice and procedure in relation to the subordinate Courts at Delhi must cease to have effect as soon as the Punjab High Court ceased to have jurisdiction over such subordinate Courts.

In support of his submission, Shri Sehgal has cited a Single Bench decision of the Madhya Pradesh High Court by Shiv Dayal, J in Munnillal Kallash Chandra v Akabai, AIR 1960 Madh Pra 130. The question arising for decision in the reported case was whether the rules made by the High Court at Nagpur in exercise of the powers conferred under section 122, Civil P C, and which were in force in the former State of Madhya Pradesh as it

existed before the Reorganisation of States on 1-11-1956, were enforceable in that territory of the new Madhya Pradesh which up to 21-10-1950 was called the Part B State of Madhya Bharat. Section 54 of the States Reorganisation Act, 1956 falling in Part V of that Act was held not to apply to the Rules made under section 122, Civil P. C. because that section referred to only those laws, rules and orders which dealt with the practice and procedure "in the High Court" and not those which deal with practice and procedure "in all Courts". A rule made by a High Court under section 122, Civil P. C., was, according to the reported decision, a piece of delegated or subordinate legislation and was governed by section 119 and not by section 54 of the States Reorganisation Act. It is obvious that the reported case does not support Shri Sehgal's submission. I may here reproduce the following observations from the reported judgment:

"It is obvious enough that any of the rules in the first schedule of the Code could be annulled, altered or added to by such rules as a High Court made under that power. Rules made in exercise of that power became a part and parcel of the First Schedule of the Civil Procedure Code so far as that State was concerned. In that view of the matter, the rules made by the High Court of the 'corresponding State' of Madhya Pradesh (that is, the former M. P. which existed prior to November 1, 1956) continued to be operative in those territories of the new Madhya Pradesh State even after November 1, 1956. But since they have not yet been adapted under section 120 of the States Reorganisation Act for the other territories of the 'corresponding new State' (that is, the present State of Madhya Pradesh) they are not operative and cannot regulate the procedure of the Civil Courts there. The territories of the former State of Madhya Bharat are, therefore, outside the operation of those rules."

The observations just reproduced, if I may say so, run counter to the counsel's submission. The learned counsel then attempted to seek some assistance by way of analogy from the High Courts (Punjab) Order, 1947 made by the Governor-General at the time of the unfortunate partition of the Punjab in 1947 when India became independent, but that analogy, in our view, is of little guidance because the two situations are far from parallel.

2. Rule 1 of Order 37, Civil P. C. was originally amended by the Lahore High Court in 1923 and 1932. According to the amendment, as it stood at the time of the partition of the country, Order 37

was applicable to the Courts of the District Judges and Subordinate Judges of the First Class of Delhi Province and the Courts of the District Judges and Subordinate Judges of First Class in the civil Districts of Lahore and Amritsar in the Province of Punjab. On the partition of the country in 1947, Lahore was included in Pakistan and Delhi and Amritsar in India. These two latter towns fell within the jurisdiction of the East Punjab High Court created by the High Courts (Punjab) Order, 1947. Later, the Punjab High Court took action under section 122 of the Code of Civil Procedure and amended, among other rules contained in the First Schedule of the Code, Rule 1 of Order 37. The amended rule so far as relevant for our purpose, reads as under:

"Order 37, Rule 1. Summary Procedure on Negotiable Instruments— This order shall apply only to —"

- | | | | | | | |
|-----|---|---|---|---|---|---|
| (a) | * | * | * | * | * | * |
| (b) | * | * | * | * | * | * |
| (c) | * | * | * | * | * | * |

(d) the Courts of the District Judges and Subordinate Judges of the First Class of the Union Territory of Delhi and the Courts of the District Judges and Subordinate Judges of the First Class in the civil district of Amritsar in the State of the Punjab."

(See pp. 39 & 40 of Chapter 21 of Vol. I of the Rules & Orders of the Punjab High Court). This statutory amendment of Order 37, Rule 1, was lawfully effected by the Punjab High Court by virtue of the power delegated to it under section 122 of the Code. Indeed, the validity of the amendment has not been challenged on the ground of want of power in the High Court or on any other ground. In the referring order dated 14-11-1967, reference has been made to a Bench decision of the Lahore High Court in Bhundu Mal's case, ILR 8 Lah 156 = (AIR 1927 Lah 174) upholding the validity of the rule made by the Lahore High Court. The ratio of that decision fully applies to the rule in question as altered by the Punjab High Court after partition.

3. Turning now to the scheme of Part X of the Code dealing with the Rules, section 121 lays down that the rules in the First Schedule shall have effect as if enacted in the body of the Code of Civil Procedure until annulled or altered in accordance with the provisions of that Part. Section 127 lays down that the rules made and approved as provided in sections 122 to 126, shall be published in the Official Gazette and, from the date of publication or from such other date as may be specified, have the same force and effect within the local limits of the jurisdiction of the High Court which made them as if they had been contained in the First Schedule.

In *Dr Kishan Singh v Bachan Singh* AIR 1942 Lah 201 a Division Bench of the Lahore High Court (Tek Chand and Beckett JJ) while upholding the validity of Rule 23-A of Order 41 Civil P C, as amended by the Lahore High Court, relied on the observations of Lord Selborne in *Empress v Burah*, ILR 4 Cal 172 (PC) that when power is given to a subordinate authority to legislate conditionally and 'the conditions have been fulfilled, the legislation becomes absolute.' The ratio of the decision in *Dr Kishan Singh's* case, AIR 1942 Lah 201 fully applies to the case in hand and the validity of Rule 1 of Order 37 as amended by the Punjab High Court, has rightly been not assailed.

4. It is undoubtedly true that S 127 of the Code lays down that the rules made, approved and published have the same force and effect within the local limits of the jurisdiction of the High Court which made them. Section 122 also empowers the High Courts mentioned therein to make rules regulating their own procedure and the procedure of the civil Courts subject to their superintendence. But even without this clause the rules made by the High Courts could not possibly operate beyond their territorial jurisdiction.

The question requiring determination in the present case is that when Rule 1 of Order 37 has been validly amended by the Punjab High Court so as to apply the summary procedure on negotiable instruments to the Courts of the District Judges and Subordinate Judges of the First Class of the Union Territory of Delhi, can this amendment be held automatically nullified merely because a separate High Court has been set up for such Union Territory? In other words, do sections 122 and 127 of the Code have this effect? Nothing has been said at the bar in support of this proposition. All that has been argued is that these rules relate to practice and procedure in Courts subordinate to the High Court and therefore, section 7 of the Delhi High Court Act does not continue them. This section according to the argument saves from discontinuance only the law in force immediately before the appointed day with respect to practice and procedure of the High Court of Punjab and not the law so in force with respect to practice and procedure in Courts subordinate to the High Court. This argument, though *prima facie* attractive seems to me to be difficult to sustain.

Section 7 appears to have been intended to apply the law in force immediately before the appointed day with respect to practice and procedure in the High Court of Punjab with necessary modifications, to the High Court of Delhi to which obviously such rules were not,

and could not be, applicable before the appointed day, for the simple reason that the High Court of Delhi did not exist before the appointed day. This section, on its plain reading, does not seem to contemplate the negative by excluding the applicability of the law in force immediately before the appointed day with respect to practice and procedure in the Courts of the District Judges and Subordinate Judges of the First Class in the Union Territory of Delhi. The Parliament in my view did not intend by enacting section 7 that Rule 1 of Order 37, as indisputably applicable in express terms to the subordinate Courts in the Union territory of Delhi, would cease to apply to them with effect from the appointed day. The Courts of the District Judges and of Subordinate Judges of the First Class in the Union territory of Delhi having been expressly included in the amendment made by the Punjab High Court in Rule 1 of O 37, nothing contained in sections 121 and 127 in my view would automatically repeal this part of Rule 1 or render this part of the amendment ineffectual or inoperative with effect from the appointed day.

Section 127 prescribing publication of the rules emphasises the initial enforcement of the rules within the local limits of the jurisdiction of the High Court making them. I am not inclined to construe this section to lay down that as soon as the High Court making the rule is replaced by another High Court, the rule validly made and applied to the proceedings in certain specified Courts in a given locality would lose its vitality in regard to them. In the absence of clear indication, I find it difficult to impute such intention to the Legislature. No principle has been brought to our notice and no precedent has been cited in support of the submission pressed by Shri Sehgal. The Punjab High Court having validly exercised its legislative power as a delegate in suitably adding to Rule 1 of Order 37 so as to make it applicable to certain specified Courts in the Union territory of Delhi, in my view, this rule as amended continues to apply to the relevant legal proceedings in those Courts in just the same way as the main body of the Code of Civil Procedure applies to them, the creation of the Delhi High Court notwithstanding. Of course it is open to the Delhi High Court at any time to again annul, alter or add to the provisions of Rule 1 of Order 37 but so long as this Court does not choose to take action under section 122 of the Code the existing Rule 1 must continue to apply to the Courts specified therein.

5 As a result of the foregoing discussion, I am inclined, as at present

advised, to hold that Rule 1 of Order 37, as amended by the Punjab High Court, would continue to apply to the Courts of the District Judges and of Subordinate Judges of the First Class in the Union territory of Delhi. The case will now go back to the Single Bench for final disposal of the revision.

6. S. K. KAPUR, J.: I agree.

KSB

Reference answered.

AIR 1969 DELHI 145 (V 56 C 25)

I. D. DUA

AND T. V. R. TATACHARI, JJ.

Krishan Lal Vij, Appellant v. Union of India through Ministry of Home Affairs Govt. of India New Delhi, and another, Respondents.

Letters Patent Appeal No. 131-D of 1963, D/- 3-2-1967, against judgment of H. R. Khanna, J., in C. W. No. 339/D of 1959 D/- 14-8-1963.

(A) Constitution of India, Art. 311 — Reasonable opportunity — What constitutes.

The question of reasonable opportunity to show cause is dependent on the peculiar facts of each case. What is reasonable is, not necessarily what is the best but, what is fairly appropriate under all the circumstances of the case. Reasonable opportunity to show cause does not necessarily include a right to be specifically and expressly granted time to produce evidence in defence even when a public servant does not choose to ask for it and does not express any desire to produce such evidence. The enquiry cannot be considered to be open to challenge on the ground that the procedure laid down in the Evidence Act for recording evidence or in the Code of Criminal Procedure for trial of offences has not been strictly followed.

(Para 4)

The right to reasonable opportunity, broadly stated, implies opportunity to deny the guilt alleged, and to establish innocence, to defend himself by examining himself and his witnesses, and to make representation against the proposed punishment.

(Para 6)

Held on facts that the plea of want of reasonable opportunity could not be sustained.

(Para 6)

(B) Constitution of India, Art. 311 — Departmental enquiry — Petitioner demanding inspection of certain documents — Relevant documents furnished — Prayer for irrelevant documents disallowed — Petitioner not shown to be prejudiced — Enquiry not vitiated: C.A. No. 322 of 1957 D/- 1-11-1960 (SC), Ref. (Para 5)

(C) Constitution of India, Art. 311 — Show-cause notice issued by officer not authorised to do so — Subsequent show-cause notice against punishment of dismissal issued by authorised officer — Full opportunity to petitioner to put forward his defence — No illegality.

(Para 6)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 1344 (V 49)=
(1962) Lab LJ 656, U. R. Bhatt v. Union of India 3
(1961) AIR 1961 SC 1623 (V 48)=
1961 Jab LJ 702, State of Madhya Pradesh v. Chintaman Sadashiva 3
(1960) CA No. 322 of 1957 D/- 1-11-1960 (SC), Tirolok Nath v. Union of India 5
(1959) AIR 1959 Punj 402 (V 46)=
1959-61 Pun LR 167, State of Punjab v. Karam Chand 3
(1954) AIR 1954 Bom 351 (V 41)=
ILR (1954) Bom 915, State of Bombay v. Gajanan Mahadev 3
Frank Anthony with Charanjit Talwar, for Petitioner; Parkash Narain, for Respondents.

JUDGMENT: This is a Letters Patent Appeal directed against the order of a learned Single Judge of the Punjab High Court dismissing the petition presented by the appellant in this Court under Articles 226 and 227 of the Constitution of India praying for a writ of certiorari to quash the order of the Director of Intelligence Bureau dismissing the petitioner as also the order of the President of India made in appeal against the order of the said Director.

The petitioner, it seems, was appointed as Upper Division Clerk in the Intelligence Bureau, Ministry of Home Affairs, Government of India, on 21-1-1950. He was promoted to the post of an Assistant on 1-3-1952. He was served with a charge-sheet on 16-2-1957 by Shri A. G. Rajadhyaksha, Deputy Director of the Intelligence Bureau, which was inter alia as follows:

"Shri Krishan Lal Vij, now an Assistant in the record room and formerly an Assistant in the NGO Branch, is charged as under:

'(1) That he kept the sum of Rupees 228/7/ which he drew from the Cash Branch on 29-11-1956 on behalf of Shri S. S. Khera on an authority (together with a stamped receipt) made out in his favour by Shri Khera on 12-9-1956 and did not remit this sum to Shri Khera as was expected.'

The charge containing some other counts does not concern us at this stage because on appeal that was held not to have been substantiated. On 14-3-1957, Shri Rajadhyaksha found the charge established and while proposing the penalty of

dismissal, he called upon the appellant to show cause against the proposed penalty. The appellant was required to make whatever statements he liked on 19-3-1957. The appellant sought extension of time for submitting his explanation by means of an application dated 21-3-1957. He further prayed for permission to inspect certain files and to take extracts from them. This prayer was allowed in part because some of the files were held not to be relevant to the case. Notes from other files were supplied to the appellant. In regard to one file, it was observed that the appellant had already examined the same. The appellant was allowed time up to 23-3-1957 to submit his statement, which he did, stating inter alia, that the enquiry as also the show-cause notice issued by Shri Rajadhyaksha, Deputy Director, were illegal and ultra vires, being in contravention of the Central Civil Services (Classification, Control and Appeal) Rules, 1957.

The amended rules came into force on 28-2-1957 and admittedly according to them, it is the head of the department and not a subordinate officer thereto who could impose the penalty of dismissal on the appellant. It is necessary to point out that on 8-5-1957 Shri B N Mullik, Director of Intelligence Bureau, passed an order to the effect that he was satisfied that the charges against the appellant had been proved and he too expressed his provisional opinion that the appellant should be dismissed. The petitioner was in fact informed that the enquiry conducted by Shri Rajadhyaksha was not a nullity because it had been conducted with the concurrence of the Director. Indeed on 17-9-1957 Shri Mullik passed the order dismissing the appellant. The appellant's appeal to the President of India succeeded in part, for the penalty of dismissal was replaced by the penalty of removal, from service.

2. Before the learned Single Judge, on behalf of the appellant-petitioner three points were unsuccessfully raised. However the point that no dereliction of duty can be said to be established on the fact has not been pressed, though the points raised before us here are also three in number. The first challenge to the impugned order is to the effect that no opportunity was afforded to the appellant to defend himself. The second point emphasises the grievance that relevant documents required by the appellant for his defence were not supplied to him and the third point challenges the authority of Shri Rajadhyaksha to hold the enquiry and to make a report against the appellant. Connected with the challenge is also the challenge that Shri B N Mullik could not have made

the final order passed on the enquiry held by Shri Rajadhyaksha.

3. Dealing with the first challenge, the appellant's learned counsel has submitted that after the close of the evidence led by the department, the appellant was entitled to be told by the Enquiry Officer that he had a right to adduce defence evidence and time should have been granted to him to summon and examine witnesses in his defence. The recognised rules of natural justice, according to the appellant's learned counsel, demand such procedure. In support of this submission, reliance has been placed on the following observations from a decision of the Punjab High Court in *State of Punjab v Karam Chand*, 1959-61 Pun LR 167 (AIR 1959 Punj 402) At p 187 (of PLR) (at p 412 of AIR) Bhandari C J observed as follows.

The expression 'reasonable opportunity' has not been defined by the framers of the Constitution but there can be little doubt that the expression means opportunity the vital elements of which are timely notice and full opportunity to the person concerned to present all the evidence and arguments which he deems important for the purpose of his case. The requirements of a reasonable opportunity are satisfied when the person affected is given personal notice of the charges he is called upon to answer when he is informed of the place where and the time when he shall so answer when he is afforded an opportunity, if he so chooses, to cross-examine the witnesses produced against him, when he is afforded an opportunity after all the evidence is produced and known to him to produce evidence and witnesses to refute it when the decision is governed by and based upon the evidence at the hearing when he is afforded an opportunity to make his representations as to why the proposed punishment should not be inflicted upon him, and when the hearing is had before an unbiased and unprejudiced officer."

State of Bombay v Gajanan Mahadev, AIR 1954 Bom 351 has also been cited by Shri Anthony. Our attention has been drawn to the following observations at p 354 of the report.

"The opportunity which the State has to furnish has to be a reasonable opportunity and the Courts have held that a reasonable opportunity is only afforded to the servant when he can show cause not only against the punishment but also against the grounds on which the State proposes to punish him. Therefore, it is not sufficient that the State should call upon the servant to show cause against the quantum of punishment intended to be inflicted upon him, the State must also

call upon the servant to show cause against the decision arrived at by a departmental enquiry if that decision constitutes the ground on which the Government proposes to take action against the servant."

Reference has next been made in this connection to the decision of the Supreme Court in *State of Madhya Pradesh v. Chintaman Sadashiva*, AIR 1961 SC 1623, in which it is laid down that two opportunities have to be given to the public servant against whom action is sought to be taken. I may point out that in this decision, it is also observed that the only general statement which can safely be made is that the departmental enquiries should observe rules of natural justice and that if they are fairly and properly conducted, the decisions reached by the enquiry officers on the merits are not open to challenge on the ground that the procedure followed was not exactly in accordance with that which is observed in the Courts of Law. The learned counsel has also sought to distinguish the decision of the Supreme Court in *U. R. Bhatt v. Union of India*, AIR 1962 SC 1344, on which the learned Single Judge has placed reliance in his order. The counsel submits that in the reported case, the public servant had declined to take part in the proceedings and when he had failed to remain present, it was held to be open to the Enquiry Officer to proceed on the materials placed before him.

4. The question of reasonable opportunity to show cause appears to me to be dependent on the peculiar facts of each case. What is reasonable is, not necessarily what is the best but, what is fairly appropriate under all the circumstances of the case. Reasonable opportunity to show cause does not necessarily include a right to be specifically and expressly granted time to produce evidence in defence even when a public servant does not choose to ask for it and does not express any desire to produce such evidence. The enquiry cannot be considered to be open to challenge on the ground that the procedure laid down in the Evidence Act for recording evidence or in the Code of Criminal Procedure for trial of offences has not been strictly followed. In the case in hand, it is quite clear that in the charge-sheet dated 16-2-1957, the appellant Krishan Lal Vij was expressly informed that while explaining the charges enumerated therein by 10 A. M. on 18-2-1957, he should also state whether in addition to offering a written explanation, he desired to be heard in person and whether he wished to produce any witnesses or documents and if so, to furnish a list of such persons and documents along with his written explanation. In the report dated

14-3-1957 which contains the findings of Shri Rajadhyaksha, it is expressly mentioned that Shri Vij had not cited any witnesses in his defence.

He had, however, cross-examined Messrs. Mohinder Lal Sood, Hooja and Inderjit Malhotra. The Enquiry Officer came to four conclusions and observed that the charges of dereliction of duty and grave misconduct in respect of money received by the appellant as an agent of Shri S. S. Khara were proved as also that he had utilised this money for an unauthorised purpose and had failed to remit the money to Shri Khara as expected. The penalty of dismissal was proposed and Shri Vij was called upon to show cause why this penalty should not be inflicted on him. Notice of the proposed penalty along with a copy of the findings was given to the appellant on 14-3-1957 and he was informed that any statement he wished to make in this behalf should be presented to the Deputy Director at 11 A. M. on 19-3-1957. On 21-3-1957, the appellant represented that the period for submitting his explanation should be extended at least by another 10 days, the period having already been extended up to 21-3-1957. The further extension was claimed on the ground that the appellant had not been supplied with a copy of the report made by Shri Hooja, Deputy Director and that he had not been given access to the examination of three files mentioned therein which contained similar subject as the case dealt with by the appellant in respect of S. S. Khara. He prayed for permission to examine the files and to take relevant extracts of the notes and copies of the letters received in NGO Branch or issued by the said branch. Reference in this representation was also made to a copy of the note stated to have been circulated by Shri M. L. Sood and copies of the notes dated 5-10-1956 and 16-11-1956 sent by the appellant to the Cash Branch.

These documents were represented to be most relevant to the circumstances of the case and necessary for his defence. It is noteworthy that in this representation, no grievance was made on the score of no adequate opportunity having been afforded to him for producing his defence witnesses. Shri Rajadhyaksha on the same day disposed of this representation. I will deal with the grievance in regard to documents a little later. Extension of time was granted to the appellant up to 11 A. M. on 23-3-1957, on which date it was clarified that the officer would proceed to pass the orders without waiting for the appellant's reply to the show cause notice. The circumstances just mentioned clearly show that the grievance of the appellant that no adequate opportunity was afforded to

him to adduce evidence in defence is unsustainable and it cannot be urged with any cogency that no reasonable opportunity to show cause was afforded to him.

5 Coming now to the grievance that relevant documents were not supplied to him, the counsel for the appellant has referred us to Annexures 'E', 'F' and 'R/4 Annexure F' seems to us to constitute a complete answer to the grievance which has been pressed before us. The submission that the appellant was the sole judge as to which documents were relevant and that the officer had no concern with this question is not easy to sustain. Indeed the learned counsel has not been able to draw our attention to any statutory provision or to any principle or precedent in support of the challenge. Reference has of course been made to an unreported decision of the Supreme Court in *Tulok Nath v Union of India*, C.A. 322 of 1957 decided on 1-11 1960 (SC). The following passage from that judgment dealing with R. 55 of the Civil Services (Classification, Control and Appeal) Rules has been specifically relied upon.

"It is for this reason that it is obligatory upon the Enquiry Officer not only to furnish the public servant concerned with a copy of the charges levelled against him, the grounds on which those charges are based and the circumstances on which it is proposed to take action against him. Further if the public servant so requires for his defence, he has to be furnished with copies of all the relevant documents that is documents sought to be relied on by the Enquiry Officer or required by the public servant for his defence. That the appellant had made a request for the supply of copies of documents is clear from the following passage in the report of Shri Sharma.

"He further pointed out that even the provisions of Civil Services (Classification, Control and Appeal) Rules had not been complied with and said that he should have been given a statement of allegations the grounds on which each charge was based, any other circumstances which it was proposed to take into consideration, a list of the prosecution witnesses and copies of the documents on which the prosecution case rested." In spite of this complaint the documents upon the perusal of which alone the Enquiry Officer has based his report were not furnished to him. All that the Enquiry Officer had to say about this is as follows

"I then informed him that in so far as his objection regarding the supply of documents etc., was concerned, it was for him to ask for any documents that he wanted to see, but he did not do so

As for the charge-sheet I thought that was comprehensive enough to enable him to draw up a statement which he was bound to furnish under R. 55 of the Civil Services (Classification, Control and Appeal) Rules."

Later in his report, the Enquiry Officer observed.

"I then asked the Raizada for the statement which he was required to submit but he told me point blank that he had no intention of submitting any such statement."

It may be mentioned that even according to the Enquiry Officer, the appellant did not say that he did not want to take any part in the enquiry or that he did not want to adduce any evidence before him. In spite of this the Enquiry Officer thought that the circumstances warranted his proceeding against the appellant *ex parte*.

Indeed, it would be clear from the fact that he was insisting on being furnished with copies of documents on which the Enquiry Officer proposed to rely that he did want to take part in the enquiry proceedings.

Again, had the copies of the documents been furnished to the appellant, he might, after perusing them well have exercised his right under the rule and asked for an oral enquiry to be held.

"Therefore in our view, the failure of the Enquiry Officer to furnish the appellant with copies of the documents such as the first information report and the statements recorded at the Shidipura house and during the investigations must be held to have caused prejudice to the appellant in making his defence at the enquiry. The enquiry must, in these circumstances be regarded as one in violation not only of R. 55 but also of Article 311 (2)."

These observations quite clearly show that they are confined to the facts of that case alone. In the case before us it was clear even to the learned Single Judge that the files, the inspection of which was asked for had no relevance to the case against the appellant and nothing was shown to the learned Judge from which it could be inferred that the petitioner was in any way handicapped in defending himself because of the refusal to show him those files. We are not persuaded to disagree with the learned Judge Shri Parkash Narain has also drawn our attention to the fact that Annexure 'E' was submitted on 21-3-1957 after the report of the Enquiry Officer dated 14-3-1957 and that Annexure 'F' suggests that the relevant documents were actually supplied to the appellant and it was only irrelevant documents, the prayer in regard to

which was disallowed. The submission pressed on behalf of the respondents does seem to possess some force. The counsel has also emphasised that the plea of the practice under which amounts used to be retained in similar circumstances was included in the appellant's representation, with the result that the appellant could not be prejudiced by not affording to him the papers relating to retention of money by him in other similar cases. This submission of the respondents also deserves consideration.

6. Lastly, it has been urged that Shri Rajadhyaksha who was not the Director could not hold the enquiry, being not authorised under the rules applicable to the appellant. Shri Parkash Narain has submitted that Shri B. N. Mullik, Director, had also in May 1957 called upon Shri Krishan Lal Vij to submit his representation if any against the proposed punishment of dismissal. This was done after going through the report prepared by Shri Rajadhyaksha. In answer to this show-cause notice, the appellant actually submitted his explanation on 22-5-1957, in which after referring to his earlier representation dated 23-3-1957 in reply to the notice dated 14-3-1957 issued by Shri Rajadhyaksha, the appellant submitted that the second show-cause notice did not indicate whether or not the previous notice had been cancelled. Some technical objections were raised against the second notice and it was stated, to quote the exact words, "I beg to submit, Sir, that in regard to the proceedings which have so far been held in my case, it is not only the first show-cause notice which was wrong, illegal and irregular but it will be observed that the entire proceedings from the very first stage were held in an irregular manner, and in contravention of the rules applicable in this case. I will request your honour to go through the contents of my representation dated 23rd March 1957 impartially in which I have clearly pointed out the various procedural and illegal irregularities committed in the proceedings. I may again submit, Sir, that the charges in my case were framed by Shri A. G. Rajadhyaksha, Deputy Director, who was not competent to do so within the meaning of R. 15(2) of the C. S. (C. C. & A) Rules

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In view of the circumstances explained above, I am constrained to submit Sir, that the procedural and illegal irregularities committed in proceedings have seriously prejudiced my case and such proceedings cannot be deemed to have been framed by an unbiased mind. I, therefore, pray that in view of the reasons already submitted in my representation dated 23rd March, 1957 the entire pro-

ceedings held by the said officer may kindly be quashed and set aside before I am called upon to explain my conduct on the basis of the Second Show-Cause Notice and to represent against the provisional penalty proposed to be inflicted upon me by your honour."

It is added in this representation that in case the objection raised in the previous representation dated 23-3-1957 was not upheld, then the appellant had a legal right to summon defence witnesses even at the stage of his explanation to the second show-cause notice before submitting his representation in reference to the second notice. In the concluding portion containing the prayer clause, the appellant desired to be apprised of the Rules under which the second show-cause notice had been served on him and it was repeated that the proceedings based on the show-cause notice issued by Shri A. G. Rajadhyaksha deserved to be quashed and the appellant be reinstated with effect from 12-3-1957 and that if this prayer was not acceded to, then the appellant be allowed to put in his defence before submitting his explanation. The Director after considering this representation again called upon the appellant to submit his reply by 15-7-1957 vide Annexure 'J' to the writ petition, informing him that no further opportunity to adduce defence evidence could be granted. Finally, Mr. Mullik passed the order dated 17-9-1957 as per Annexure dismissing the appellant from service with effect from the date of the said order. What has just been stated, quite clearly shows that the appellant cannot be considered to have been denied a reasonable opportunity of showing cause against the charges or against the proposed punishment.

It may again be emphasised that the right to reasonable opportunity, broadly stated, implies opportunity to deny the guilt alleged, and, to establish innocence, to defend himself by examining himself and his witnesses, and to make representation against the proposed punishment. In the present case, he was quite clearly afforded an opportunity to show cause against the charges levelled and was quite clearly informed that he could adduce evidence in his defence if he so desired and was again afforded full opportunity of making representation against the proposed punishment. The appellant seems to us to have been afforded adequate and reasonable opportunity to represent his case and defend himself according to the recognised standards applicable to departmental enquiries. Such enquiries cannot be equated with criminal trials under the Code of Criminal Procedure. It is, therefore, not easy to sustain the contention advan-

ced on behalf of the appellant that the enquiry against him is tainted with any legal infirmity violative of the recognised rule of reasonable opportunity of showing cause against the guilt and the punishment proposed.

7 For the foregoing reasons, this appeal fails and is dismissed, but in all the circumstances of the case, there will be no order as to costs.

VGW/DVC.

Appeal dismissed.

AIR 1969 DELHI 150 (V 56 C 26)

I D DUA, C. J

Raj Kishore Bhag Rai, Petitioner v State, Respondent.

Criminal Misc. (Main) No. 120 of 1968, D/- 18-9-1968

(A) Criminal P. C. (1898), S 526 — Reasonable apprehension — Depends on peculiar incidents and circumstances of each case.

What is reasonable apprehension, has to be decided in each case with reference to its own peculiar incidents and the surrounding circumstances. In determining whether an applicant has a reasonable apprehension, it is the duty of the Court, by placing itself in the position of the accused, to consider the attending facts and circumstances. Abstract reasonableness cannot, normally speaking be the standard in such cases

(Para 6)

(B) Criminal P. C. (1898) S 526 — Words used and opinions expressed by Magistrate—When do not cause reasonable apprehension.

The words used by a judicial officer though susceptible of explanation and traceable to a strong sense of duty may at times be calculated to create in the mind of the accused an apprehension—which may not be an imaginary or foolish apprehension—that he may not have an impartial trial and, in any event, words used by the Court in a given background may induce the superior court to hold that it would be expedient for the end of justice to transfer the case. But it cannot be laid down as a matter of law that all expressions of opinion by the Magistrate in the order of adjournment should be held to give rise to a reasonable apprehension in the mind of the accused necessitating an order of transfer by the High Court. (Para 6)

Merely because section 526, Cr P C. does not require a Magistrate to make any observations, it does not impose any disability on the Magistrate to express a relevant opinion justified on the record. The question requires consideration on the facts of each case. (Para 6)

Held on facts of the case that the recording of the Magistrate's impression, which did not appear to be baseless that whenever the P. Ws. appeared in Court, some accused persons absented themselves, could not, by itself as a matter of law he held necessarily to give rise to a reasonable apprehension in the mind of the accused persons. (Para 6)

(C) Criminal P. C. (1898), S 526 — Object of—Duty of court—Cases should not be transferred lightly.

Though the importance of the highly desirable object to clear away every thing which might engender suspicion and distrust of a court trying a criminal case and to promote the feeling of confidence in the administration of justice which has been recognised to be essential to special order and security cannot be minimised at the same time the High Court is bound in the interest of justice to see that cases are not transferred lightly

(Para 6)

Speedy and uninterrupted trial of cases, is equally essential to social order and security and too lightly to transfer cases may tend to impair the peoples confidence in the administration of justice and in the impartiality and integrity of the Presiding Officers of Courts of Law and justice. (Para 6)

(D) Criminal P. C. (1898), S 528 (8)—On first intimation that accused desires to apply for transfer of the case, the Magistrate must adjourn case for such period as would afford sufficient time for transfer application to be made and an order to be obtained thereon—Fifteen days is ordinarily considered as reasonable time — High Court Rules and Orders—Delhi High Court Rules and Orders, Vol. III, Chap 26A, Para 12 (Para 6) Cases Referred Chronological Paras (1968) 70 Pun LR (D) 237 Pran

Nath v State 5

(1967) 1967 Delhi LT 289 Ganesh

Dass v State 5

K. B. Kalra, for Petitioner V D Misra, for Respondent.

ORDER Shri Raj Kishore has presented an application under section 526, Cr P C for transfer of two connected cases, State v Raj Kishore and two others, under sections 332/353/186/224/225/34, I. P. C. and, State v Raj Kishore under section 61 of the Punjab Excise Act, from the Court of Shri K. N. Joshi, Magistrate Ist Class, Delhi, to some other competent Court.

2. According to the averments in the application, both the cases were fixed for appearance in the Court of the said Magistrate for 28-3-68 and were adjourned to 8-4-68. On 30-3-1968, the petitioner made an application for change of the date from 8-4-1968 to some other date because of his inability to attend

the Court. This prayer was granted and the date was changed to 10-4-1968. In spite of this change, the learned Magistrate on 8-4-1968 ordered non-bailable warrants to issue for the arrest of the petitioner and his co-accused. On 10-4-1968, when the petitioner and the co-accused appeared in Court, they learnt of the warrants having been issued and the next date being 18-4-1968. On the date fixed, the petitioner and the co-accused were getting their bail-bonds written out by the petition writer when the case was called and non-bailable warrants were again issued for the arrest of the petitioner and the co-accused. As soon as the petitioner and his co-accused entered the Court with the bail-bonds, they were taken into custody. The petitioner's application for cancelling the warrants issued was also rejected by the learned Magistrate and the petitioner and the co-accused were sent to jail on 18-4-1968. They were released on bail on 19-4-1968. On 22-5-1968, in the case under section 332 etc., Guru Datt accused filed an application under section 528 requesting for 15 days time to enable him to file a transfer application in the Court of the learned Sessions Judge when the learned Magistrate made the following order:—

"P. S. I. is present. Accused are present, P. Ws. Rashid Ahmed, Chandan Singh, Ved Parkash, S. I. Amar Singh are present. Accused Guru Datt has filed an application that he wants to get the case transferred from this Court. On seeing orders on the file it appears that whenever P. Ws. are present, the accused absent themselves. In the same way P. Ws. are present today in Court so that they are not examined in Court. To file personal bond for Rs. 200/- and to appear in Court on 7-6-68."

On 27-5-1968, after Guru Datt's application was made, the petitioner requested for adjournment of the other case under the Punjab Excise Act, but the learned Magistrate observed that the petitioner should file a separate application. The petitioner, as directed, filed a separate application and also gave a personal bond for Rs. 200/-. The learned Magistrate then made the following order:

"The P. S. I. is present. Accused are present. P. Ws. Rashid Ahmed, Chandan Singh, S. I. Ved Parkash, Ch. Amar Singh are present. Accused presented an application in court that he wants to get his case transferred. From the orders on file it appears that when P. Ws. appear one accused absents. In the same way P. Ws. are present today so that P. Ws. are not examined in Court today. He was asked to file personal bond in the sum of Rs. 200/- and obtain orders of transfer by 7-6-1968."

The petitioner feels aggrieved by the observation of the learned Magistrate that the application had been moved by the petitioner so that the P. Ws. are not examined in Court and the petitioner's counsel argues that this shows that the Court below is inimically inclined towards the petitioner, thereby giving rise to a reasonable apprehension in the petitioner's mind that he would not get a fair and impartial trial in the court below.

3. In answer to the petitioner's application for transfer made in the Court of the learned Sessions Judge, the learned Magistrate had observed in his comments that the accused had always been adopting delaying tactics whenever witnesses were present. This has also been objected to by the petitioner's learned counsel.

4. In his comments, the learned Magistrate has stated that both the cases in question were fixed for 28-3-1968 for the appearance of the accused, but they were not present and the cases had to be adjourned to 8-4-1968. At about 3.30 P. M., the counsel for the accused persons appeared in Court and stated that the accused persons were waiting outside the court-room No. 30, in which court-room the cases were being heard earlier and that the accused had no knowledge of the transfer of the cases to the present Court. This, according to the learned counsel, was the reason for their non-appearance. Thereafter, non-bailable warrants issued against the petitioner were cancelled and the cases fixed for 8-4-1968 for prosecution evidence. It appears from the comments that on 30-3-1968, the counsel for the accused had appeared and applied for adjournment of the case to 10-4-1968 and this prayer was granted. Inadvertently, however, the order made on that date could not be placed on the file by the Reader, as a result whereof the case was heard on 8-4-1968. As the accused did not appear on 8-4-1968, warrants were issued against them for 18-4-1968. On 10-4-1968, an application was made by the accused and the warrants were cancelled. From verification, it appeared that no warrants had actually been issued by the Court, nor were the accused arrested by anybody. The case was adjourned to 18-4-1968. On that date again, the accused were not present. The prosecution witnesses Ram Sarup, Rashid, Ved Parkash, A. S. I. and Amar Singh, Deputy Superintendent of Police, were present. It was in these circumstances that the warrants were ordered to issue against the accused on 18-4-1968 and the case was adjourned to 27-4-1968. At about 1 p.m. on 18-4-1968 the counsel for the accused appeared and presented an application praying for cancellation of the war-

rants issued on 10-4-1968. The counsel was informed on the order dated 10-4-1968 when the case was fixed for 18-4-1968. In spite of this intentional absence on the part of the accused persons, the Court admitted the accused persons to bail on their furnishing a bond amounting to Rs 5000/- with one surety in the like amount. The accused were absent from 10 A.M. to 1 P.M. on 18-4-1968 and it was only when the prosecution witnesses had gone away that the accused persons appeared in Court and made an application for cancellation of the warrants. The averments about the accused filing an application for transfer and the Court requiring a personal bond of Rs 200/- have been admitted.

5 The learned counsel for the petitioner has very strongly relied on the following observations made by Hardy J in *Ganesh Dass v State* 1967 Delhi LT 289

'The petitioner's allegations and the explanation of the learned Magistrate were duly considered by the learned Sessions Judge and the application for transfer was rejected by his order dated 1-12-1966. Ordinarily, therefore I would have been reluctant to accede to the request made by the petitioner for transfer of the case. But I find that on 10th October 1966 when the petitioner informed the learned Magistrate about his intention to make an application for transfer of the case from his file, the learned Magistrate recorded the following order:

'The accused is present. Suraj Bhan and Darshan Singh PWs are present. The accused moved the transfer application without any sound reason, just delaying tactics. The accused has been asked to file the Machalka for Rs 200/- He is to move the application in the Sessions Court by 24-10-66'

I am of the view that the learned Magistrate went out of his way in stating in his order 'The accused moved the transfer application without any sound reason just delaying tactics'. It may be that in the circumstances of the case this observation of the learned Magistrate was not wholly unjustified. But sub-section (8) of S 526 of the Code of Criminal Procedure confers a right on the accused to obtain an adjournment of the case if he intimates to the Court that he intends to make an application under that section for transfer of his case and all that the Court is entitled to require is that the accused shall execute a bond without sureties of an amount not exceeding Rs 200/- to the effect that he will make such application within a reasonable time to be fixed by the Court. The learned Magistrate had no right to comment upon the conduct of the petitioner

and to observe that "the application for transfer was being sought to be moved without any sound reason and merely as a part of the delaying tactics. In saying so, the learned Magistrate entered the arena of controversy in which he arrayed himself as a party against the accused."

In the reported case, the Court also referred to the circumstance of the learned trying Magistrate there being acquainted with the D S P, who was the brother of the complainant. But this was held not to be sufficient to warrant the inference that the learned Magistrate would not do justice in the case. After making this observation, the Court proceeded to record in the order as follows.

'But what is to be seen is the cumulative effect of the various incidents alleged in the petition in spite of their denial by the learned Magistrate and the last order made by him on 10th October, 1966. All these, in my opinion, do create a reasonable apprehension in the mind of the petitioner that he will not receive a fair trial at the hands of the learned Magistrate. The susceptibilities and the apprehension of the accused have an important bearing on the question as to whether a particular case should be ordered to be transferred from one Court to the other. The apprehension has necessarily to be a reasonable one and it is not the reaction of a hypersensitive or overwrought mind that should weigh with this Court.'

The petitioner's counsel has also referred me to my decision in *Pran Nath v State*, (1968) 70 Pun LR (D) 237 where it has been observed that the expression of opinion by the Magistrate that the accused was delaying the trial may justifiably raise an apprehension in the mind of the accused that his case may not be dealt with by the trial Magistrate with the requisite judicious detachment, objectivity and impartiality and that the Courts should not do anything which may be suggestive of bias in their mind against any party which is not judicially supportable on the material on the record. In the case cited the opinion of the Magistrate was held to be wholly unjustified on the record.

6 Section 526 Cr P C provides for the transfer of cases when it appears to the High Court, inter alia

(a) that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate thereto or

(e) that such an order is expedient for the ends of justice

I have not reproduced the other parts of the section because this case can by no stretch fall in the clauses which have been omitted. What is reasonable apprehension has, in my opinion, to be decided in each case with reference to

its own peculiar incidents and the surrounding circumstances. In determining whether an applicant has a reasonable apprehension, it is the duty of the Court, by placing itself in the position of the accused, to consider the attending facts and circumstances. Abstract reasonableness cannot, normally speaking, be the standard in such cases. It is also correct that the words used by a judicial officer, though susceptible of explanation and traceable to a strong sense of duty, may at times be calculated to create in the mind of the accused an apprehension — which may not be an imaginary or foolish apprehension — that he may not have an impartial trial and, in any event, words used by the Court in a given background may induce the superior Court to hold that it would be expedient for the ends of justice to transfer the case. But the recording of the learned Magistrate's impression, which does not appear to be baseless, that whenever the P. Ws. appear in Court, some accused persons absent themselves, cannot by itself as a matter of law be held necessarily to give rise to a reasonable apprehension in the mind of the accused persons that they would not get a fair and impartial trial in the Court. In the decision in Ganesh Dass's case 1967 Delhi LT 289 it must not be forgotten that finally the learned Judge came to the conclusion on a consideration of all the circumstances of the case, including what appears to be an extremely important circumstance, that the brother of the complainant was a D.S.P. who was acquainted with the learned Magistrate. I am not at all minimising the importance of the highly desirable object to clear away every thing which might engender suspicion and distrust of a court trying a criminal case and to promote the feeling of confidence in the administration of justice which has been recognised to be essential to social order and security. At the same time, this Court is bound in the interest of justice to see that cases are not transferred lightly and that unless incidents are brought to its notice, which, though susceptible of explanation and may have happened without any real bias in the mind of the Presiding Officer of the Court are such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial, the trial should not be disrupted and transferred from the Court where it is proceeding. The ends of justice can also be defeated by frequent transfer of cases on grounds on which no reasonable mind, placed in the position of the accused, can be held to entertain an apprehension that he would not get a fair and impartial trial in the Court concerned.

In the present case, I am far from

satisfied that any such incident has happened which would justify a reasonable apprehension in the mind of the petitioner. Speedy and uninterrupted trial of cases, it may be borne in mind, is equally essential to social order and security and too lightly to transfer cases, may also tend to impair the people's confidence in the administration of justice and in the impartiality and integrity of the Presiding Officers of Courts of Law and justice. When the petitioner applied to the trial Court for adjournment of the case so as to have the same transferred he could not have any reasonable apprehension on the basis of the observations contained in the order of adjournment and even before the learned Sessions Judge, when transfer of the case was applied for in that Court, no allegation was made in the application that the learned Magistrate had made any comments in the order staying the proceedings, which had given rise to a reasonable apprehension in the petitioner's mind that he would not get a fair and impartial trial in the trial Court. The order of the learned Sessions Judge dated 20-7-1968 expressly mentions absence of any such allegation. Apparently, this ground struck the counsel at the time of argument in that Court. I have, therefore, no hesitation in holding that the observation of the learned Magistrate of which capital has been sought to be made by the petitioner's learned counsel is not enough to give rise to a reasonable or justifiable apprehension in the mind of the accused that he would not get from the trial Court an impartial trial.

The learned Magistrate was enjoined on the first intimation as a matter of law to adjourn the case as provided by section 526 (8), Cr. P. C. for such period as would afford sufficient time for the application to be made and an order to be obtained thereon. According to paragraph 12, Chapter 26-A, Vol. III, High Court Rules & Orders, a period of about 15 days is ordinarily considered to be a reasonable time to allow for the making of an application. The period of adjournment is accordingly a matter of discretion vested in the learned Magistrate. The trial Court granted adjournment on 27-5-1968 up to 7-6-1968. The observation to which the accused has taken exception was, in my view, relevant for the purpose of supporting the order and it could not be said to be a gratuitous expression of opinion which could be held to be unjustified or unsupportable on the record and which would show prejudice in the mind of the learned Magistrate against the accused. The two decisions cited by Shri Kalra do not as a matter of law lay down that all expressions of opinion by the learned Magistrate in the order of adjournment should

be held to give rise to a reasonable apprehension in the mind of the accused necessitating an order of transfer by this Court. Merely because S 526 Cr P C. does not require a Magistrate to make any observations, does not impose any disability on the learned Magistrate to express a relevant opinion justified on the record. The question requires consideration on the facts of each case.

7 In so far as the question of directing warrants of arrest to issue on 8-4-1968 and 18-4-1968 is concerned, the explanation of the learned Magistrate seems to me to be convincing and here again, I do not think the accused can have any reasonable apprehension that he would not get a fair and impartial trial in the Court of the learned Magistrate. I must not be understood to lay down as a broad and general rule that convincing explanation of the Magistrate must necessarily rule out all possibilities of a reasonable apprehension in the mind of an accused person that he would not get a fair and impartial trial in that Court. The question, as observed earlier has to be viewed on the peculiar facts and circumstances of each case and in spite of a convincing explanation on the part of the Magistrate incidents can be imagined which may give rise to a reasonable apprehension justifying an order of transfer. No legal proposition as a straight jacket fitting all occasions is either possible or desirable to be formulated.

8 In the case in hand on a consideration of all the relevant facts and circumstances to which my attention has been drawn, I am unable to conclude that the petitioner has justifiable grounds for entertaining a reasonable apprehension that he would not get a fair and impartial trial in the Court below. The ends of justice, in my opinion, do not require transfer of the case. This petition accordingly fails and is dismissed. Parties are directed to appear in the trial Court on 3-10-1968 when a short date would be given for further proceedings in accordance with law. The learned Magistrate, it is hoped, would try to dispose of this case with due despatch and promptitude.

DRR

Petition dismissed.

AIR 1969 DELHI 154 (V 56 C 27)

(HIMACHAL BENCH AT SIMLA)

FULL BENCH

I. D. DUA C. J. S. K. KAPUR

AND T. V. R. TATACHARI JJ

Inder Singh, Appellant v Gulzara Singh and another Respondents

L. P. A. No 9 of 1967 D/ 25-6-1968, decided by Full Bench on order of reference made by S N Shankar J., D/- 5-4-1968.

(A) Civil P C (1908) Pre — Interpretation of Statutes — Rules of — Use of legislative history — (Interpretation of statutes)

Courts may take recourse to the legislative history as well as to the intention of the Legislature but bearing always in mind that the intention is best expressed in the words used. In finding out the legislative intent the courts cannot speculate and thus trespass into the field of legislation.

Resort may be had, and in fact Courts are in some cases bound to do so to ascertain the mischief left unprovided for in the old law and sought to be remedied by the new statute. That course is adopted to find out the intention of the Legislature in the statutes penned obscurely but principally a law must be interpreted by the words of the statute itself. The words must be read in their ordinary sense though they may be modified only to avoid an absurdity or incongruity. (Para 4)

(B) Punjab Pre-emption Act (1 of 1913) (as amended by Punjab Act 10 of 1960) Section 15(1) (b) (thirdly) — Or meaning of — Does not mean 'and' — Father's brother has superior right over father's brother's son — (1968) 70 P L R 571 Overruled — (Words and Phrases — Or)

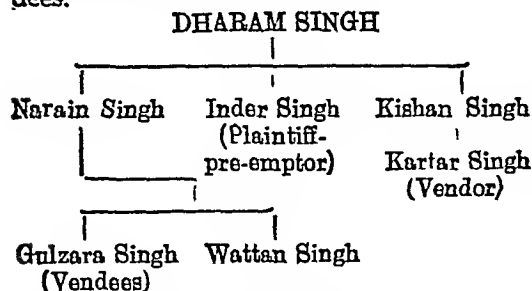
Though sometimes the Courts have read the word 'or' as and the normal rule of construction remains that the words must be given their primary meaning and, therefore, unless compelled by the scheme of the Act indicating an obvious intent of the Legislature to adopt a contrary rule, the courts must read 'or' as 'or' and not go to the extreme limit of reading it as and. (Para 4)

The scheme of the Punjab Pre-emption Act, 1913 does not enjoin that the word 'or' used in the clauses of S 15 should be read as and. The use of the word 'or' in the clauses of S 15 creates various alternatives and fixes a preferential order among the persons grouped under a particular class, and when so interpreted it is clear that under clause thirdly of S 15 (1) (b) the father's brother has a superior right of pre-emption over father's brother's sons of the vendor 1968-70 Pun LR 571 Overruled. (Paras 6 7 9)

Cases Referred Chronological Paras
(1968) 70 Pun LR 571 = ILR (1968)
1 Punj 698 Hira v Bir Singh 6
(1954) AIR 1954 Punj 55 (V 41) =
55 Pun LR 500 (FB) Uttam Singh
v Kartar Singh 11

T. C. Chitkara and M. G. Chitkara,
for Appellant, C. L. Lakhanpal and Sh.
Chhabildas, for Respondents.

S. K. KAPUR, J: By registered sale deed dated July 26, 1963, Kartar Singh sold 6 Kanals and 4 Marlas of land being a share in joint land, in favour of Gulzara Singh and Wattan Singh respondents herein for a consideration of Rs. 2,500/-. On January 15, 1964, Inder Singh instituted a suit for possession of the said land by pre-emption. Inder Singh plaintiff founded his claim on a superior right of pre-emption over the vendees, Gulzara Singh and Wattan Singh. The following pedigree table brings out the relationship of Kartar Singh vendor, Inder Singh plaintiff and Gulzara Singh and Wattan Singh vendees:



2. The trial Court decreed the suit on July 21, 1965, and an appeal in the Court of District Judge against the trial Court's decision also failed. The vendees filed a second appeal in this Court which was allowed by S. N. Shankar, J. on September 21, 1967. Inder Singh plaintiff filed a Letters Patent Appeal against the judgment of S. N. Shankar, J. which was, by order dated April 5, 1968, referred to a Bench of three Judges and that is how this Letters Patent Appeal has come before us for disposal.

3. Since the sale in this case was in respect of a share out of the joint land by one of the co-sharers, the short question that falls for determination is the interpretation of section 15 (1) (b) clause Thirdly of the Punjab Pre-emption Act, 1913 (Punjab Act 1 of 1913) as amended by Punjab Act No. 10 of 1960, the question being whether the plaintiff, who is the father's brother of the vendor, has a superior right of pre-emption over the vendees, who are the vendor's father's brother's sons. The learned Single Judge on the interpretation of the said section 15 (1) (b) decided that the father's brother of the vendor did not have a superior right of pre-emption over the vendees and all the relations mentioned in section 15 (1) (b) Thirdly had equal right to pre-empt. The learned Single Judge observed:

"No separate and independent rights of pre-emption have been conferred on the two classes or groups of persons specified in paragraph Thirdly to cl. (b) of sub-section (1) of section 15 of the Act and this provision has necessarily to

be read subject to section 13 of the Act which provides the mode in which the joint right of pre-emption conferred by the Act could be exercised."

The controversy, therefore, centres round the point that whereas Inder Singh plaintiff claims that he has a superior right of pre-emption over the vendees, the latter maintain that they have an equal right of pre-emption with the plaintiff and consequently the plaintiff's suit is not maintainable. It is the common ground that only if the plaintiff's right is held to be superior to that of the vendees, the Letters Patent Appeal should succeed.

4. The learned Single Judge in coming to the aforementioned conclusion was mainly influenced by section 13 of the said Act as conferring a joint right on each class or group of persons in section 15. It is appropriate to read section 15 as it stands after amendment by Act No. 10 of 1960—

"15. (1) The right of pre-emption in respect of agricultural land and village immoveable property shall vest—

(a) where the sale is by a sole owner—

First, in the son or daughter or son's son or daughter's son of the vendor.

Secondly, in the brother or brother's son of the vendor;

Thirdly, in the father's brother or father's brother's son of the vendor;

Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly,—

First, in the sons or daughters or sons' sons or daughters' sons of the vendor or vendors;

Secondly, in the brothers or brother's sons of the vendor or vendors;

Thirdly, in the father's brothers or father's brother's sons of the vendor or vendors;

Fourthly, in the other co-sharers;

Fifthly, in the tenants who hold under tenancy of the vendor or vendors the land or property sold or a part thereof;

(c) where the sale is of land or property owned jointly and is made by all the co-sharers jointly,—

First, in the sons or daughters or sons' sons or daughters' sons of the vendors;

Secondly, in the brothers or brother's sons of the vendors;

Thirdly, in the father's brothers or father's brother's sons of the vendors;

Fourthly, in the tenants who hold under tenancy of the vendors or any one of them the land or property sold or a part thereof.

(2) Notwithstanding anything contained in sub-section (1)—

(a) where the sale is by a female of land or property to which she has suc-

ceeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female after inheritance, the right of pre-emption shall vest,—

(i) if the sale is by such female, in her brother or brother's son,

(u) if the sale is by the son or daughter of such female, in the mother's brothers or the mother's brother's sons of the vendor or vendors

(b) where the sale is by a female of land or property to which she has succeeded through her husband, or through her son in case the son has inherited the land or property sold from his father, the right of pre-emption shall vest,

First, in the son or daughter of such female,

Secondly, in the husband's brother or husband's brother's son of such female." Another amendment was introduced in 1964 in Section 15, paragraph First of clause (b) of sub-section (2) and the words 'husband of the' were introduced between the words 'such and 'female' but that amendment is not material for the purposes of the case at hand. The learned counsel for both the parties had recourse to the legislative history to which I shall refer later as supporting their respective points of view, but divorced from the legislative history the plain reading of section 15 to my mind, appears to lead to no other conclusion than that the father's brother has a superior right of pre-emption over father's brother's sons of the vendor. To what extent if at all, the history of the enactment can or does alter the plain meaning of the section is a different question and I will refer to it later. Courts may take recourse to the legislative history as well as to the intention of the Legislature but bearing always in mind that the intention is best expressed in the words used. In finding out the legislative intent the Courts cannot speculate and thus trespass into the field of legislation. Resort may be had, and in fact Courts are in some cases bound to do so to ascertain the mischief left unprovided for in the old law and sought to be remedied by the new statute. That course is adopted to find out the intention of the Legislature in the statutes penned obscurely, but principally a law must be interpreted by the words of the statute itself. The words must be read in their ordinary sense though they may be modified only to avoid an absurdity or incongruity. Law reports abound with decisions that the Courts can go no further and I propose to adhere to that well-recognised rule.

I find it difficult to attribute a more expansive quality to the statute than the words used reasonably admit. In sec-

tion 15 (1) (b) Thirdly the word 'or' has been used between two classes of pre-emptors and if I were to hold that they have been given a joint right of pre-emption, I must of necessity read the word 'or' as 'and'. I am not unmindful of the statutes in which sometimes the Courts do read the word 'or' as 'and' and vice versa but there must be some strong reason to do so. For instance, such substitution may have to be made to give effect to the obvious intent of the Legislature and to effectuate the policy intended to be laid down by a given statute. The normal rule of construction, however, remains that the words must be given their primary meaning and, therefore, unless I am compelled by the scheme of the Act indicating an obvious intent of the Legislature to adopt a contrary rule I must read 'or' as 'or' and not go to the extreme limit of interpretation. The question then is, does the scheme of the Act enjoin me to do so. The learned Single Judge felt bound as I have said, to read the word 'or' as 'and' because of S 13 wherein a provision has been made that

"whenever according to the provisions of this Act a right of pre-emption vests in any class or group of persons the right may be exercised by all the members of such class or group jointly, and, if not exercised by them all jointly by any two or more of them jointly, and, if not exercised by any two or more of them jointly, by them severally"

From this, the learned Single Judge deduced that all the categories mentioned in the clause under consideration formed a class or group jointly entitled to a right of pre-emption. Apart from the fact that the language of section 13 as discussed hereafter, accords with the interpretation placed by me on section 15, section 17 (b) if it is to be given effect to, also revolts against such an interpretation. It seems to me that S 17 (b), which was mainly relied upon by the learned counsel for the appellant, really does not fit in with the language of section 15 as amended for the persons mentioned in section 15 as the pre-emptors do not "claim as heirs" but claim as conferees of a right under the statute. Section 15 was amended, as I have said, by Punjab Act No 10 of 1960 but S 17 (b) remained untouched though it does appear that when amending the Pre-emption Act in 1960 the Legislature did direct its attention to section 17 as well and omitted clauses (c) and (d) thereof. I have really not been able to appreciate as to what was the object of the Legislature in retaining clause (b) of section 17 in this form as it deals with the share which the pre-emptors will get in the property pre-empted "if they claim as heirs". Clause (b) of section 17 could

fit in with the scheme of the unamended section 15 which conferred rights on "persons in order of succession, who, but for such sale would be entitled on death of the vendor to inherit the land or property sold". The unamended section 15 read—

"15. Subject to the provisions of section 14 the right of pre-emption in respect of agricultural land and village immovable property, shall vest

(a) where the sale is by a sole owner or occupancy tenant or in the case of land or property jointly owned or held, is by all the co-sharers jointly, in the persons in order of succession who, but for such sale would be entitled on the death of the vendor or vendors, to inherit the land or property sold;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly, —

First, in the lineal descendants of the vendor in order of succession;

Secondly, in the co-sharers, if any, who are agnates in order of succession;

Thirdly, in the persons, not included under firstly or secondly above, in order of succession, who but for such sale would be entitled on the death of the vendor to inherit the land or property sold;

** ** *

5. Even if I were to adhere to the principle announced in various decisions that effort should be made to attribute some meaning to every provision in the Act it strengthens the opinion that I have expressed, namely, that the father's brothers have been treated as having a superior right over the father's brother's sons of the vendor. To give effect to S. 17 (b) I must read the words "if they claim as heirs" as "if they are heirs". Even then the same result follows. Take a case falling under section 15 (1) (a). The right under section 15 (1) (a) First has been conferred on "the son or daughter or son's son or daughter's son of the vendor". If they were to be held to possess equal right of pre-emption then in case of Hindus at least it will be impossible to work out the proportion in which they will get the pre-emption in which they will get the pre-empted property. I am thinking of a case where a son, a daughter and a son's son, governed by the Hindu Succession Act, file a suit for pre-emption claiming an equal right. In that event, all of them must get the property pre-empted because they have a joint right, yet under section 17 a son's son, unless he is a son of a predeceased son, will have no right to inherit the property in the event of the vendor's death and consequently will be excluded under section 17. Similar would be the situation if a son of a

living daughter and a son of the vendor file suits. A similar anomaly would also arise in the case of pre-emption by brother and brother's son of the vendor under section 15 (1) (a) Secondly.

In giving the above illustrations I am quite alive to the fact that in construing the provisions of section 15 of the said Act I am not expected to determine the class of persons entitled to pre-empt by reference to order of priority under Hindu Succession Act to inherit for the said Act applies to other than Hindus also. But at the same time it applies to Hindus as well and the illustrations demonstrate the artificiality of the argument in favour of joint right to classes mentioned in the clause under consideration. Section 13, in my opinion, presents no impediment in coming to the conclusion that in section 15 (1) (b) Thirdly father's brother of the vendor has a superior right to pre-empt over his father's brother's son. The words "class" or "group" in the section has reference to the whole of section 15 and when applied to section 15 (1) (b) Thirdly mean "father's brothers" as one class and "father's brother's sons" as another class. It is section 15 which must control S. 13 because before S. 13 is applied one has to see on whom has the right to pre-empt been conferred.

It was argued by the learned counsel for the respondents that priority of classes or groups had been determined by use of the expressions, First, Secondly and so forth and, therefore, each paragraph in Sections 15 (1) (a) and 15 (1) (b) must be so construed as to confer a joint right on each class or group mentioned in each paragraph. I do not agree. Each paragraph deals with categories "groups" of persons entitled to pre-empt and use of the word "or" then creates inter se priority amongst the pre-emptors in each paragraph.

It was then suggested on behalf of the respondents that pre-emption is a piratical right and therefore the interpretation sought to be placed on behalf of the respondent must be held to accord more in conformity with the intention of the Legislature, namely, to give that right jointly to the heirs who would have otherwise succeeded to the property. The right may be piratical but I am unable to appreciate as to why an expansive quality should be attributed to the statute when choice has to be made between the pirates. Even otherwise, no such intention of the Legislature is discernible from the statute. For instance, I see no reason why, if the Legislature intended to give joint rights, has the widow been excluded from the category of persons entitled to pre-empt.

6. In *Hira v Bir Singh* 1968-70 Pun LR 571, R S Sarkaria, J., while interpreting section 15 (1) (b) of the said Act, decided that all the persons grouped under each paragraph of the various sub-sections in section 15 had an equal right of pre-emption. In the opinion of the learned Judge the other construction would reduce to silence the provisions of Sections 13 and 17 with great respect to the learned Judge, I am unable to subscribe to that view. Section 13 is really not rendered nugatory because, as I have said, it deals with the exercise of right by "all the members of such class or group jointly". Each of the expressions or categories for instance "father's brothers" on the one hand and "father's brother's sons" on the other in section 15 (1) (b) Thirdly constitutes a "class" or "group" within section 13. Similarly, each of the expressions or categories in section 15 (1) (a) First to Thirdly and in 15 (1) (b) First and Secondly as also in 15 (1) (c) First to Thirdly constitutes a class or group. Again, each of the expressions or categories namely, "tenants" and "co-sharers" mentioned in section 15 (1) (a) Fourthly, section 15 (1) (b) Fourthly and Fifthly, and in section 15 (1) (c) Fourthly constitutes a class or group. Thus section 13 is not rendered nugatory at all. As regards section 17 also, I am unable to agree that on the interpretation placed by me on section 15 it will be rendered otiose. That can be illustrated even from a case where the pre-emptors are brother and brother's son of the vendor under section 15 (1) (b) Secondly, which was the provision under consideration by R. S. Sarkaria, J. In case of such pre-emptors governed by Hindu Succession Act, brother will exclude the brother's son by virtue of the provisions in sections 8 and 9 of the Hindu Succession Act read with section 17 (b) of the Punjab Pre-emption Act. If the construction other than the one placed by me is to be adopted while the brother and the brother's son will have a joint right under section 15 (1) (b) Secondly, the brother's son will not be able to exercise his right under section 17 (b) — not being an heir at all. Thus section 17 (b) will in such a case have the effect of taking away the right conferred on the brother's son under section 15. On the other hand, the interpretation placed by me completely squares with section 17 (b). All these reasons induce me to hold that the use of the word "or" creates various alternatives and fixes a preferential order among the persons grouped under a particular class.

7. In the result, it must be held that the plaintiff had a superior right of pre-emption over the vendees and was en-

titled to succeed. The appeal is, therefore, allowed with the result that Inder Singh plaintiff's suit is decreed. In the circumstances, however, I leave the parties to bear their own costs.

8 I D. DUA, C. J.: I am in complete agreement with the reasoning and conclusion of my learned brother Kapur, J. and would merely add a few words.

9. A statute is a solemn enactment of the State acting through its Legislature. It is accordingly permissible to assume that the Legislature is aware of the rules of statutory construction and of the relevant judicial decisions. Again, normally speaking, the Courts do not lightly assume that the Legislature has made a mistake and if there is some defect in the phraseology used by it, the Court, as a general rule, does not take upon itself the extra-judicial duty of aiding the defective phrasing by rewriting the Act. The plain meaning of unambiguous words legitimately claims *prima facie* preference at the hands of the court in the task of discovering the legislative design and intent, for, the language used is the true depositor of such design and intent, though the field of research for such discovery extends to the whole statute considered in the background of its purpose and object, and is not confined to a part of it in isolation. To clear unambiguous language, the Court is rarely, if ever, entitled to add words in order to evolve a scheme which may be supposed to carry out some unexpressed intention of the law-maker, for, that is more of a legislative than of a judicial function. In the case in hand, by construing the word "or" as "or" in clause Thirdly of section 15 (1) (b) of the Punjab Pre-emption Act, would neither lead to any absurdity nor to any ambiguity or contradiction; nor would it in any way frustrate, defeat or obstruct the object or purpose which, on the plain reading of the statute as a whole, is clearly discoverable. And then, merely construing the word "or" as "and," would scarcely be enough. To uphold the respondent's contention, one would have to add a lot more to the existing phraseology of section 15 (1) (b) Thirdly, as indeed this clause would have to be virtually redrafted, which seems to me to be beyond this Court's competence, and even if it were so competent for this Court to do in some exceptional circumstances, the present is not shown to be such a case. It may be pointed out that before the referring Bench, as is clear from the referring order dated 5-4-68 the respondent's case, as argued by his counsel, was that all persons mentioned in section 15 (1) (b) Thirdly had been clothed separately with the right of pre-emption and that it was not a joint right to be exercised by them all jointly.

This merely serves to show that even the respondent is not quite clear about the statutory scheme or design.

10. In regard to the effect of S. 17, apart from the important fact that section 15 does not in terms create any right of pre-emption claimable in the capacity of heirs, I am also extremely doubtful if the rule of succession governing the possible pre-emptors, clothed with the right of pre-emption under the Punjab Pre-emption Act (Hindus, Muslims and Christians etc.), justifies the assumption as obliquely suggested on behalf of the respondent that persons clothed with the right of pre-emption by the various clauses of section 15 are those who are entitled to succeed simultaneously to the vendor irrespective of the remoteness of the degree of their relationship. At the bar, at least, no serious attempt has been made to properly and fully develop this aspect.

11. Finally, if due to unprecise statutory phrasology and somewhat obscure statutory scheme, I have to assume some mistake or omission on the part of the draftsman, I would much rather be inclined to consider it more likely that clause (b) was inadvertently retained in Section 7 in 1960 than that it was purposefully retained after thoughtful deliberation by the draftsman so as to govern cases covered by section 15 (1) (b) Thirdly as amended. I have been induced to prefer this view for two reasons. First, because the claim of pre-emption is not in terms retained in the persons entitled to pre-empt in their capacity as heirs, as was the case before the amendment of 1960, and secondly because I also find the continued retention in the Act of sections 3 (4), 14, 23, 24, 29 and the concluding clause of S. 9 in spite of the repeal of the Punjab Alienation of Land Act, 1900 and of a Full Bench decision of the Punjab High Court in *Uttam Singh v. Kartar Singh*, 1953-55 Punj LR 500 (AIR 1954 Punj 55) (FB) having declared these provisions to be void and nugatory as far back as June, 1953. The Legislature, for reasons best known to it, has not cared for all these years to weed out these unconstitutional provisions, although more than once the Act has been amended.

12. With these words, I wholly agree with the order proposed by Kapur, J. I have not considered it necessary to repeat the facts of the case as they are fully stated in the referring order dated 5-4-1968 and also in the order of Kapur, J.

13. T. V. TATACHARI, J.: I agree.
Appeal allowed.
DRR

AIR 1969 DELHI 159 (V 56 C 28)

S. K. KAPUR

AND M. M. ISMAIL, JJ.

Delhi Cloth & General Mills Co. Ltd
Delhi, Petitioner v. Municipal Corporation of Delhi and another, Respondents.

Civil Writ Petns. Nos. 104 and 105 of 1967 and 563D and 564D of 1966 D/-9-10-1967.

(A) Municipalities — Delhi Municipal Corporation (Validation of Electricity Tax) Act (35 of 1966), S. 2 — Validation — Municipal Corporation passing resolution on 24-6-59 levying electricity tax under S. 150 (3) of Delhi Municipal Corporation Act (1957) — Resolution held illegal because of invalidity of steps taken under Sub-sections (1) and (2) which are conditions precedent—Subsequent validation of resolution under sub-sec. (3) by Validation Act — Validation also validated steps taken under anterior sub-sections (1) and (2) of section 2: AIR 1967 Madh Pra 56, Distinguished.

(Para 8)

(B) Municipalities — Delhi Municipal Corporation (Validation of Electricity Tax) Act (35 of 1966), S. 2—Validation—Municipal Corporation's resolution imposing electricity tax for a specified period — In absence of levy for further period, validation of rates was held to be of no effect — Municipalities — Delhi Municipal Corporation Act (1957), Ss. 150, 109, 113.

First resolution of the Municipal Corporation purported to have been passed as required by S. 150 (1) read with S. 109 (2). The levy by the 1st resolution was in express terms limited to the year 1959-60. The decision to levy becomes effective upon sanction by the Central Government under sub-s. (2) of S. 150. The effect of the sanction would be to render the levy effective only for the period to which the resolution extends. The actual rates and the right to charge tax on those rates spring into effectiveness only after the second resolution is passed which resolution is required to determine actual rates within the maximum fixed by the first resolution. The second resolution does not touch upon the levy itself. The second resolution extending the levy beyond the period mentioned in the first resolution would be ineffective to that extent. (Para 10)

Sub-section (1) of S. 2 of the Validation Act validated only the second resolution and consequently validated only the determination of rates under sub-section (3) of S. 150 of the said Act. No doubt, sub-section (1) of S. 2 of the Validation Act says that the rates specified in the second resolution shall be deemed to be, and to have been, the

actual rates of tax under the said Act with effect on and from the 1st day of July, 1959 and up to and inclusive of the 31st day of March, 1966 yet the effect of sub-section (1) would be only to validate the determination of rates and extend those rates to 31st day of March, 1966. But that determination of rates itself is not backed by a levy for the period beyond 1959-60 and, therefore, would be ineffective. It follows that validation of rates by the Validation Act beyond the year 1959-60 in the absence of levy was of no effect and consequence. (Para 10)

(C) Municipalities — Delhi Municipal Corporation Act (1957), Ss 113 (2) (d), 150 — Levy of tax on consumption, sale or supply of electricity — Corporation can legally levy tax on consumption of electricity irrespective of the source of that electricity — Tax on consumption of electricity generated by the consumer himself is not illegal. (Para 11)

(D) Municipalities — Delhi Municipal Corporation Act (1957), Ss 113 (2) (d) and 150 (1) — Power to levy tax — No guidance provided by Parliament for fixation of rates — Absence of guidance amounts to excessive delegation — Sections are void.

Power to fix rates of taxes is not an essential legislative function and can be delegated. The question to be seen, however is whether the legislature has laid down intelligible standards for the guidance of the administrative agencies. (Tests to see whether any such standards have been laid down indicated)

(Paras 14, 15)

It must be held that S 113 (2) (d) read with S 150 delegates to the Corporation an unguided and unfettered power to impose any amount of tax it likes on any person or property of its own exclusive choice. In the absence of any intelligible standards prescribed by the Legislature S 113 (2) (d) and S 150 (1) must be held to be suffering from the vice of excessive delegation and, therefore void. It has been left completely to the Corporation to fix any rates it likes. The fact that under sub-section (2) of S 150 the first resolution has to be sanctioned by the Central Government provides no check or control as that also has to be done by the Executive. The Corporation can, no doubt, launch upon business adventures. A ceiling is provided with respect to all the compulsory taxes under S 113 so that if the Corporation suffers losses it can make up the said losses only from the optional taxes. Again, the formulation of budget estimates in the light of the activities that the Corporation may decide to enter into is a matter exclusively to be determined by the Corporation itself. What would be the financial needs of the Cor-

poration must therefore, necessarily depend also on the result of its activities in running inter alia Electric Supply and Transport Undertakings and its decision to expand funds for other activities in which the Corporation may decide to engage. Even selection of the persons and the properties to be taxed, the system of assessment to be adopted and the exemptions to be granted have been left completely to the judgment of the Corporation. It cannot, therefore, be said that any intelligible standards have been prescribed for the exercise of this power of taxation committed to the Corporation. AIR 1965 SC 1107 and AIR 1959 SC 586 and AIR 1967 SC 1895 Ref. (Para 15)

(E) Municipalities — Delhi Municipal Corporation (Validation of Electricity Tax) Act (35 of 1966), S 2 — Resolution of Delhi Municipal Corporation under S 150 (3) of the Delhi Municipal Corporation Act, 1957 validated in so far as rates specified in the resolution in respect of tax on consumption or sale of electricity — Resolution not specifying rates — Resolution, however, approving resolution of Standing Committee which in turn referring to rates sanctioned by Government — Rates held were specified by reference, though not expressly recited in the resolution of the corporation to the resolution of the standing committee. (Para 9)

Cases Referred Chronological Para
(1967) AIR 1987 SC 1895 (V 54) =
Civil Appeals Nos. 526 527 and
529 of 1966 D/- 10-4-1967 Devi
Das Gopal Krishan v State of
Punjab 13, 14

(1967) AIR 1967 Madh Pra 56
(V 54) = 1966 MPLJ 842 Amalg-
amated Coalfields Ltd, Calcutta v
State of Madhya Pradesh 8

(1965) AIR 1965 SC 1107 (V 52) =
(1965) 2 SCR 477 Corporation of
Calcutta v Liberty Cinema 13 14

(1959) AIR 1959 SC 586 (V 46) =
(1959) Supp (2) SCR 71 Western
India Theatres Ltd v Municipal
Corporation of the City of Poona 13

N C. Chatterjee Senior Advocate with
M/s Dalip K Kapur A N Sinha and
D R Thadani and N A. Palkhivala
Senior Advocate for Petitioner (on 18-8-
67 only) H R Gokhale Senior Advocate
with D D Chawla for Respondent No 1
S S Chadha for Respondent No 2 and the
Attorney General of India, for Respon-
dents

JUDGMENT This judgment will dis-
pose of Civil Writ Petitions Nos. 104 of
1967 105 of 1967 563-D of 1966 and
564-D of 1966

2 On February 9 1959 the Delhi
Municipal Corporation passed a resolu-
tion purporting to be under sub-section (1)
of S 150 of the Delhi Municipal Corpora-

under Section 435 of the Code of Criminal Procedure. He accepted the contention of the learned Counsel appearing on behalf of the accused Lourenco Rocha and made a reference to this Court that the order passed by the learned Magistrate directing seizure of the paddy and its delivery to the Sarpanch is not a legal order and, therefore, it may be set aside. The order of the learned Magistrate directing seizure of the paddy was later confirmed by him by his order dated 10th November, 1967.

3. Shri Navelkar, learned Counsel for the applicant-accused Lourenco Rocha, contends that the order passed by the learned Magistrate dated 13th October, 1967 directing seizure of the paddy from the house of the applicant-accused and its deposit with the Sarpanch of Ambaulim has not the support of law. He supports the reference made by the learned Sessions Judge. Shri Bosco Vasconcelos, learned Counsel for respondent-complainant Euclidas Joao Rodrigues, cites Section 98 (1) of the Code of Criminal Procedure in support of the legality of the order passed by the learned Magistrate. This section, to the extent it is material for the present purpose, provides that if a Magistrate of the First Class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, he may by his warrant authorise any police officer above the rank of a constable to take possession of such property which the police officer reasonably suspects to be stolen. This section, I am afraid, is not attracted, for the simple reason that in the entire complaint or in the examination of the complainant there is no allegation that the house of the accused Lourenco Rocha was used for the deposit or sale of stolen property. The warrant issued by the learned Magistrate was addressed to the Police Station Quepem; it does not authorise any police officer above the rank of a constable to take possession of the property used for the deposit or sale of stolen property. The emphasis is on the words "is used for the deposit or sale of stolen property."

The section is not intended to apply to a case where the property which is subject matter of a complaint and which is stated to be stolen is found lying in the house of an accused person. In a Calcutta case reported in ILR (1958) 1 Cal 501=1957 Cri LJ 669 (670, 671) it was stated by the Calcutta High Court that the essential requirement of Section 98 is that there must be some allegation or information which the Magistrate believes that a particular place is used for the deposit or sale of stolen property. It was held in that case that on facts there

being no allegation that the place intended to be searched was used as a place for deposit of stolen property the warrant was illegally issued and the inquiry, presumably under Section 523, which followed was held without jurisdiction. The section does not apply in terms apart from the fact that there was no allegation either in the complaint of the complainant or in his examination. Section 516A of the Code of Criminal Procedure also does not apply for the simple reason that the paddy seized was not produced earlier before the learned Magistrate during the course of an inquiry into the complaint filed by the complainant. Under this section when any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial.

It is common ground that the paddy found from the house of the accused Lourenco Rocha was not produced before the learned Magistrate during the course of the said inquiry, and, therefore, Section 516A also cannot be invoked in support of the validity of the order passed by the learned Magistrate. It is the case of the complainant that the paddy was removed from his field and that it belongs to him. The case of accused Lourenco Rocha was that the paddy belongs to him and not to the complainant. The question of title etc. remains to be decided and, therefore, in this view of the matter it could not have been said with sufficient legal justification before the warrant was issued that in regard to the paddy the offence of theft appears to have been committed. It is only after the conclusion of the trial that the learned Magistrate can decide the question of ownership and also whether on the facts proved any criminal offence is committed. I agree with Shri Navelkar, learned Counsel for the applicant-accused Lourenco Rocha, that the order of the learned Magistrate directing seizure of the paddy from the house of the accused was not legal. This is also the recommendation of the learned Sessions Judge which I accept. In this view of the matter the orders dated 13-10-67 and 10-11-67 passed by the learned Magistrate are hereby set aside and the reference accepted. The Record and Proceeding should be sent back to the learned Magistrate with directions to decide the complaint filed according to the provisions of the law.

SSG/D.V.C.

Reference accepted.

AIR 1969 COA, DAMAN AND DIU 50
(V 56 C 13)

V S JETLEY, J C

New Zealand Insurance Company Ltd.
and another, Appellants v Krishna Naik and
another, Respondents

Civil Appeal No 3 of 1967, D/- 11-7-
1967

Motor Vehicles Act (1939), Sections 110B
and 110A — Compensation — Determina-
tion — Principles

A distinction is to be made between special
and general damages. The compensation
to be awarded to an injured person has to
be equivalent to the loss or deprivation sus-
tained taking into consideration the material
loss and also other relevant factors. The
criteria for determining the compensation
are not laid down specifically in the Motor
Vehicles Act but the Claims Tribunal can
make an award determining the amount of
compensation which appears to it to be
just, and specify the person or persons to
whom compensation shall be paid and in
making the award the Claims Tribunal shall
specify the amount which shall be paid by
the insurer. Case law discussed.

(Para 4)

Cases Referred	Chronological	Paras
(1966) AIR 1966 Mad 466 (V 53) =		
79 Mad LW 271, Champalal v.		
Venkataraman		4
(1963) AIR 1963 Punj 125 (V 50) =		
84 Pun LR 912, State of Punjab		
v Smt. Phool Kumari		4
(1962) AIR 1962 SC 1 (V 49) =		
(1962) 1 SCR 929, Gobald Motor		
Service Ltd. v Veluswami		4
(1952) 1952 CA No 89, Taylor v.		
Mayor		4
(1951) 1951 C A No 271,		
McCarthy v Coldair Ltd.		4
(1935) 1935-1 KB 354 = 104 LJB		
199 Flint v Lovell		4
B F D'Souza, for Appellants, N S		
Verlekar, for Respondent (1), Respondent		
(2) in person.		

JUDGMENT: This is an appeal filed by
the appellants against the award by the
Claims Tribunal under Section 110B of the
Motor Vehicles Act, 1939 whereby the
Tribunal determined Rs 3120 as the amount
of compensation payable by the appellants.

2. The facts leading to this appeal may
be broadly stated. It was on 5th February
1966 at about 10.30 p m that a boy Damo-
dar was knocked down by a truck owned
by appellant (2). The truck was driven by
respondent (2). Damodar was on a bicycle
when the accident occurred. He was rush-
ed to the hospital where after medical
treatment he was discharged on 9th Febru-
ary, 1966. The respondent (1) father of
Damodar, moved the Claims Tribunal for
compensation under Section 110A of the

Motor Vehicles Act. The learned Judge
presiding over the Tribunal examined Damo-
dar, the respondent (1) and other evidence
and then determined compensation as stated
above.

3. Shri D'Souza, learned counsel for the
appellants, attacks the award on various
grounds, mentioned in the memorandum.
He concedes that the respondent (2) was
negligent while driving the truck. Accord-
ing to him the injuries received by Damo-
dar did not result in permanent disablement
and were not of a serious nature. Shri
D'Souza objects to the award of Rs 2,000
as "moral damages" suffered as a result of
the accident. The question of compensa-
tion is to be considered in the context of
the injuries suffered by Damodar and also
other relevant factors. Shri D'Souza says
that distinction is to be made between spe-
cial and general damages. This is correct.
Assessment of damages is often a difficult
task. It is well settled that damages are of
two kinds—special and general. Examples
of special damages are hospital and medi-
cal expenses, financial loss of income be-
cause of having someone to replace the
injured to carry on his duties. Damages of
this kind seldom present any serious diffi-
culty. It is the general damages which of-
ten present difficulty. Examples of gene-
ral damages are pain and suffering, reduced
earning capacity, inconvenience and loss of
endowment of life.

4. Shri Verlekar, learned counsel for the
respondents, draws my attention to the
decision of the Punjab High Court reported
in State of Punjab v Smt. Phool Kumari,
AIR 1963 Punj 125. This was a case of
collision of two vehicles resulting in death
of person. The facts of each case are dif-
ferent but the principles stated in this deci-
sion is of assistance. One of the principles
is that nothing is to be paid by way of sola-
tium. It is also stated that intervention of
an appellate Court in assessment of dama-
ges in cases of accident where persons suffer
death or are injured is called for only when
the compensation determined has been
reached by application of some wrong prin-
ciple of law, or the amount is so inordi-
nately low or the inordinately high that it
must be a wholly erroneous estimate of the
compensation determined. This decision
follows the decision of the Supreme Court
reported in Gobald Motor Service Ltd. v.
Veluswami, AIR 1962 SC 1. The case
with which their Lordships of the Supreme
Court were dealing was one under the Fatal
Accidents Act (1855) Subba Rao, J., (as
he then was), stated that in calculating the
pecuniary loss to the dependants many
imponderables enter into the calculation.
This decision, with respect, is not helpful
to us. In this case we are not dealing with
a claim under the Fatal Accidents Act. Shri
Verlekar also relied on the decision
'Champalal v. Venkataraman', AIR 1966

Mad 466. This was a case of tort where, on account of the negligence of the taxi-driver, the claimant who prosecuted his claim under the Motor Vehicles Act became lame, in spite of medical treatment in the hospital for a period of ten months. The learned Judge considered the question whether the quantum of compensation awarded by the Tribunal was excessive or not; in this case the compensation awarded was Rs. 10864/47. While considering this question the learned Judge considered various heads of compensation, such as reasonable expenses including expenses for medical treatment, nursing, medical appliances and also for loss of earnings as a result of injury and, in addition, general damages in respect of pain and suffering which the claimant had to suffer upto the date of the proceedings before the Claims Tribunal and also which he was likely to suffer thereafter. The learned Judge did not interfere with the quantum of compensation determined and, in support of his conclusion, he relied on the decision in *Flint v. Lovell*, 1935-1 KB 354 at p. 360. In that decision the House of Lords observed:—

"In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

The learned Judge also referred to the observations of Denning, L. J. in *McCarthy v. Coldair Ltd.*, 1951 C. A. No. 271. The learned Lord said:—

"I think Mr. Everett put the test graphically and rightly when he said that this court would interfere if it said to itself 'Good gracious me as high as that.'"

In *Taylor v. Mayor, Aldermen and Burgesses of Southampton* Lord Denning observed:—

"When I heard the facts of this case, I said to myself 'Good gracious me as low as that' for these injuries." (1952 C. A. No. 89)

The criteria for determining the compensation are not laid down specifically in the Motor Vehicles Act but the Claims Tribunal can make an award determining the amount of compensation which appears to it to be just, and specify the person or persons to whom compensation shall be paid, and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer. I shall revert to the facts of the present case and divide the compensation into special and general damages. In para 6 of the decision of the Claims Tribunal it is stated that the compensation to be awarded to an injured person has to be equivalent to the loss or deprivation sustained taking into account not

only the material loss, but to some extent, the moral damage caused to him. What the learned Judge said is correct except for the fact that the expression 'moral damage' may have been conveniently avoided. Shri Verlekar argues—and not without force—that this expression has been used by the learned Judge in support of determining general damages. As, for special damages, the learned Judge observed that Damodar had to remain without salary for seven months and his salary being Rs. 70 per month he suffered a loss of Rs. 490. Shri D'Souza for the appellants does not dispute this assessment. He however disputes a claim of Rs. 50 per month awarded by the learned Judge as maintenance expenses for a period of seven months. It is in evidence that Damodar was in the employ of one Dalal and besides his salary of Rs. 70 he was also receiving food and clothing. I do not think the assessment of maintenance expenses is arbitrary. Damodar was undoubtedly deprived of maintenance expenses when he was out of employment for a period of seven months. The learned Judge also took Rs. 60 as medical expenses and Rs. 100 as expenses for prosecuting the claim before the Tribunal. I am afraid the latter amount cannot be allowed. As far as the general damages are concerned, it is in medical evidence that Damodar had fracture of both the bones of the left leg. This was confirmed by X-ray taken in the hospital. The medical evidence is also to the effect that there is a slight change in the shape of the downward portion of the leg at the level of junction of the 2/3 with the 1/3, that is, junction of upper portion with the lower portion of the leg. This injury, according to Dr. Lourenco, does not influence the functioning of the leg. It is also in his evidence that when he last examined him Damodar was complaining of pain in the leg and he was advised to use elastic bandage. I may next turn to the evidence of Damodar. He was examined after about seven months from the date of the accident and he deposed that his leg gets swollen if he walks as he used to do. He also stated that he was afraid now of walking freely and doing heavy work because of the fracture in the leg. The learned Judge observed that the fracture of Damodar left "a slight deformity of the downward portion of the leg" and that he "will have to live his whole life with such a deformity" resulting in some sort of inferiority complex. The general damages on account of the injury caused to Damodar were assessed by the learned Judge at Rs. 2,000. Shri D'Souza contends that this amount is on the high side. Shri Verlekar argues that it is reasonable. I do not think the learned Judge acted upon wrong principle of law. I also do not think that the compensation awarded is on the higher side. The learned Judge had the advantage of seeing the injured and his estimate of compensation

in view of the facts found by him does not appear to be arbitrary. I would not say "Good gracious me, as high as that!" or "Good gracious me as low as that!" for the injuries caused to Damodar.

5 Barring a sum of Rs 100 awarded by way of compensation for prosecuting the claims before the Claims Tribunal, the award of the learned Judge determining the amount of compensation at Rs 3020 is maintained. This compensation, according to the learned Judge was just and I see no reason to interfere with the award. In the circumstances the appeal filed by the appellants is rejected. Section 110B requires the Claims Tribunal to specify the amount which shall be paid by the insurer. This specification has not been done by the learned Judge. It may be that because the truck was insured under a comprehensive policy therefore the learned Judge did not specify this amount. Shri D'Souza states that the appellant (1) has deposited a sum of Rs 3120 in the office of the Claims Tribunal. It is directed that the amount of Rs 3020 should be paid by the appellant (1) and this is the amount which is specified. The appeal is dismissed with costs assessed at Rs 100.

MVJ/DVC

Order accordingly

AIR 1969 GOA, DAMAN AND DIU 52
(V 56 C 14)

V S JETLEY, J C

Keshav Gangaram Prabhu Mhambrey and another Applicants v Vasant Atmaram Prabhu Mhambrey and another, Respondents

Criminal Revn. Appln. No 14 of 1968,
D/ 5-3-1968, against order of S J D/
6-12-1967

Criminal P. C. (1898), Ss 435, 439 —
Revision relief is not a matter of mere
formality — High Court does not sit in revision
as Court of appeal to appreciate evidence —
Concurrent finding that applicant defamed
the complainant — Revision petition is liable to be rejected in limine —
(Penal Code (1860), S 499) (Para 3)
Cases Referred Chronological Paras
(1966) AIR 1966 Goa 32 (V 53) =

1966 Cr LJ 1412, Caetano Colaco
v Joao Rodrigues

B

S V Prabhu, for Applicants

ORDER: This is a revision application directed against the order passed by the learned Sessions Judge, dated 6th December 1967.

2. The prosecution case was that the applicants had defamed the complainant Vasant Atmaram Prabhu Mhambrey by stating to various persons that the complainant had a son from a widow maid ser-

vant, not his wife, and that he was a drunkard. The learned Magistrate, after considering the evidence of the prosecution witnesses and the defence witnesses and also the statement of the accused, came to the conclusion that this statement was per se defamatory, made with a view to harm and knowing or having reason to believe that such statement will harm the reputation of the complainant. In this view of the matter, he held the offence under Section 499 of the Indian Penal Code proved and accordingly convicted the accused under this section and sentenced each one of them to pay a fine of Rs 250/- or in default to undergo 30 days' imprisonment. The complainant was awarded a sum of Rs 200/- as compensation out of the fine realised. The applicants felt aggrieved by this judgment of the learned Magistrate and hence filed an appeal in the Court of Session. The learned Sessions Judge concurred with the conclusion of the learned Magistrate and dismissed the appeal. The applicants then approached this Court in revision.

3 Shri S V Prabhu, learned counsel for the applicants contends that there has been a material irregularity in the conduct of the trial and consequently this Court should interfere in revision, in particular he has relied on grounds (5) to (7) in the memo of revision. These grounds are —

Ground 5 "The lower appellate Court ought to have seen that the statements of the accused are not properly recorded under Section 342 of the Criminal Procedure Code and hence the proceeding is illegal and the conviction ought to have been set aside."

Ground 6 "The procedure followed by the trying Magistrate is not warranted by law and as such the lower court ought to have set aside the order of conviction. There are material irregularities in the conduct of the proceeding and hence there is failure of justice."

Ground 7 "No opportunity has been given to the accused to cross-examine twice all the witnesses of the prosecution, as laid down in the Criminal Procedure Code."

The other grounds relate to appreciation of evidence. In the memo of appeal filed the two grounds in relation to Section 342 of the Criminal Procedure Code and also in relation to the opportunity to cross-examine twice were not taken. Be that as it may there are concurrent findings of fact recorded by the Courts below that the applicants did defame the complainant. In Caetano Colaco v Joao Rodrigues, AIR 1966 Goa 32, the scope of revision petition under Section 435 of the Criminal Procedure Code has been explained at some length. The circumstances where interference is called for by this Court are set out. I am not sitting here as a Court of appeal to appreciate the evidence. It was for the learned Sessions Judge to appreciate the evidence in appeal, and after hearing the learned

counsel for the appellants, he came to the same conclusion as the learned Magistrate. Shri Prabhu has not been able to make out any case for interference in the exercise of revisional jurisdiction of this Court. It may be added that revision relief is not a matter of a mere formality. The revision petition does not disclose any arguable question. In this view of the matter the petition is rejected in limine. It was presumably because the complainant and the petitioners are relatives therefore a deterrent sentence was not imposed.

HGP/D.V.C.

Petition rejected.

AIR 1969 GOA, DAMAN AND DIU 53
(V 56 C 15)

V. S. JETLEY, J. C.

Conceicao Manuel Clemente and another, Petitioners v. Lily D'Souza and another, Respondents.

Civil Revn. Appln. No. 1 of 1968, D/- 4-1-1968.

Civil P. C. (1908), S. 115 and O. 8, Rr. 10, 9, 1 — "Material irregularity" in S. 115—It relates to material defect of procedure — Powers of Revision Court.

The expression "material irregularity" in S. 115 does not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact, after the formalities which the law prescribes have been complied with. Therefore where the trial court gives two dates for filing of the written statement by the defendant and he does not avail of them and files the statement after the date which the court does not accept and adjourns the case for hearing, it cannot be held that the case is covered by clause (e) of S. 115. Case law discussed. (Paras 4, 5)

Further, the judgment pronounced finally would undoubtedly satisfy the requirements of the definition of decree within S. 2 (2) and would be appealable. It would be open to the defendant to satisfy the Appellate Court in the event of decision against him that further time may be given to him to file the written statement. The powers of the Appellate Court, in a way, are wider than the powers of the Revision Court under Section 115. (Para 4)

Cases Referred: Chronological Paras

(1966) AIR 1966 Goa 1 (V 53)

(FB), Ramanata v. Judge, Comarca Court 3, 4

(1964) AIR 1964 SC 497 (V 51) =

1963 All LJ 1068, S. S. Khanna v. F. J. Dillon 3

(1961) AIR 1961 Andh Pra 102

(V 48), Chendraith v. Seetaram-maiah 8

(1958) AIR 1958 All 330 (V 45),

Paras Ram v. Mt. Noor Jahan Begum 8

(1936) AIR 1936 Nag 157 (V 23) =

ILR (1936) Nag 73, Devidas v. Nilkanthrao 4

(1935) AIR 1935 Cal 102 (V 22) =

60 Cal LJ 91, Indu Bala v. Lakshmi Narayan 3

(1934) AIR 1934 Cal 102 (V 21) =

37 Cal WN 1093, Loke Nath v. Abani Nath 3

S. K. Kakodkar, for Petitioners.

ORDER: This is an application under Section 115 of the Civil Procedure Code praying for the reasons mentioned therein that the orders of the learned Civil Judge, Junior Division, Ponda, dated 29th November 1967 and 20th December 1967 in suit No. 31 of 1967 be set aside.

2. The facts broadly stated are that the opponents instituted a suit against the petitioners in the Court of the Civil Judge, Junior Division, Ponda. The Court issued a summons to the petitioners to answer the averments made in the suit and also for final disposal. This summons was in accordance with Order V, Rule 5 of the Civil Procedure Code. The summons was returnable on 3rd November 1967. On this date the petitioners did not file written statement. They were asked to file it on 13th October 1967. The petitioners asked for some further time for filing written statement and the learned Judge adjourned the suit for hearing on 29th November 1967. The petitioners failed to file the written statement on that day. The petitioners asked for further time for filing written statement but this request was not granted. The petitioners, according to Mr. Kakodkar, presented written statement on 18th December 1967. The learned Judge did not accept that written statement and adjourned the suit for judgment on 3rd January 1968. The petitioners felt aggrieved by this decision and filed the present revision petition under Section 115 of the Civil Procedure Code.

3. The scope of Section 115 of the Civil Procedure Code has been explained at length by this Court in Ramanata v. Judge, Comarca Court, AIR 1966 Goa 1. According to Mr. Kakodkar, the learned Judge acted with material irregularity when he did not accept the written statement presented on 18th December. What is "material irregularity" within the meaning of Section 115 has been explained in the above decision of this Court. Mr. Kakodkar has cited the following authorities in support of his argument that this Court should revise the interlocutory order passed by the learned Judge refusing to accept the written statement presented on 18th December 1967. (1) Loke Nath v. Abani Nath, AIR 1934 Cal 102; (2) Indu Bala v. Lakshmi Narayan, AIR 1935 Cal 102; (3) Paras Ram

v Mt. Noor Jahan Begum, AIR 1958 All 330 (4) Chendrabai v Seetarammaiah, AIR 1961 Andh Pra 102 (103), and (5) S S Khanna v F J Dillon, AIR 1964 SC 497. It is well settled that a case is an authority for what it decides. The facts of the cases cited in the above decisions are distinguishable from the facts of the present case. AIR 1935 Cal 102 refers to AIR 1934 Cal 102. A principle is enunciated in these decisions to the effect that a High Court in the exercise of its jurisdiction under S 115 Civil Procedure Code will not interfere with interlocutory orders unless irreparable injury and inevitable miscarriage of justice result therefrom. Another principle is also enunciated that ordinarily the discretion of a judicial officer will not be reviewed by the High Court in revision. The learned Judge in the instant case showed indulgence to the petitioners and gave them time to file the written statement twice, but they are to be blamed for not presenting the written statement within the time required by the Court. It cannot be said that the learned Judge exercised his discretion in an arbitrary manner. The Andhra Pradesh case dealt with an order forfeiting right of the defendant to file written statement. This order was held as illegal and reliance for this purpose was placed on Section 115 of the Civil Procedure Code. The facts of this case are entirely different from the facts of the present case. AIR 1958 All 330 deals with a situation where Order 17 did not provide for an order striking out the defence of a party and therefore the High Court interfered with the interlocutory order passed by the Lower Court. This case also does not assist the petitioners. In AIR 1964 SC 497, the implications of the expression "case decided" have been explained by their Lordships at some length. It is stated that the expression "case" used in Section 115 is a word of comprehensive import, it includes civil proceedings other than suits, and is not restricted by anything contained in the sections to the entirety of the proceeding in a civil Court. According to their Lordships, to interpret this expression as an entire proceeding only and not a part of a proceeding, would be to impose a restriction upon the exercise of powers of superintendence to which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject. It was made clear in this decision that this expression includes a part of a case and therefore revisional jurisdiction can be exercised from interlocutory orders in certain cases. In this case the learned Subordinate Judge held by an interlocutory order that the suit filed by the plaintiff for recovery of the amounts advanced to the defendant was not maintainable. This was, in the view of their Lordships, "manifestly a decision having a direct bearing on the rights of the plaintiff to a decree for recovery of the loan alleged to have been advanced by him, which he says

the defendant agreed to repay, and if the expression "case" includes a part of the case, the order of the Subordinate Judge must be regarded as a "case which has been decided". This case also does not assist the petitioners. The facts are entirely different from the facts in the instant case.

4. Section 115 provides that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears — (a) to have exercised a jurisdiction not vested in it by law or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. Mr Kakodkar, learned counsel for the petitioners, does not rely on clauses (a) and (b) of this section. He relies on Cl (c) and according to him when the learned Judge did not accept the written statement presented on 18th December 1967 he acted in the exercise of his jurisdiction with material irregularity. It is an admitted fact that the learned Judge has not yet passed judgment in this case. It is therefore doubtful whether an order adjourning the case for judgment can be regarded as a "case" within the meaning of this section. Order XLIII deals with appealable orders. One of the orders from which an appeal lies is an order under Rule 10 of Order VIII pronouncing judgment against a party. Order VIII Rule 10 provides that "where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

According to Mr Kakodkar, this rule is to be read along with Rule 9 and not Rule 1 of Order VIII. There are authorities in support of his contention, although a view is possible that Rule 10 may also be read along with Rule 1. If a judgment is pronounced against the petitioners, then, on the assumption that Rule 10 is to be read with Rule 1, the order passed by the learned Judge may be appealable. In any case the final order pronouncing judgment will have the effect of decree and therefore is appealable. What is "decree" is defined in Section 2 (2) of the Code. The judgment pronounced would undoubtedly satisfy the requirements of this definition and therefore is appealable. It would be open to the petitioners to satisfy the Appellate Court in the event of decision against them that further time may be given to them to file the written statement. The powers of the Appellate Court, in a way, are wider than the powers of the Revision Court under Section 115.

I am satisfied in this case that the discretion was not exercised arbitrarily by the

learned Judge and I am unable to see how the learned Judge acted in the exercise of his jurisdiction with material irregularity. There is no defect of procedure in this case. The expression "material irregularity" does not cover either errors of fact or of law. It is not the case of Mr. Kakodkar that the learned Judge acted illegally. The expression "material irregularity" does not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact, after the formalities which the law prescribes have been complied with: *Devidas v. Nilkanthrao*, AIR 1936 Nag 157 (159). This case is cited by us at page 15 in AIR 1966 Goa 1. It would have been a case of material irregularity if the petitioners had not been given an opportunity of appearing and of being heard. They were given a chance of presenting their case. This section can only be invoked when there is failure of justice due to the procedure indicated in this section. The learned Judge applied his mind and then gave decision. He observed the principles of a fair and proper trial. There was no error committed by him but, assuming such error is there, even then it is independent of the decision itself and therefore clause (c) is not attracted.

5. It would be open to the learned Subordinate Judge to review his own order in case after hearing the petitioner's counsel he is inclined to give further opportunity to the petitioners to present their written statement. In case he does not do so it would be open to the Appellate Court to consider the merits of this case and pass such order as is necessary in the ends of justice. As it is, the petition for revision is not covered by clause (c) of Section 115 and, accordingly, it is rejected.

MVJ/D.V.C. Revision rejected.

AIR 1969 GOA, DAMAN AND DIU 55
(V 56 C 16)

V. S. JETLEY, J. C.

Mani Muttayya Pillay, Applicant v. State, Respondent.

Criminal Revn. Appln. No. 22 of 1967,
D/- 27-3-1968.

Telegraph Wires (Unlawful Possession) Act (1950), S. 7 — Conviction for theft and unlawful possession of telephone copper wire — Notification delegating power to file complaint as required under S. 7 (1) published in fact in Gazette of India as cited in the footnote to S. 7 in AIR Manual, Vol. 15 P. 592 but not brought on record — Complainant not stating that the complaint was made by or under authority of Central Government or that he was specially empowered to file that complaint — Held that there was no compliance with S. 7 and the Magis-

trate had no power to take cognizance of the offence under Telegraph Wires (Unlawful Possession) Act — Conviction and sentence for the offence of theft under S. 379, Penal Code was, however, proper — (Penal Code (1860), S. 379). AIR 1960 Pat 243 and AIR 1967 Delhi 41, Disting.

(Para 3)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 Delhi 41 (V 54) =		
1967 Cri LJ 868, Electrical Manufacturing Co. Ltd. v. D. D. Bhargava		8
(1966) AIR 1966 Goa 32 (V 53) =		
1966 Cri LJ 1412 (FB), Caetano Colaco v. Joao Rodrigues		8
(1960) AIR 1960 Pat 243 (V 47) =		
1960 Cri LJ 845, Rawlagan Singh v. State of Bihar		3
Applicant in person.		

ORDER: This revision application is directed against the judgment passed by the learned Sessions Judge dated 6th September, 1967, whereby he confirmed the judgment dated 7th July, 1967, passed by the learned Magistrate, Bicholim, convicting the applicant under Section 379, I. P. C. and sentencing him to undergo rigorous imprisonment for one year and to pay a fine of Rs. 500/- or, in default, to undergo six months' rigorous imprisonment. The applicant was also convicted of the offences under Sections 5 and 6 of the Telegraph Wires (Unlawful Possession) Act, 1950, and sentenced to undergo imprisonment for two months and to pay a fine of Rs. 100/- or, in default, to undergo rigorous imprisonment for 15 days. The sentences were directed to run concurrently. The applicant was found not guilty of the offence under Section 25 of the Indian Telegraph Act, 1885, and accordingly he was acquitted.

2. The prosecution case was that the applicant and two others committed theft of telephone copper wire from six poles at Sarvona between the night of 2nd of April, 1967, and 3rd of April, 1967, valued at Rs. 450/-. A charge was framed against the applicant and two other accused under Section 379 read with Section 34, I. P. C. and also under Section 25 of the Indian Telegraph Act, 1885, and under Sections 5 and 6 of the Telegraph Wires (Unlawful Possession) Act, 1950. The applicant pleaded guilty to the charge. After examining as many as 15 witnesses in support of the prosecution case and also after examining the applicant, the applicant was sentenced as mentioned above. The applicant felt aggrieved against the conviction and the sentence and moved the learned Sessions Judge in appeal.

In the memo of appeal it was urged by the applicant that he pleaded guilty to the charge but as far as the sentence is concerned it is "severe". The learned Sessions Judge considered the question of sentence but in view of the fact that the crime of

copper wire theft is rampant in this territory he declined to reduce the sentence. In this view of the matter he rejected the appeal with the observation that "stealing Telegraph wire" is a serious offence. The applicant then moved this Court in revs on

3 I have carefully considered the judgments of the learned Magistrate and the learned Sessions Judge and the evidence recorded by the learned Magistrate and I find that the applicant had been properly convicted under Section 379 of the I P C. As regards the conviction under Sections 5 and 6 of the Telegraph Wires (Unlawful Possession) Act, 1950 Section 7 (1) thereof provides that no Court shall take cognizance of any offence punishable under this Act, save on complaint made by or under the authority of the Central Government or by an officer specially empowered in this behalf by that Government. In the judgment of the learned Magistrate there is a reference to this provision and it is stated that the power to file a complaint was delegated by Notification "published in the Gazette of India and that it was published is a fact—see footnote to the Section 7 in the AIR Manual Vol. XV p 592". It appears through oversight the learned Magistrate relied on this notification cited in the above Manual. The said notification is not on the record. The complainant did not state in this case that the complaint was made by or under the authority of the Central Government or he was specially empowered to file that complaint by that Government.

The learned Assistant Public Prosecutor who appeared in the Sessions Court explained at the stage of admission that there was no notification authorising the complainant to file the complaint. The learned Magistrate relied on *Rawlani Singh v State of Bihar* AIR 1960 Pat 243 and *Electrical Manufacturing Co Ltd v D D Bhargava* AIR 1967 Delhi 41 in support of the view taken on sanction. These decisions are not applicable to the facts of the present case. It seems through error he relied on certain observations of the Delhi High Court in connection with a sanction matter arising out of the application of the Imports and Exports (Control) Act, 1947. It appears there has been no compliance with the provisions of Section 7 and consequently the learned Magistrate had no power to take cognizance of the offence and hence the conviction of the accused under Sections 5 and 6 of the Telegraph Wires (Unlawful Possession) Act, 1950 was without jurisdiction.

In this view of the matter the said conviction and the sentence are set aside and the applicant acquitted of the offences under these sections. The question regarding compliance with the provisions of Section 7 seems to have escaped the attention of the learned Sessions Judge. The learned Sessions Judge gave convincing reasons in

support of the sentence of one year and the fine imposed on the applicant for the offence of theft. This sentence is not at all severe. The scope of the revision petition has been explained at length in *Cactano Colaco v Joao Rodrigues*, AIR 1966 Goa 32 (FB).

4. This is not at all a fit case for interference in the exercise of revisional jurisdiction, and accordingly the revision application is rejected in limine.

HGP/DVC

Revision application rejected.

AIR 1969 COA, DAMAN AND DIU 50
(V 50 C 17)

R S BINDRA, Addl J C

Phroz Jehangiri Dastur Petitioner v
State, Respondent.

Reference No 153 of 1966 D/ 18-9-1968

Goa, Daman and Diu (Laws) Regulation (12 of 1962) Section 4 (2) (d) — Scope — Clause applies only to such investigations that were pending when the Regulation came into force — Investigations commencing after Regulation came into force have to be under Criminal P C (1898) even if offence has been committed prior to the coming into force of Regulation — Lt. Governor's order D/ 6-11-63 directing investigations in relation to offences committed prior to Criminal P C being made applicable, according to law in force in the territory, held was ultra vires AIR 1955 Raj 135 (FB) and AIR 1955 Raj 203, Rel. on. (Paras 6-8)

Cases Referred Chronological Paras

(1955) AIR 1955 Raj 135 (V 42) =

ILR (1955) 5 Raj 693 (FB) Baha
dur Singh v Rajpramukh of Raja
sthan 8

(1955) AIR 1955 Raj 203 (V 42)

Purshotam Singh v Naran Singh 7

G A Merchant, for Petitioner S Tamba,
Gov. Pleader for the State

ORDER. The facts bearing on this revision petition can be gathered from the complaint filed by Phroz Jehangiri Dastur against the accused Roshan Jal Nanavaty Homi Dhunibhoy Engineer and Mohamed ali Alibhai Damania in the Court of the Judicial Magistrate at Daman under Sections 120B 403 443 341 454 and 114 of the Indian Penal Code. The accused No 2, Homi Dhunibhoy Engineer it is said, is a member of the bar and happens to be the attorney of accused no 1 Roshan Jal Nanavaty. Accused No 1 owns at Daman a property known as Roshan Ahad and she used to run hotel business therein in the name and style of Brighton Hotel. On 30th of April 1953 runs the complaint, the accused No 1 executed a lease agreement in favour of the complainant respecting the

aforementioned Brighton Hotel. The complainant was put into possession of the demised property on 10th of June 1953. On 4-9-1953 accused Nos. 1 and 2 approached Mr. Mehta, a solicitor of the complainant, requesting him to prevail upon the complainant to surrender possession of the Brighton Hotel to them. The complainant when summoned refused to oblige the accused. The said two accused put more pressure on the complainant through their own solicitor Mr. Eruch Dastoor but the complainant refused to yield. On or about 7th of September 1953 all the three accused went to the premises of the hotel and demanded of D'Souza, the complainant's manager in the hotel, to vacate the premises and on his refusal to comply with the demand made he was forcibly pushed out of the hotel and the possession thereof taken over by them (the three accused).

On 25-9-1953 the complainant gave notice to accused nos. 1 and 2 (in relation to occurrence dated 7-9-1953) through his solicitor but it remained unacknowledged. It was on 5th of November 1962 that Phiroz Jehangirji Dastur filed a complaint in the Court of the Presidency Magistrate at Bombay against the three accused. That complaint was dismissed on 10-5-1963. The complainant took the matter in revision to the High Court at Bombay and Mr. Justice Naik accepted the revision by his order dated 11-10-1963 and remanded the case to the trial court directing it to proceed therewith according to the provisions of law. Thereafter the Magistrate discharged the accused after recording some evidence of the complainant on the ground that without previous sanction of the State Government in terms of Section 188 of the Criminal Procedure Code the charge levelled against the accused could not be enquired into. This order necessitated another revision on behalf of the complainant. However, this time he did not meet better fate because Mr. Justice Naik dismissed the revision petition by his order dated 11th of December, 1964.

Mr. Justice Naik, it is said, expressed the opinion in his order dismissing the revision petition that it would be open to Dastur to lodge a complaint at Daman since the Indian Penal Code and the Criminal Procedure Code had been extended to the territory of Goa, Daman and Diu. It is in these circumstances that the complaint was lodged on 30th of March, 1966 in the Court of Shri D. H. Patel, the Judicial Magistrate, First Class, Daman. That Magistrate made over the complaint to Shri Argemiro Fernandes, another Magistrate at Daman, for disposal according to the Portuguese Law. Shri Fernandes consequently sent the complaint to the "Delegado" under the provisions of the Portuguese Decree Law No. 35007 dated 13-10-1945 by his order dated 10-5-1966.

2. Aggrieved by Shri Fernandes' order dated 10-5-1966 the complainant lodged a revision petition in the Court of Sessions Judge at Panaji. It was urged before the Sessions Judge that since the Indian Penal Code and the Criminal Procedure Code had been extended to the territory of Goa, Daman and Diu with effect from 1st of November 1963 the complaint should have been dealt with in the manner prescribed by these Codes and as such the order of Shri Fernandes sending the complaint to the "Delegado" for investigation was bad in law. The Sessions Judge was clearly of the opinion that since the offences were alleged to have been committed before the Indian Penal Code had been extended to the territory of Goa, Daman and Diu, the Indian Penal Code did not govern the matter. However, respecting the contention that the Criminal Procedure Code should govern the proceedings of the complaint the learned Sessions Judge could not express any final opinion. It appears that on the basis of order No. GAD/74/63/25007/dated 6-11-1963 issued by the Lt. Governor the Criminal Procedure Code was not being applied to criminal cases in relation to offences committed prior to 1-11-1963. The Sessions Judge doubted the validity of that order. However, since it was brought to his notice that a writ petition under Article 227 of the Constitution challenging that order was pending in this Court he suggested to the parties to approach this Court with the prayer that the revision application should be taken up for decision along with that writ petition. Obviously it was pursuant to that suggestion of the Sessions Judge that Phiroz Jehangirji Dastur filed a separate revision in this Court. The prayers made in the revision petition are, (1) that the Revision Petition No. 34 of 1966 and the Writ Petition No. 91 of 1966 be heard together, (2) that the Government Order dated 6-11-1963 as also the Magistrate's Order 10-5-1966 be quashed, and (3) that a direction be issued to the Magistrate at Daman to proceed with the complaint in accordance with the provisions of the Criminal Procedure Code. It may be stated that a recommendation made by the Sessions Judge in his reference to this Court was that the complainant be directed to amend his original complaint so as to mention the charges in reference to the provisions of the Portuguese Penal Code.

3. The prayer that the Magistrate be directed to proceed with the complaint in accordance with the provisions of the Criminal Procedure Code was hotly contested by Shri S. Tamba, representing the respondent, the Union Territory of Goa, Daman and Diu. However, Shri Tamba could not support the validity of Lt. Governor's order dated 6-11-1963. It may be mentioned that the Writ Petition No. 91 of 1966 wherein the validity of Lt. Governor's order dated 6-11-1963 was challenged was disposed of

without deciding that point before the revision petition came up for hearing.

4 Proceedings done in the Magistrate's Court at Daman and the arguments addressed before the learned Sessions Judge at Panaji bring out clearly that the Magistrate's order dated 10-5-1968 sending the complaint to the "Delegado" in terms of Decree Law No 35007 was supported on behalf of the State on the basis of Lt. Governor's order dated 6th of November, 1963. Since the legal validity of that order has been assailed by Shri Merchant on behalf of the petitioner, it is appropriate that the Order should be reproduced here in extenso. It runs as under—

"In exercise of the powers conferred by the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962, and notwithstanding anything to the contrary contained in any law for the time being in force in this Territory the Lieutenant Governor makes the following order—

All criminal proceedings in relation to offences committed prior to the date of coming into force of the Criminal Procedure Code shall be carried on under the law in force in the Territory before that date."

This order was passed by the Lt. Governor in exercise of the powers conferred by the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962, hereinafter called the Removal of Difficulties Order. The latter order had been made by the Central Gov-

ernment in exercise of the powers conferred by Section 8 of the Goa, Daman and Diu (Administration) Ordinance No 2 of 1962, hereinafter called the Ordinance. Section 8 of the Ordinance provides that if any difficulties arise in giving effect to the provisions of the Ordinance or in connection with the administration of Goa, Daman and Diu, the Central Government may, by order, make such further provisions as appear to it to be necessary or expedient for removing the difficulties. Shri Merchant, it may be stated at the outset, did not challenge the validity of either the Ordinance or the Removal of Difficulties Order. He only assailed the vices of Lt. Governor's order dated 6th of November, 1963. The Lt. Governor could have at the best issued order only under Para 2 of the Removal of Difficulties Order. That para enacts that for the period during which any law in force immediately before 20th day of December 1961 in Goa, Daman and Diu or any part thereof is not adapted under sub-section (2) of Section 4 of the Ordinance, the powers conferred and duties imposed by or under any provision of such law on any functionary specified in Column I of the Table given below para No 2 shall, unless such provision is inconsistent with, or repugnant to, the provisions of the Constitution, be exercisable and performed subject to such directions as the Central Government may give, by the functionary specified in Column II thereof. The table given below para No 2 is as follows—

I

President of Portugal,
Overseas Minister
(Ministro do Ultramar),
Governor General of the
State of India
Secretary General

Police Commandant
(Comandante-geral da Policia)

II

Administrator

Chief Civil
Administrator, Goa
Senior Superintendent
of Police, Goa.

The order of the Lt. Governor dated 6th of November, 1963 is clearly in the nature of legislation. It was, therefore, incumbent on Shri Tamba to convince this Court that such power of legislation vested under any law which was in force immediately before the 20th of December 1961 in Goa, Daman and Diu in the President of Portugal, or Overseas Minister or Governor General of the State of India, the three functionaries mentioned in Column I of the table and whose functions under the Removal of Difficulties Order were assigned to the Administrator. Since Shri Tamba was unable to cite any such law, a conclusion must follow that the Lt. Governor had no legal sanction for issuing the order dated 6-11-1963. As such that Order has no binding value on Courts or on any other functionary or on the citizens. Shri Tamba, it would thus

appear, was perfectly justified in conceding that the Magistrate's order dated 10-5-1968 cannot be supported on the basis of the Lt. Governor's order dated 6-11-1963.

5 Shri Tamba, however, supported the impugned order of the Magistrate on the basis of sub-section (2) of Section 4 of the Goa, Daman and Diu (Laws) Regulation No. 12 of 1962, hereinafter referred to as the Regulation. Sub-section (1) of Section 4 of the Regulation prescribes that any law in force in Goa, Daman and Diu or any area thereof corresponding to any Act referred to in Section 3 or any part thereof shall stand repealed as from the coming into force of such Act or part in Goa, Daman and Diu or such area, as the case may be. Sub-section (2) of Section 4 of the Regulation is in the following terms—

"(2) Nothing in sub-section (1) shall affect (a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Regulation had not been made:

Provided that anything done or any action taken (including any appointment or delegation made, notification, instruction or direction issued, form, bye-law or scheme framed, certificate obtained, patent permit or licence granted, or registration effected) under any such law, shall be deemed to have been done or taken under the corresponding provision of the Act extended to Goa, Daman and Diu and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act."

Shri Tamba urged on the basis of Cl. (d) of sub-section (2) and the words in-between that clause and the proviso that follows to support his argument that all investigations respecting the offences committed before the Regulation came into force have to be conducted under the provisions of the Portuguese Criminal Procedure Code even though the complaints about the offences are lodged after that event. Shri Merchant urged, on the contrary, that it is well settled principle that no one has any vested right in any procedural law, that any change in the procedural law has retrospective effect in the sense of being applicable even to judicial proceedings initiated before the change, and that as such in the present case the procedure prescribed by the Criminal Procedure Code of India rather by Portuguese Criminal Procedure Code shall govern the proceedings relating to the complaint. Shri Tamba's rejoinder to this submission of Shri Merchant was that it is within the Legislative competence of Parliament to keep alive wholly or in part the repealed Act for specified purposes by making a suitable provision in the repealing Act and that the Parliament did keep alive the provisions of the Portuguese Criminal Procedure Code respecting the investigations in reference to the offences committed before the enforcement of the Regulation by Clause (d) of sub-section (2) of Section 4 thereof.

6. I must concede that the matter at issue is not altogether free from difficulty. However, the weight of argument is in

favour of the contention canvassed by Shri Merchant. In the first instance the phraseology of Clause (d) indicates that the investigations which are declared immune from the operation of sub-section (1) of Section 4 are those which were pending on the date the Regulation came into operation, and the investigations which had to be undertaken in reference to pre-Regulation offences reported after the enforcement of the Regulation are not saved by Clause (d) of Section 4 (2). Shri Tamba could not controvert the conclusion that the expressions 'investigation' and 'legal proceeding' used in Clause (d) are such which were pending when the Regulation came into force. However, he urged that the words "and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Regulation had not been made", occurring beneath Clause (d) bring out clearly the legislative intendment and that that intendment is that investigations relating to pre-Regulation offences are not subject to the provisions of Section 4 (1) even if such offences were reported to the investigating authorities after the Regulation came into operation.

This argument was chiefly founded on the words "may be instituted, continued or enforced" forming part of the portion of Section 4 (2) just reproduced. The precise argument of Shri Tamba was that the verb "instituted" governs the noun "investigation" that precedes it and that since the expression "instituted" means and connotes "initiated" and not continued" therefore Parliament clearly intended that investigations undertaken even after the Regulation in reference to the offences committed prior thereto shall be governed by the provisions of the Portuguese Criminal Procedure Code.

I have not been impressed about the soundness of this argument. If the expression "investigation" used in clause (d) means investigation pending on the date the Regulation came into force, a conclusion not contested by Shri Tamba, then the expression "investigation" used in the lines between clause (d) and the subsequent proviso can mean only that investigation which was pending on that date. It is for the reason that the expression "investigation" used in those lines is preceded by the adjective "such". That adjective has obviously reference to the 'investigation' mentioned in Clause (d). Therefore, the argument of Shri Tamba though apparently plausible and quite ingenious nevertheless is without real merit. The use of the verb "instituted" need not deter the Court from adopting the view urged by Shri Merchant because it is conceivable that concerning an offence reported to the authorities just before the enforcement of the Regulation the investigations had not been initiated or started by

the date of its enforcement. Quia such a case it can be legitimately urged that the investigation was pending though it had yet to be instituted or undertaken.

In this manner the significance of the words used in the lines between Clause (d) and the proviso can be fully comprehended and the apparent contradiction between them and the phraseology of Clause (d) got over.

Hence I feel satisfied that only those investigations were declared immune by Clause (d) from the repealing provisions enacted in Section 4 (1) of the Regulation which were pending on the date the Regulation came into force and arose out of offences which had been committed on or before that date. The consequence that ensues is that the investigations which have to be embarked upon pursuant to a complaint lodged after the Regulation came into force in relation to the offences committed before that event have to be conducted by the provisions of the Criminal Procedure Code of India.

7 Sub-section (2) of Section 4 of the Regulation minus the proviso corresponds exactly with Clauses (b) (c) (d) and (e) of Section 6 of the General Clauses Act of 1897. The two provisions are almost identical word for word. Shri Tamba heavily relied upon the interpretation placed by the various High Courts and the Supreme Court on the provisions of Section 6 of the General Clauses Act to shore up his contention that Clause (d) of Section 4 (2) of the Regulation includes the investigations started on or after the date the Regulation came into force in reference to offences committed before that date. However he was unable to cite any direct authority to support that contention. A Division Bench of the Rajasthan High Court had an occasion to examine Clause (e) of Section 6 of the General Clauses Act in the case of *Purshotam Singh v Naran Singh*, reported in AIR 1955 Raj 203. Chief Justice Wanchoo of that High Court (as he then was) said, while speaking for the Court, that Section 6 (e) of the General Clauses Act has nothing to do with the forum where the investigation, legal proceeding or remedy has to be pursued.

If the repealing Act, it was held, further, provides a new forum where a legal proceeding coming on before the repealing Act came into force can be pursued thereafter the forum must be as provided in the repealing Act and that no party can insist that the forum of the repealed Act must continue. It is germane to point out that Cl. (e) of Section 6 of the General Clauses Act exactly corresponds with clause (d) of Section 4 (2) of the Regulation.

6 The facts of the Rajasthan case may be examined to bring out the exact significance of the aforementioned observations made by the High Court in that case. *Thakur Pratap Singh*, the holder of the

Jagr of Jilola, died in September 1952 without leaving any male issue. Disputes arose between Purshotam Singh and Naran Singh as to who was the successor to the Jagr of Jilola. Article VII (3) of the Covenant which created the State of Rajasthan with effect from 7-4-1949 provided that the exclusive jurisdiction to recognise succession would be in the Rajpramukh of the new State. In exercise of that jurisdiction the Rajpramukh of the Rajasthan State declared Naran Singh as the successor to the Jagr of Jilola. Having felt aggrieved with that decision of the Rajpramukh, Purshotam Singh moved a writ petition in the High Court under Article 226 of the Constitution. Earlier, a Full Bench of the Rajasthan High Court had held in the case of *Bahadur Singh v Rajpramukh of Rajasthan*, AIR 1955 Raj 185 that the Rajpramukh of Rajasthan, or for the matter of that, of any other State in India, had no sovereign powers whatsoever left in him after the coming into force of the Constitution of India, and so whatever sovereign powers the Rajpramukh could exercise under Article VII (3) of the Covenant of Rajasthan before the Constitution of India came into force could not be exercised by him after the Constitution came into effect.

It was further held that a decision by the Rajpramukh in the matter of recognition of a successor to Jagr after the coming into force of the Constitution on 26-1-1950 does not bar a civil suit. It was contended before the High Court on behalf of Naran Singh that even if the Constitution had impliedly repealed Article VII (3) of the Covenant as held in the case of *Bahadur Singh*, Section 6 (e) of the General Clauses Act will apply, and the Rajpramukh would still have the power to recognise succession to Jagrs.

The manner in which this argument was repelled by the High Court cannot be stated better than in the words of the High Court itself. The relevant part of the judgment reads as under:

"(11) Lastly it was urged that even if the Constitution impliedly repealed Article VII (3) of the Covenant, Section 6 (e), General Clauses Act, will apply, and the Rajpramukh would still have the power to recognise succession to jagrs. Assuming, but not deciding, that Section 6 General Clauses Act, applies to the circumstances of this case we have to see what Clause (e) of that section provides. It lays down that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege etc.

This clause has, in our opinion, nothing to do with the forum where the investigation, legal proceeding or remedy has to be pursued. If the repealing Act provides a new forum where a legal proceeding coming on from before the repealing Act came

into force can be pursued thereafter, the forum must be as provided in the repealing Act, and no party can insist that the forum of the repealed Act must continue.

In the present case the Constitution has repealed Article VII (3) of the Covenant. The new forum after the repeal of Article VII (3) is the civil court by virtue of Section 9, Civil P. C. Therefore, it is not possible for any one to insist that the old forum mentioned in Article VII (3), namely the Rajpramukh, must still continue even with regard to pending proceedings. There is no force therefore in this argument either."

These observations of the High Court, with which I fully agree, clearly bring out the distinction which has to be kept in mind between the institution, continuation or enforcement of the investigations and the forum where such investigations can be instituted, continued or enforced. Therefore even if the contention of Shri Tamba that the repeal of the Portuguese Criminal Procedure Code by Section 4 (1) of the Regulation did not deprive the accused hauled up in connection with the offence committed before the Regulation came into force of the right that the investigations should be done under the Portuguese Code, is assumed, without conceding, to be well founded, the accused have no right to claim that the investigations should be done necessarily by the forum mentioned in the Portuguese Code because the Criminal Procedure Code of India also prescribes a forum by which the investigations are to be carried out. As such, the Magistrate's order dated 10-5-1966 referring the complaint to the "Delegado" for doing investigations has no support in law.

It is for the reasons, firstly, that Cl. (d) of Section 4 (2) of the Regulation relates to investigations pending on the date the Regulation came into force and not to the investigations which took birth after that date though in reference to the offences committed on or before that date, and, secondly, since the Criminal Procedure Code of India prescribes a forum for doing the investigations the accused have no legal justification for insisting that the investigations must necessarily be carried out by the forum which was recognised under the Portuguese Criminal Procedure Code. In the case of Purshotam Singh (supra) the Rajasthan High Court recognised the right of Narain Singh to have the dispute about succession to Jagir settled but not from the forum mentioned in Article VII (3) of the Covenant but only from the Civil Court in terms of Section 9 of the Civil Procedure Code. Likewise, here, if it be assumed that the right to investigation is saved by Cl. (d) of Section 4 (2) of the Regulation, that does not tantamount to saying that the forum for investigation envisaged by Portuguese Code is also guaranteed to them.

9. As a result, I accept the revision petition, quash the order dated 10-5-1966, and direct the Magistrate to proceed with the complaint in the manner outlined in the Criminal Procedure Code of India. However, accepting the recommendation of the learned Sessions Judge I direct the petitioner to amend his complaint in such a way that the offences alleged to have been committed by the accused have reference to the Portuguese Penal Code and not to the Indian Penal Code. This is for the reason that the offences are alleged to have been committed when the Portuguese Penal Code was in force.

GGM/D.V.C.

Petition allowed.

AIR 1969 GOA, DAMAN AND DIU 61 (V 56 C 18)

R. S. BINDRA, Addl. J. C.

Agencia Olimpia (Cement), Petitioner v. Govt. of India, through the Administrator of the Union Territory of Goa, Daman and Diu and others, Respondents.

Writ Petn. No. 25 of 1968, D/- 4-11-1968.

(A) Constitution of India, Arts. 19(1)(g), 19 (6) — Article 17 of Portaria No. 7012 requiring inspection and certificate of Health authorities about fitness of property or part of building for occupation, does not contravene Article 19 (1) (g) — It is in the interest of general public and constitute no unreasonable restriction on citizen in exercise of their right under Article 19 (1) (g). (Para 7)

(B) Constitution of India, Article 226 — Power of High Court under — Article 17 of Portaria No. 7012 — Certificate concerning godown in dispute — Health authorities have power to insert condition that cement should not be stored therein — Petitioner acquiescing in the terms of orders forming part of Certificate — Orders not quashed under Article 226.

The power conferred on the High Court under Article 226 is purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily. One of the limitations imposed on the High Courts by themselves is that they will not exercise jurisdiction in writ cases unless substantial injustice has ensued or is likely to ensue. The High Courts will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which had not occasioned injustice in a broad and general sense. Case law disc. (Para 10)

The real object behind Article 17 of Portaria 7012 is to safeguard the health of the community at large and not merely to ad-

LL/LL/F626/68

vance the interest of that individual who happens to occupy the building concerned. The condition inserted in the certificate concerning the godown in dispute that cement should not be stored therein is not beyond the power given to the health authorities by Article 17 of Portaria. (Para 9)

Where the petitioner had acquiesced in the terms of orders forming part of Certificate under Article 17 of Portaria No 7012 he could not challenge the validity of the certificate but was bound by the terms thereof. Discretionary power under Article 228 could not be exercised to quash the orders. (Paras 12, 11)

Cases Referred Chronological Paras

(1957) AIR 1957 SC 397 (V 44) =

1957 SCR 233, Pannalal Brijraj v Union of India 10

(1956) AIR 1956 SC 479 (V 43) =

1956 SCR 267, Bidi Supply Co v Union of India 10

(1955) AIR 1955 SC 425 (V 42) =

1955-2 SCR 1 Sangram Singh v Election Tribunal 10

Ataide Lobo, for Petitioner; S Tamba, Govt. Pleader, for Respondents

ORDER This writ petition under Article 228 of the Constitution of India has been made by Agencia Olimpia (Cement) a partnership concern, through its partner Narandas Popatlal challenging the validity of certain orders made by the respondents directing the petitioner to stop the storage of cement in a building, situate at Margao which the petitioner had taken on lease from Ramesh Poi Rauturcar on 7-6-1966

2 The facts bearing on the petition are that on 24-10-1966 the Health Officer of Salcete at Margao addressed a letter to the petitioner requesting it to remove the cement stored in the godowns by the end of December 1966. The Health Officer it appears had been forced to write that letter because of the various complaints received by him about the nuisance created by the storage of cement in the godowns by the petitioner. It is said that on 31-10-1966 the petitioner filed an appeal with the Director of Health Services against the order contained in the aforementioned letter of the Health Officer. It was contended in that appeal that if the direction had been given by the Health Officer for removing the cement stored in the godowns in terms of Article 17 of Portaria No 7012 dated 17-9-1957, then that direction was bad in law because the 'Certificado de habitabilidade' issued under that Article is meant to protect the health of the occupier and not the interest of third persons. On 5-12-1966 the Health Officer wrote another letter to the petitioner mentioning that another complaint had been received by him against the inconvenience arising out of the storage of cement in the godowns.

This complaint was made by M/s West Coast Corporation. In reply to that

letter the petitioner took the stand that they were entitled in law to use the godowns for the purpose of storing cement and as such there was no justification in calling upon them not to use the godowns for that purpose. The tension between the petitioner and the Health Directorate, however, abated considerably when the Secretary of the Government in the Industries and Labour Department made an order approving the storage of cement by the petitioner in the godowns until the multi-storied building located near the godowns was occupied by permanent dwellers, but this approval was subject to certain conditions mentioned in the letter addressed by the Director of Health Services to the Health Officer Salcete and a copy whereof was endorsed to the petitioner. The conditions mentioned were, (1) loading and unloading of more than 100 bags of cement should be carried out between 8.00 p.m. and 8.00 a.m., (2) unloading of upto 100 bags may be carried on during the day but only through the back door; and (3) in case the bags are to be loaded in a lorry it (the lorry) shall be kept at more than 20 metres from the godown. As a consequence of the order made by the Secretary nothing of note happened during the year 1967.

3 On 24th of January 1968 the Health Officer Salcete once again directed the petitioner to stop the storage of cement in the godowns. It was pointed out to the petitioner that in terms of the certificate dated 8th June 1966 no cement could be stored in the godown and that concession had been given to the petitioner to utilise the godowns for the purpose until the occupation of the nearby building by permanent dwellers. It was then stated that since the building had been occupied by the permanent dwellers and that since the building of which the godowns in dispute form a part had also been occupied and the occupants had made complaints in regard to the cement dust nuisance, the storage of the cement in the godowns could not be permitted. The petitioner it is claimed, lodged an appeal on 29-1-1968 with the Director of Health Services against the order contained in that letter. Since the petitioner failed to comply with the direction given in that letter, another such letter was issued by the same officer on 26-3-1968.

It was mentioned in this letter that the Government had withdrawn the permission given to the petitioner to store cement in the godowns. The letter was followed by an order dated 17-4-1968 issued by the Mamlatdar of Salcete calling upon the petitioner to stop storage of the cement in the godowns within 4 days on the pain of coercive proceedings being initiated for enforcement of the order. The petitioner challenged the validity of this order on the grounds outlined in para 17 of the petition. It was also urged in that para of the peti-

tion that the Government had no jurisdiction to interfere with the manner in which the private buildings are utilised by the lessees. It was alleged that the "Certificado de Habitabilidade" contemplated by Art. 17 of the Portaria has reference to the fitness of the building for occupation and that the conditions under which the business shall be carried out in the building cannot be incorporated in it. As such, it was pleaded further, the respondents cannot direct the petitioner not to store cement in the godown on the basis of that certificate.

4. Various orders issued by the respondents were also assailed on the ground that they violated the fundamental rights of the petitioner guaranteed by Art. 19 (1) (g) of the Constitution. It was contended that the respondents had failed to indicate under what provision of law they could direct the petitioner not to store cement in the godown and so the direction issued had no legal sanction. The principles of natural justice were also invoked in assailing the validity of the orders inasmuch as, it was asserted, no opportunity for hearing had been given to the petitioner before they were made.

5. The prayer made by the petitioner was that this Court issue a writ of certiorari or any other writ, direction or order under Article 226 of the Constitution setting aside the various orders made by respondents Nos. 2, 3 and 4, who are respectively the Collector of Goa, the Mamlatdar of Salcete and the Health Officer of Salcete Division.

6. The writ petition was opposed by the respondents who submitted their contentions to the Court in the shape of an affidavit sworn to by Dr. A. C. Vaga, the Director of Health Services, Panaji. It was firstly mentioned in the affidavit that the impugned orders being purely executive in nature are not justiciable. It was then denied that the petitioner had acquired any right under the lease agreement or otherwise to store the cement in the godowns. It was further submitted that by accepting the condition mentioned in the "Certificado de habitabilidade" that no cement shall be stored in the premises, the petitioner was estopped from raising any contrary contention. On merits, the respondents denied that any principle of natural justice or any fundamental right of the petitioner had been violated. It was said further that even if the petitioner had the fundamental right under Article 19 (1) (g) of the Constitution to do business in cement, the restriction imposed on it under Portaria No. 7012, dated 17th of September 1957, imposed only reasonable restriction and that too in the interest of general public and as such it was saved by Article 19 (6) of the Constitution. The allegation of the petitioner that he had taken the premises in dispute for storing

cement meant for sale in south Goa was specifically denied and it was stated that the respondents relied on the true meaning and interpretation of the respective lease agreement if and when produced. It was stated further that before the lease agreement was executed it was necessary in law to have the premises inspected by the Health Officer of the area concerned, that the Health Officer actually inspected the premises on 8th of June 1966, and that after the inspection that officer gave the authority that the four rooms bearing nos.

7, 8, 16 and 17 of the building may be leased to the petitioner provided those rooms were not utilised for storing cement. In face of that restriction, it was urged, the petitioner had no right to utilise the premises for storing cement. The letter dated 24th of October 1966, it was pleaded, had been sent by the Health Officer to the petitioner because the former had received a large number of complaints from the public against the storage of cement in the godowns.

It was denied that the letter dated 31st of October 1966 addressed by the petitioner to the Director of Health Services was in the nature of an appeal against the order contained in the letter dated 24th of October 1966 written by the Health Officer Salcete to the petitioner. While explaining how the Government had agreed to relax the rigors of the "Certificado de habitabilidade" it was stated in para 12 of the affidavit that the Health Officer Margao sent a communication to the Director of Health Services regarding to storage of cement in the godowns by the petitioner, that the Director of Health Services in turn wrote to the Secretary of Industries and Labour Department that a large number of complaints had been lodged against the storage of cement in the godowns by the petitioner, and that the Secretary of the Industries and Labour Department ultimately agreed to the stores of cement being kept in the premises provided rigorous compliance was made with the conditions set down by him.

When the multi-storeyed building was occupied by the people and they raised objections against the nuisance created by the flying cement dust, a report was prepared by the Deputy Director of Health Services on 7th of February 1968 in which it was suggested that the permission granted by the Secretary should be withdrawn. On receipt of that report of the Deputy Director of Health Services the Government approved his suggestion and then the cancellation was communicated to the petitioner. It was denied that any appeal had been filed by the petitioner against the order dated 24-1-1968 of the Health Officer, Margao. It was vehemently asserted by the respondents that since the petitioner had not filed any appeal against the condition

mentioned in the 'Certificado de habitabilidade', nor had reacted to the letter Exh. G whereby the Secretary had permitted the petitioner to store cement subject to the conditions mentioned therein, the petitioner was estopped from challenging the orders issued against him or the condition inserted in the "Certificado de habitabilidade". The respondents placed reliance on certain documents in support of the allegations made in the affidavit.

7 An analysis of the pleadings adopted by the petitioner would show that it seeks the reversal of the various adverse orders on the following grounds—

(1) The principles of natural justice had been violated in making the orders inasmuch as no bearing had been given to the petitioner before they were passed,

(2) That the fundamental rights guaranteed by Article 19 (1) (g) of the Constitution had been flouted, and

(3) That Article 17 of the Portaria had been wrongly interpreted.

The first ground mentioned above was not pressed at all during the course of arguments. Hence it does not call for any comments in this order. Sub-clause (g) of Article 19 (1) of the Constitution provides that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business. This right is, however, subject to the limitations mentioned in Clause (6) of Article 19, and that clause runs as under

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

Evidently, this clause saves the operation of any law which was in force on the date the Constitution came into operation if it imposes reasonable restrictions, in the interests of the general public, on the exercise of the right conferred by sub-clause (g). It was not contended by Shri Lobo that the provisions of Article 17 of the Portaria No 7012 are not in the interest of the general public or those provisions constitute unreasonable restrictions on the exercise of the right conferred by sub-clause (g). Nor do I believe that the provisions

of Article 17 of the Portaria are not in the interest of the general public or that they constitute unreasonable restrictions on the citizens in the exercise of the right conferred by sub-clause (g). Hence the second ground adopted in the petition is also without any substance. Moreover, it was not pressed seriously at the bar.

8 Shri Lobo's main contention was that in exercise of the authority conferred on the Health Officer by Article 17 of the Portaria he (the Health Officer) could not have prescribed that cement should not be stored in the godowns in question. While elaborating his arguments Shri Lobo urged that Article 17 is meant to protect the health of an occupier of a building and not the interests of third persons. On this premise it was urged by Shri Lobo that the insertion of the condition in the certificado de habitabilidade that cement shall not be stored in the godown was altogether illegal and as such it can be ignored with impunity. Shri Tamba, on the other hand, submitted with equal vehemence that the phraseology of Art. 17 does not interdict the insertion of the impugned clause and he asserted, besides, that right from 17-9-1957, when the Portaria came into force, such clauses have been inserted in Certificado de habitabilidade. After examining the respective contentions I have come to the conclusion that the stand taken by Shri Tamba is legally justified.

9 Article 17 of Portaria provides that no property or a part of building shall be utilised or occupied for dwelling purposes for the first time or after having been vacated without its inspection by the health authorities and without those authorities certifying that the property or a part of building as the case may be, is fit for occupation. The contention of Shri Lobo that the real purport behind enacting Article 17 was to protect the health of the occupier and not to safeguard the interests of third persons would amount to restricting the wide amplitude and unfettered nature of the phraseology of the Article 17, or introducing some words into the Article which are just not there. It is not mentioned in the Article, or anywhere else in the Portaria, that the objective of Article 17 is limited to the extent and in the manner indicated by Shri Lobo. The hierarchy of health authorities have to look to the well being of the community at large in the region of the property concerned rather than to that of occupant or occupants alone of that property.

In the cloth market in a city like Margao, for instance, if some one takes into his head to start a business in fireworks, the health authorities would be well within their rights not to permit that dangerous trade being carried out there. Likewise, if some one wants to manufacture some gas dangerous to health in the heart of the city, the health authorities would be justified in refusing to issue the certificate contemplated by Article 17. In each of the two cited instances the certificate will

visions. This question has been considered by the Supreme Court in two decisions. In *Santosh Kumar v. Bhai Mool Singh*, reported in AIR 1958 SC 321, Bose J. speaking for the Court, has observed that wherever the defence raises a "triable issue", leave must be given, and when that is the case it must be given unconditionally, otherwise the leave may be illusory. If the Court is of opinion that the defence is not bona fide, then it can impose conditions and is not tied down to refusing leave to defend. But it cannot reach the conclusion that the defence is not bona fide arbitrarily. It is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in any other matter. Where the defence is a good and valid one, conditions cannot be imposed. The power to impose conditions is only there to ensure that there be a speedy trial. If there is reason to believe that the defendant is trying to prolong the litigation and evade a speedy trial, then conditions can be imposed. But that conclusion cannot be reached simply because the defendant does not adduce his evidence even before he is told that he may defend the action. It has been further observed as follows:—

"It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. The object is explained in *Kesavan v. South India Bank Ltd.*, ILR (1950) Mad 251 = AIR 1950 Mad 226, and is examined in greater detail in *Sundaram Chettiar v. Valli Ammal*, (AIR 1935 Mad 43) to which we have just referred. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts."

In para 12 of the report, the following observations are made:—

"The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether 'if the facts alleged by the defendant are duly proved' they will afford a good, or even

a plausible, answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains."

This latter part of the observations of the learned Judge, if read separated from the context of the facts and other observations made in the judgment, enables an argument that at the stage of the summons for judgment, the test is whether "If the facts alleged by the defendant are duly proved, they will afford a good or even plausible answer to the plaintiff's claim and if the Court is satisfied about that, unconditional leave must be granted." But the exact effect of this part of the judgment has been explained by the Supreme Court in *Milkharam (India) Pvt. Ltd. v. Chamanlal Bros.*, AIR 1965 SC 1698, by observing that that part of the observations of the learned Judge has to be understood in the background of the facts of the case that the Court was called upon to consider. There the trial Court being already satisfied that the defence raised a triable issue, was not justified in imposing a condition to the effect that the defendant must deposit security because he had not adduced any documentary evidence in support of the defence. The stage for evidence had not been reached. Whether the defence raises a triable issue or not has to be ascertained by the Court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of the material placed before it the Court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable, it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but is improbable, the Court would be justified in coming to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. It is further observed by the Supreme Court as follows:—

"... It is indeed not easy to say in many cases whether the defence is a genuine one or not and, therefore, it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false,

or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the Judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to O. 37, R. 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend."

These observations would also apply to the impugned provisions of the rules for summary procedure applicable to Ahmedabad Small Cause Court particularly Rule 39 read with Rule 3 of Order XXXVII. In short, the principles decided by the Supreme Court are that (1) if a triable issue is raised, unconditional leave to defend should be granted; (2) if the Court is satisfied beyond doubt that the defence raised is frivolous, false or sham, leave to defend should be refused; (3) however, if the Court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the Judge may impose conditions for granting leave to defend. It would also be useful to note that the learned Judges of the Supreme Court have expressed their opinion as regards the object of the summary procedure. It has been observed that O. XXXVII, Rule 2 is applicable to what may be compendiously described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, the money disputes are not to be adjudicated upon expeditiously. It is these conditions which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given, should be given subject to conditions. Care must be taken to see that the object of the rule to assist expeditious disposal of the commercial causes to which the order applies, should not be defeated. At the same time, care should be taken to see that real and genuine triable issues are not shut out by unduly severe order as to deposits.

7. Against this background of facts and law, we now proceed first to examine the submission of Mr. N. J. Mehta, the learned advocate for the applicant, concerning the challenge based on the ground of the rules being invalid as they conflict with the fundamental right guaranteed under Article 19(1)(f) which cover grounds Nos. 1 and 2 as raised by him.

8. Article 19 (1) (f) of the Constitution lays down that all citizens shall have

the right to acquire, hold and dispose of property. However, by clause (5) the Constitution does contemplate and enables certain restrictions to be imposed on this fundamental right. It provides that nothing in clause (f) shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of the right conferred by sub-clause (f) in the interests of the general public. In order to substantiate the challenge on the ground of the rules being violative of the fundamental right under Article 19(1)(f) read with sub-clause (5), the applicant has to establish two facts (1) that the impugned rules of summary procedure as applicable to the Ahmedabad Small Cause Court impose restrictions on his fundamental right to acquire, hold and dispose of property, and (2) that the said restrictions are unreasonable. On the first part of the contention, it was urged by Mr. Mehta that his challenge was not to the decision or order passed by the Court whereby the defendant is either refused leave or is given a conditional leave on deposit of an amount or giving of security, but to the provisions of the rules themselves which entitle the Court to pass such orders which are violative of the fundamental right of the defendant. So far as the order is concerned, he would challenge it on the ground of being erroneous because it is based on the rules which permit the Court to pass such an order which affected the fundamental right to hold property. The challenge to the impugned provisions on the first part of the contention was formulated as follows :—

(1) When leave to defend is refused and the decree is passed, reliance is only placed on the affidavits filed and no opportunity is given to the defendant to defend his cause either by cross-examining the plaintiff or his witnesses, if any, or by leading oral evidence. The decree so passed, inevitably affects his property by compelling him to part with the property in execution of such decree.

(2) (a) Where the Judge makes a conditional order, he has a mere doubt regarding the quality of the defendant's defence and by imposing the condition of security or deposit, the Court virtually compels the defendant to purchase his right of defence and if the defendant is not able to comply with the condition, a decree would be passed and that would affect the right of the defendant to hold property.

(b) The order of conditional leave affects the defendant's property because he is made to deposit the amount and in case of his ultimate success, such order deprives him, at least temporarily, for the period of litigation of the right to hold

that property and thus affects his fundamental right.

(3) By depriving the defendant of the right to defend property without a reasonable opportunity given in consonance with the principles of natural justice, the summary procedure creates a direct restriction on his right to hold property.

9. In order to focus our attention to certain principles having a bearing on this part of his submission, we were referred to the following decisions of the Supreme Court:

10. In re Kerala Education Bill, 1957, AIR 1958 SC 956, reliance was placed on this decision for the limited purpose of showing that while determining the constitutional validity of a provision, regard must be had to the real effect and impact thereof on the fundamental right and further that in judging the validity of any law regard must be had to its real intent and effect on the rights of the aggrieved party rather than to its form. It was also laid down that the legislature cannot indirectly take away or abridge the fundamental right which it could not do directly. With these general principles, there can be no quarrel. The question is, what is the effect of these principles on the facts of the present case and whether they have any application to it. We shall examine this aspect in due course.

11. The next decision to which our attention was drawn is Gullapalli Nageswara Rao v. State of Andhra Pradesh, (1960) 1 SCR 580—(AIR 1959 SC 1376). This was done with a view to urge that though in England it was open to the Parliament, Parliament being the supreme authority, to abridge or even take away even fundamental right, in India that cannot be done as even Parliament's authority to make laws is subject to the fundamental right guaranteed to the citizen under various Articles including Article 19. There can be no dispute about the correctness of this proposition of law. But as we shall point out, the principle laid down does not come in the way of the impugned provisions of the summary procedure.

12. It was submitted on behalf of the applicant that these provisions regarding the summary procedure have, in substance, the effect on the defendant's fundamental right to hold property inasmuch as it provides a procedure whereby his right of defence in respect of his property has been taken away or arbitrarily abridged. What directly affects the defendant is the provisions of the summary procedure that authorise the Court to decide upon the validity of the claim of the plaintiff on mere affidavits and without affording the defendant adequate opportunity to defend the claim made. Where leave to defend is refused,

the Court comes to the conclusion merely on the affidavits filed that the defendant's defence is sham or mala fide and the decree is passed. The defendant is thus deprived of his right to hold property in execution of that decree. It may be that literally interpreted, the property is not directly affected but the right to hold property is directly affected or, in any case, threatened by such decree passed. The right to hold property necessarily includes the right not to be deprived of it except by a process of law which passes the test of reasonableness. Therefore, it affects the defendant's right to hold property. It was conceded that the right to defend cannot be claimed to be a fundamental right on its own. But it was urged that the defendant has a right not to be deprived of his property except in due course of law. The inevitable consequence of the working of the impugned rules is to be seen in the case where the decree is passed on the ground that the defence is sham or not bona fide. The inevitable result is that the decree follows without any proper opportunity being given to the defendant to defend (against) the claim of the plaintiff. Where the Court feels doubtful about the bona fides of the defence, an order to deposit is made which inevitably compels the defendant to deposit, if he wants to avoid a decree being passed. So in that case, the very right to defend property is made dependent upon the liability to part with the amount of deposit at least for the period of litigation. Thus, the order to deposit is also a restriction on the right to hold property. Again, though the Court only feels doubtful as regards the bona fides of the defence, the defendant is given no opportunity to exercise his valuable right of cross-examination or leading of evidence to remove that doubt and leave to defend is granted only on condition of depositing an amount. An impecunious defendant may not be able to make such a deposit and the result would be that the decree would be passed in favour of the plaintiff. The direct result of the impugned rules, in either case, therefore, is to deprive the defendant of his property without giving him proper opportunity to defend. In law, therefore, these rules themselves violate the fundamental rights and, therefore, they should be struck down.

13. We will examine these submissions made on behalf of the applicant, but before we do so, we may as well mention the submissions made on behalf of the opponent by his learned advocate Miss K. A. Dabu. It was contended that before the application of Article 19(1)(f) is attracted, the person aggrieved has first to establish that some specific property of his is affected by the impugned provisions of law in such a way as to amount

to any arbitrary restriction on his right to acquire, hold or dispose of such property. Unless, therefore, the applicant here can put his finger on any specific property and point out to the Court that the impugned rules directly affect the right to hold that property the validity of the rules cannot be challenged on that ground. In the present case no restrictions are placed by the impugned rules on any property of his. According to the learned advocate the amount of Rs 1000/- in the hands of the defendant is the property of the plaintiff which he claims to recover. Therefore there is no property of the defendant which is affected. We however do not see any force in this contention. In the first place, until the plaintiff succeeds in establishing his case the amount of Rs. 1000/- in the hands of the defendant cannot be said to be the plaintiff's property. But apart from that, if the rules which enable the passing of a decree for Rs 1000/- directly and inevitably affect the right to hold any property of the defendant, they can be challenged on the ground of their being violative of his fundamental right under Article 19(1)(f). There is little doubt that the provision of law which prescribes the procedure with the very object of creating arbitrary restrictions on any of the fundamental right, even though discretion may be vested in the Court by the procedure provided, the provisions providing the procedure themselves would be invalid.

14. The next submission was that the object and purpose of the impugned provisions is to provide a procedure for speedy disposal and realization of certain monetary claims of liquidated amounts in commercial causes and to achieve that object discretion is given to the Court to decide on affidavits whether conditional or unconditional leave to defend should be given or leave should be refused. If in passing of such order any right to property of the defendant is affected, the rules themselves cannot be held to be bad. The object of the rules is merely to provide a speedy remedy in certain types of litigation and they do not aim at creating any restriction on the fundamental right of the defendant and if as a result of judicial decision arrived at on the basis of the procedure so provided any right to hold property is incidentally affected, it cannot go to affect the constitutional validity of the rules providing the procedure. The rules if at all, only restrict or regulate his right to defend the money claim made by the plaintiff and right to defend is not a fundamental right. We find that there is substance in this submission made on behalf of the opponent and it deserves to be accepted as we shall presently point out.

15 As important constitutional questions of far reaching consequence are involved in this case, we had requested the learned Acting Advocate General to assist us and he has kindly done so for which the Court expresses its thanks. He did not support the contention raised on behalf of the applicant. He submitted that now the principle is well settled that the effect on the fundamental right of the impugned provisions must be direct. The impugned legislation must directly legislate in respect of the subject covered by the Article under which the fundamental right is claimed and not merely incidentally or indirectly touch the right. The test is that the provisions objected to must directly and inevitably affect the fundamental right which is alleged to have been violated. In support of his submissions he heavily relied upon the case of *Express Newspaper Ltd. v Union of India*, AIR 1958 SC 578

We have preferred to quote extensively from the above decision as in our view, the submission of the learned Acting Advocate General that the principles decided in that case should govern the present case is correct and it will be proper to see whether having regard to these principles, it can be said that the impugned rules are violative of the applicant's right to hold property. The tests laid down, shortly speaking in the said decision are (1) whether the intention or the proximate effect and operation of the impugned provisions are such as to take away or arbitrarily restrict the fundamental right of the applicant under Article 19(1)(f) (2) only direct and inevitable consequences of the impugned provisions can be taken into consideration for determining the validity mere possibility or indirect effect of the impact of the impugned provisions in conceivable cases would not vitiate the said provisions.

16 From the principles laid down, it can be seen that the emphasis is not on the incidental or possible result that may ensue but what is material for the test is to see the aim and object of the provisions. The intention and the direct and inevitable effect of the rules have to be seen to find out whether they affect the defendant's right to hold property. Unless the applicant proves that the rules affected his particular fundamental right as a direct and inevitable result he cannot succeed.

17 As we have already observed, if power is given to frame rules such rules have to be subjected to fundamental rights and if discretion is given to the Court to act in a particular manner exercise of such discretion cannot be challenged as violating the fundamental right, it being a judicial determination, but the

rules giving discretion may be struck down if they themselves violate fundamental rights. In that case the decision must also fail. But such is not the case in the matter on hand. When we turn to the present case and apply the test laid down by the Supreme Court, as already observed, the aim and object of the impugned rules is to provide a machinery for adjudication of commercial disputes involving claims of liquidated amounts, expeditiously and for securing or making it possible to expeditiously recover the amount, if a decree is passed. It does not deal with any of the fundamental rights to hold property, of the defendant. Looked at even from another angle, what Rule 39 does is to provide for the manner and the conditions subject to which the defendant will have a right to defend such a money claim. Even in the wider sense of the word "property", at this stage no property of the defendant is involved or is concerned. In context with the provisions with which we are dealing and giving a wider connotation to the concept of property which would include an actionable claim, the property here is the claim which the plaintiff makes. It is something which is capable of being owned or acquired, held or disposed of. But that cannot be said about the right of defendant to defend the money claim made against him. The right to defend a money claim can never be property in any sense, much less the so called right to defend the claim in a particular manner, viz., having the right to cross-examine or lead oral evidence. The rules only directly affect the right of the defendant to resist a money claim for a liquidated amount and as no right to property of the defendant is directly involved, no question of his fundamental right to acquire, hold or dispose of any property can be said to be affected by the impugned rules. We are unable to accept the submission of Mr. Mehta that when, under the summary procedure the Court passes a decree on affidavits only and without giving the defendant the right to cross-examine the plaintiff or lead evidence himself, believing the defence of the defendant to be bogus or not bona fide, the procedure itself directly affects his fundamental right to property. What is affected at the most is the mode of his defence. Right to defend is not a fundamental right and, in our view, it is open to the State to provide restrictions on the right to defend or regulate his right to defend, and the provisions that prescribe such restriction cannot be attacked as contravening any fundamental right. It is true that if the restrictions are such that they contravene the very fundamental principles of natural justice, they may be invalid on that score. But that aspect would fail for con-

sideration when we go to consider the question as to whether the restrictions placed are reasonable or not. At this stage we are only concerned with the question as to whether any right of the defendant to hold property is directly or inevitably contravened by the rules of the summary procedure themselves.

18. Mr. Mehta tried to support his submission by relying on the decision of Prem Chand Garg v. Excise Commissioner, U. P., AIR 1963 SC 996 wherein the Supreme Court struck down one of the Supreme Court Rules on the ground of it contravening a fundamental right. In the said case, the Supreme Court, by majority decision, held that there can be little doubt that if the impugned rules affected adversely any of the rights guaranteed under Article 19(1)(f) and cannot pass the test of reasonableness, they would have to be struck down. In the case before the Supreme Court, the rule directly and inevitably and as a necessary consequence thereof was held to retard and infringe the fundamental right of the petitioner given to him under Article 32 to assert or vindicate his right by moving the Supreme Court, but such is not the position in the instant case as pointed out. Here, when under the summary procedure the leave to defend is refused — and we may say that that happens in only exceptional cases where the defence is found to be palpably untenable or mala fide, it is so done after a judicial adjudication. The affidavits filed by both the sides are taken into account and the defendant is heard. It is true that he does not get the right which in other proceedings is available of cross-examining or leading of oral evidence. But that is only the mode of defence or right to resist the money claim that is specially prescribed. No litigant, however, can claim to have a right to defend in a particular manner. The right to defend cannot be raised to the pedestal of the fundamental right. The right to hold property does not include the right to defend a monetary claim made against him. These impugned rules, therefore, cannot be challenged as contravening Article 19(1)(f) as they cannot be said to affect any property right of the defendant. Even when we go to consider the case when the Court passes an order of conditional leave to defend and requires the defendant to deposit an amount, the same result ensues. Properly viewed, by granting such conditional leave the Court does not actually order the making of a deposit. The Court only imposes a condition that if the defendant desired to defend the claim against him, he may deposit and defend. It is not like an order of attachment of property or issuing of any injunction against any

property. He brings the money in Court by a voluntary act of his because he is desirous to defend and, as pointed out, the right to defend is not a fundamental right at all. Again, by depositing he does not lose the ownership at all. It is only when the claim is established that he loses it. But then it is established to be not his property and, if not, he gets it back. The deposit is, as a matter of fact, only by way of a security for the plaintiff's claim. True it is that he temporarily loses control on the amount while it is in the custody of the Court. But that cannot mean that the rules affect the right to hold property as a necessary and direct consequence. It is only on a judicial assessment of the facts that the said order is made when the Court believes that his defence may or may not be true. If a conditional order is made and if he cannot deposit and the decree is passed, then that is a consequence of an extraneous fact of his not having enough funds with him. But that cannot again, as pointed out in the case of *Express Newspapers Ltd.*, AIR 1950 SC 578 (supra) be a ground to hold that the provisions are invalid as contravening any fundamental right.

19 We may here with advantage refer to one of the latest decisions of the Supreme Court in *Naresh v State of Maharashtra*, AIR 1967 SC 1.

Gajendragadkar C. J. observed that it was well settled that in examining the validity of a legislation it was legitimate to consider whether the impugned legislation was the legislation directly in respect of the subject covered by any particular Article of the Constitution or touch the said Article only incidentally or indirectly. He applied the same test of pith and substance to the matter with which they were concerned and came to the conclusion that the impugned order was a judicial order passed by the Court in exercise of this inherent jurisdiction and its sole purpose was to help the administration of justice. Any incidental consequence which may flow from the order will not introduce any constitutional infirmity in it. Certain observations of Sarkar J in his concurring judgment are also instructive. He has observed as follows:—

"I turn now to the question whether the law which Tarkunde J had applied was a valid law. It is said that it is not a valid law as it offends the fundamental right to freedom of speech conferred by Art. 19(1)(a). Now that law is the inherent power of a High Court to prevent publication of the proceedings of a trial. The question is does this power offend the liberty of speech? It seems to me beyond dispute that the power to prevent publication of proceedings is a facet of the

power to hold a trial in camera and stems from it. Both are intended to keep the proceedings secret. Suppose a Court orders a trial in camera and assume it had a valid power to do so in such a case the proceedings are not available to persons not present at the trial and cannot, for that reason at least, be published by them. Can any such person complain that his liberty of speech has been infringed? I do not think so. He has no right to hear the proceedings. Indeed, there is no fundamental right to hear if he has not, then it should follow that his liberty of speech has not been affected by the order directing a trial in camera."

He has further observed that the exercise of the power to hold the trial in camera, no doubt, has the effect incidentally of preventing a citizen from publishing the proceedings of the trial for he is prevented to hear them. What he cannot hear he cannot, of course, publish. All the same, the learned Judge did not think this restriction on the liberty of speech is a violation of fundamental right in regard to it. Firstly because the liberty of speech was only affected indirectly and it had been held by the Supreme Court in many cases beginning with 1950 SCR 88—(AIR 1950 SC 27) that when a law which, though it violates a fundamental right is nonetheless good under any of the clauses (2) to (5) of Article 19 indirectly affects another fundamental right for which no protection can be claimed under these clauses no grievance can be founded on the indirect infringement. He further held that all that the law did was to legally prevent a person from entering the court and hearing the proceedings. Really there was no such thing as an absolute right to hear. In our view, the principles laid down and confirmed by the Supreme Court in this case of *Naresh v State of Maharashtra*, AIR 1967 SC 1 go directly to support the view we have taken.

20 Realising that the principles laid down by this decision and particularly in the S. C. decision of *Express Newspaper Ltd.*, AIR 1958 SC 578 (Supra) if made applicable would be an unsurmountable difficulty in the way of the applicant, his learned advocate tried to persuade us that the ratio of the said decision cannot apply to the present case. He argued that the provisions were held not to violate the fundamental right as the consequences which were visualized by the petitioners were all such as could only be held to be remote and dependent upon various factors which may or may not come into play and the possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the legislature while enacting a measure of this type

for the benefit of the workmen concerned. It was urged that, therefore, in the said case, as the provisions of a beneficial legislation were attacked, the argument advanced by the employers' side that the burden, if laid, some of them would have to close down was held to be remote because the factor of financial inability and the other factors which were pressed into use for supporting the argument were of a variable nature and very remote. We do not see any force in this submission. The aim and object of the summary procedure is, as pointed out, to provide expeditious remedy to proceed with and realise the money claims in certain commercial causes which is in the interests of the general public. The legislature and the rule making authority by enacting these provisions could not be said to have any ulterior motive because the defendant in some cases may be called upon to deposit an amount before leave to defend is granted or his evidence is recorded or in some cases impecunious defendants may not be able to deposit the amount at all or in a rare case the Court may wrongly refuse leave to defend and pass a decree. It cannot be said from these facts that the provisions of the summary procedure are enacted with the aim or object of putting the defendant to any of the aforesaid disadvantages visualised on behalf of the applicant. At one stage Mr. Mehta appeared to argue that it is well-nigh impossible for a Court to come to a correct decision on merely reading the affidavits and without the defendant getting the right to cross-examine the plaintiff or permitting him to lead oral evidence, that the defence is entirely bogus or mala fide. We find ourselves unable to agree with Mr. Mehta. As we have indicated, the Judge comes to the conclusion after exercising proper judicial discretion and, indeed, only in very few cases where his judicial conscience is satisfied beyond doubt about the falsity of the defence that the Judge will refuse leave to defend. To say that in no case a Judge will be able to reach a correct decision on this score is to unjustifiably underestimate or rather disregard the very basis of judicial system and judicial discretion. Then again, where the conditional order is made, the Court is not fully satisfied that the defendant has a good or bona fide defence. Then keeping in mind the object of the legislation, a discretion is given to the Judge to grant conditional leave on deposit being made. There again those defendants who are favourably placed may not feel any financial difficulty while those who are absolutely impecunious in conceivable cases may not be able to meet the requirement and a decree may follow. But then similar was the situation in the Supreme

Court case also where marginally situated newspaper establishments were assumed not to be able to, in conceivable cases, bear the strain and may have to disappear after closing down their establishments. But that was held to be a consequence which would be extraneous and not within the contemplation of the legislature and it was further held that the possible impact of these measures in conceivable cases could not be held to vitiate the legislation as such.

21. We, therefore, see no justifiable ground whatever to accept the submission that the ratio of the said Supreme Court decision can have no application to the instant case. These principles apply and they effectively repel the aforesaid contentions advanced on behalf of the applicant. Having carefully considered all the submissions advanced on behalf of the applicant, we come to the conclusion that the impugned rules cannot be held to affect any fundamental right of the applicant to acquire, hold or dispose of property.

22. This leads us to the second limb of the submission on behalf of the applicant in respect of violation of Article 19 (1)(f) that if the said Article is held to be attracted then whether the restrictions are unreasonable. Strictly speaking, having come to the conclusion that we have, on the first part of his submission, there is no necessity for us to deal with this question but as all the learned advocates have advanced elaborate arguments on it, we deem it expedient to examine this aspect also.

23. It was argued that the summary procedure and particularly the procedure provided by the latter part of Rule 39 of the Ahmedabad Small Cause Court Rules read with Rule 3 of O. XXXVII, Civil Procedure Code, create unreasonable restrictions on the fundamental right of the defendant to hold property inasmuch as it does not give the defendant the right of hearing and defend the cause in consonance with the requirements of natural justice. The requirement of natural justice is not a static or a definitive concept and it varies with the nature of the tribunal and the nature or consequence of the order made. Here we are concerned with the civil Court, a judicial authority, and the order passed affects the defendant's right to hold property. Therefore full compliance with the requirement of natural justice has to be insisted upon and, according to Mr. Mehta, the minimum requirement is what is to be found in the following passage at p. 1709 in Willoughby on the Constitution of the United States 2nd Edition :—

"From the general characterizations of due process which have been already quoted, it will have been seen that an essential element of due process of law

is that the parties whose personal or property rights may be affected by any judgment, verdict, or decree that may be rendered or given by a court shall have had 'his day in court'. This means: (1) that he shall have had due notice, which may be 'actual or constructive' of the institution of the proceedings by which his legal rights may be affected, (2) that he shall be given a reasonable opportunity to appear and defend his rights, including the right himself to testify, to produce witnesses, and to introduce relevant documents and other evidence (3) that the tribunal in or before which his rights are adjudicated is so constituted as to give reasonable assurance of its honesty and impartiality and (4) that it is a Court of competent jurisdiction."

Stress was particularly laid on the part that the defendant should have the right himself to testify to produce witnesses and to introduce relevant documents and other evidence. It was urged that in the case of AIR 1965 SC 1998 (Supra) as pointed out, the Supreme Court has indicated the scope and effect of these provisions regarding the summary procedure. It was argued that the effect of the procedure is that full or adequate right of hearing is taken away and no right to lead oral evidence or cross-examine the adversary or his witnesses is available to the defendant and the Court comes to its decision on suspicion of the defence being not genuine or bona fide. Though the court remains in more doubt that the defence may or may not be genuine, no opportunity is given to the defendant to remove that doubt by leading oral evidence and cross-examining the plaintiff or his witness. If an order for depositing some amount is made, an impecunious defendant would not be able to deposit the amount and a decree would follow though he may have a good defence. He gets no opportunity to dispel the doubt by cross-examination or leading evidence and for want of reasonable opportunity to defend, his right to hold the property would be adversely affected. Even when leave to defend is refused, the Court comes to the conclusion that the defence was sham or frivolous only on the basis of affidavits and the defendant gets no opportunity to convince the Court to the contrary by cross-examining the plaintiff or leading evidence. This procedure virtually calls upon the defendant to show that he has a good defence before he enters upon his defence. The Court, under such circumstances, can never come to a rightly just decision. Mr Mehta conceded that the right of cross-examination or leading oral evidence may not be such principles of natural justice as can be said to be inviolate in all cases. He however argued that the very nature of the concept of natural justice is flexible.

The content of the principle of natural justice varies with the nature of the tribunal and the nature of the consequences of the order passed. The basis of our judicial system is the adversary system and the courts have not to travel beyond the record in search of truth. The truth is to be ascertained from evidence on the record and under such circumstances the right of cross-examination and leading of oral evidence is the main plank of the right to defend. Before Courts and tribunals which are under the obligation to decide judicially, the rights of cross-examination and leading of oral evidence are inviolate. These submissions made on behalf of the applicant, though in parts have substance as we shall point out, by and large, they are fallacious and the conclusions reached are incorrect.

24. In the first place, the very basis on which the submissions are advanced is inherently weak. The observations from Willoughby relied upon by Mr Mehta are concerning the doctrine of Police Powers and the corresponding doctrine of "Due process of law" on which the American Constitution is rested which is not the case in India. The provisions of our Constitution have to be interpreted by the plain words used in the Constitution and not with reference to the connotation of the doctrine of police power or due process of law, though there may be some similarity in the principle underlying the doctrine of due process of law and of 'reasonable restriction' to be found in the Indian Constitution. The argument starts with the premises that the particular type of procedure mentioned by Willoughby is the *sine qua non* of reasonableness and is, therefore, fallacious in its very basis. It is true that the restriction imposed upon any fundamental right guaranteed by Article 19 would not be considered to be reasonable if it seeks or empowers an authority to impose a restriction on a fundamental right without complying with the rules of natural justice. It is also true that there can be no universal standard of natural justice to be made applicable to all the cases and the content or requirement of natural justice is bound to vary with the nature of the tribunal. But it is now well established that there are only two broad principles or fundamental requirements which form the basis of the doctrine of natural justice and they are (1) the authority deciding the matter must be independent, unbiased and impartial and (2) the principle of *audi alteram partem*, that is to say, no man shall be condemned unheard. In this case we are more concerned with the second requirement. Broadly speaking the requirement of natural justice would be met if the party

concerned is given reasonable notice of the case he is required to meet, the opportunity of stating his case and a reasonable opportunity of being heard. The question is, do the impugned provisions of the summary procedure contravene the requirements of the principle of *audi alteram partem*? The submission, as we have seen, on behalf of the applicant is, that it does because the procedure does not afford him the opportunity of full hearing including the right of leading evidence and cross-examining the plaintiff and his witnesses, if any.

25. The question for our consideration, therefore, is whether the fact that full defence at the first stage is not permitted to the defendant by leading of evidence or cross-examining the plaintiff amounts to non-compliance with the requirements of natural justice so as to amount to unreasonable restrictions. In our judgment, it cannot be so held. There can indeed be no universal rules laid down as to the kind of hearing required to comply with the requirement of natural justice. The summary procedure entitles the defendant to receive notice of the case he has to meet, entitles him to appear and further to file his own affidavit or affidavits of his witnesses in which he can fully meet the case of the plaintiff and also submit his arguments himself or through his advocate in order to satisfy the Court *prima facie* that he has a good defence to make or disclose such facts as *prima facie* be sufficient to show that he is entitled to make a full defence in the case. All the three ingredients of notice, opportunity to meet the adversary's case and the right to be heard before the Judge who decides the matter are complied with. The Judge dealing with the matter, where the summary procedure applies, has to decide judicially after taking into account the contents of the affidavit for summons for judgment and the plaint on the one hand and the affidavit filed in reply thereto by the defendant, whether to grant leave conditionally or unconditionally or refuse leave to defend. Therefore, all the fundamental principles of natural justice are complied with and only on judicial adjudication the defendant's right to hold property, if at all, is affected. A similar view has been taken by this Court in the decision of *Sam M. Haeems v. Samson J. Benjamin*, (1966) 7 Guj LR 87, where, in Chief Justice Shelat, as he then was, has made the following observations in respect of the provisions of the summary procedure so far as they apply to the Ahmedabad City Civil Court which, as we have indicated, are in *pari materia* with the impugned provisions:—

"The second branch of his argument was that these rules are also illegal as

they violate the principles of natural justice. It is somewhat difficult to appreciate this branch of the argument, for the rules under Order 37 and our rules 142 to 148 confer right to a defendant in a summary suit to file his appearance and an affidavit in reply to a summons for judgment taken out by a plaintiff. It is only after the Judge dealing with such a summons has considered the affidavit filed by the defendant showing cause against the summons for judgment and has heard the parties, that he can dispose of such a summons. Since the rules expressly provide for the right to appear, to file affidavit disclosing the defence and to be heard it is difficult to understand how it can be said that they are in breach of the principles of natural justice. It is true that where a defendant fails to file his appearance within the time prescribed, or where he fails to obtain leave to defend, or where he fails to comply with the order passed by the Judge on such summons, such as for instance where he fails to furnish the deposit as ordered by the Judge, the averments made in the plaint are deemed to be admitted by such a defendant. But the deeming provision comes into play only where any of these things happens and not otherwise. It is, therefore, not possible to say that a defendant to whom the summary procedure applies is not afforded an opportunity of defending himself or being heard. Principles of natural justice, therefore cannot be said to have been violated by any of the provisions impugned in this petition."

26. It was tried to be urged that in the said decision it does not appear to have been argued that the restrictions on the right of cross-examination and leading of oral evidence amount to unreasonable restrictions as they violate the requirement of natural justice, but we do not find any substance in this plea. The only basis of the challenge that possibly could be advanced to support the submission of the rules of summary procedure not complying with the rules of natural justice is the restriction on the right to make defence by way of cross-examination and leading of oral evidence. It is not, therefore, possible to distinguish the said decision on that score. True it is that the said decision is of a Single Judge and it is open to the applicant to press on us to differ from it, but we see no reason to do so and, with respect, adopt the reasoning and conclusion reached by the learned Judge to be correct.

27. An effort was made on behalf of the applicant to rely on the decisions in respect of the inquiry under Article 311 (2) of the Constitution wherein it had been held that even in an administrative inquiry where there is a duty to decide

judicially, the right of cross-examination and even the right to claim copies of documents relied upon are required to be afforded to the person concerned to comply with the rules of natural justice; much more so in an inquiry by a Court which is a full dressed judicial inquiry. It is true that Courts have held that even in quasi judicial inquiry and inquiries held by administrative authorities who are under the duty to decide judicially, have to comply with the principles of natural justice and in some cases the right to cross-examine has been held to be such a requirement. But, as already observed, there is no universal rule that can be laid down as regards the requirement of natural justice except the aforesaid two requirements indicated by us. Where witnesses have been orally examined either in presence or in absence of the person aggrieved and reliance is tried to be placed on such oral evidence, Courts have held that even in administrative inquiries where there is the duty to decide judicially, the party must have the opportunity to cross-examine or even to get copies of relevant documents which are to be used against him. But such is not the position in the present case. No oral evidence is allowed on the part of even the plaintiff. As has been observed by the Division Bench of this Court in *Govindbhai v Union of India*. (1966) 7 Guj LR 703 where the proceedings were quasi judicial, the question as to what are the rights accorded by the principles of natural justice in a particular case is always a question of some difficulty and the subject though well worn is one replete with impediments to orderly generalization. These rights have been defined in varying language in a large number of cases covering a wide field. The question whether the requirements of natural justice have been met by the procedure adopted in a particular case must depend to a great extent on the facts and circumstances of the case in point. The requirements of natural justice are not such as can be reduced to any formula inclusive or exclusive which can have universal application to every kind of inquiry, for a good deal may depend on the subject matter, the nature of the inquiry itself, the nature and constitution of the tribunal or authority which holds the inquiry and the rules under which the inquiry is held. It is to be mentioned that in the said case it was held that the right to cross-examine the Deputy Chief Chemist, whose opinion in writing was to be relied upon against the party concerned, was an essential ingredient to comply with the requirement of natural justice. But that conclusion was reached particularly in view of the fact that there was nothing in the Central Excises and Salt Act, 1944 and the rules

thereunder, under which the inquiry was held, which prescribed any particular procedure to be followed in holding the inquiry for the purpose of determining whether an offence of breach of the provisions of the Act and the Rules was established against the person charged for such offence. The Court then proceeded to see whether there was anything in the subject, the nature of the inquiry and the nature of constitution of the Tribunal which required that before the opinion of the Deputy Chief Chemist could be relied upon by the Assistant Collector of the Central Excise for the purpose of holding the charge against the petitioner established, the petitioner should be given an opportunity to cross-examine the Deputy Chief Chemist when such opportunity was demanded by him.

28. The reading of the decision clearly shows that on the broad facts of that case it was held that the petitioner should have had the right to cross-examine the Deputy Chief Chemist. In the present case, the statute and the provisions of law lay down the particular procedure to be followed and it does not provide the right of cross-examination at the first stage of *prima facie* satisfaction to be reached by the Court. That first stage is where the Court has to merely reach a *prima facie* satisfaction as to whether the defence is good or sham or mala fide. Right to cross-examine, it is conceded, is not necessary or inviolate requirement of natural justice and, therefore, there is no impediment whatever on the right of the legislature or its delegate to authorise the inquiring authority, judicial or administrative, by providing in the statute any express terms or by implication, not to permit the right of cross-examination or leading of oral evidence and follow only the very basic requirement of natural justice. As the learned Acting Advocate General has rightly pointed out, the object of the statute is speedy disposal of commercial cause and weeding out of false, frivolous, mala fide or doubtful defences and if a full dressed hearing has to be allowed even at the first stage when the Court only tries to ascertain on affidavits whether the defendant has a triable, tenable or bona fide defence, the very object of the statute and the rules would be defeated. In our judgment, therefore, the restrictions put on the manner in which the defendant will be entitled to defend the cause where the summary procedure applies are in the interest of the public in the sense that all those who have a *prima facie* case in commercial causes of the nature contemplated by the said rules shall be entitled to speedy disposal and recovery of their rightful claims and, as such, are not unreasonable. The contention of the applicant on this aspect also fails.

29. It was urged that unlike the English practice the impugned rules do not provide for an appeal or even require the Court to give reasons while making a conditional order or an order refusing the leave to defend and this also is a factor which makes the rules unreasonable. We are unable to accept this submission also. Neither are the requirements of natural justice, and the legislature may or may not provide for them in a given procedure. We have at length examined the question of the requirement of natural justice and have come to the conclusion that the procedure as it stands does not violate any requirement of natural justice and we do not find it necessary to dwell any longer on the subject under this contention also and it is rejected.

30. Now we turn to the challenge made to rule 39 of the Ahmedabad Small Cause Courts Rules read with rule 3 of O. XXXVII on the ground of it being violative of the fundamental right under Article 14 of the Constitution. It was submitted that the impugned rules apply unequally to the plaintiff and the defendant though they are similarly situated in relation to the object of the said provisions. If the object of the rules is speedy disposal of the matters, it does so only in favour of the plaintiff and not the defendant. The expeditious disposal could be also in favour of the defendant but it is not because when the defence is found to be vexatious or mala fide, the rules give a speedy decree in favour of the plaintiff by refusing leave to defend, but even if the plaintiff be vexatious or mala fide and though it may be shown to be so in reply to summons for judgment, the rules do not provide for a speedy disposal of a suit by dismissal and the defendant is compelled to go through the gamut of full hearing and incur the cost and suffer delay till the matter is finally disposed of. Despite the fact that the suit is vexatious and mala fide, the plaintiff will still have the right to lead evidence, cross-examine the defendant and his witnesses and thus have the full advantage of the procedure of full hearing. These rules, therefore, apply unequally to persons similarly situated and should, therefore, be struck down.

31. Article 14 does not provide unqualified guarantee of equal protection of laws. The State is not deprived of the power to classify persons for certain recognised legitimate purposes and "equal protection" only means the right to equal treatment under similar circumstances or to persons similarly situated. Article 14 does not require uniformity of application of laws. For determining whether a classification is reasonable, it is now well established that the Court is required to

take into account various factors. The Court has to see the policy underlying the statutory provision and the object intended to be achieved by it. After ascertaining the policy and purpose, the now well-acknowledged dual test has to be applied: (1) Is the classification rational and based on intelligible differentia which distinguishes persons placed in one group from those who are not included therein; (2) Has the basis of differentiation any rational nexus or relation with the object and policy of the statute? If these tests are satisfied, the provision cannot be held to be invalid.

32. The object and purpose of summary procedure, as we have seen, is to provide a procedure in certain class of commercial claims which conduces not only to speedy disposal of matters but more so the speedy realisation of the amount due by the defendant to the plaintiff by curtailing the opportunity to the defendant to protract the litigation or frustrate the decree the plaintiff may get by lengthy proceedings of the general procedure provided for all types of litigation. Having regard to this primary object of the rules and the policy underlying, it is difficult to hold that the plaintiff and the defendant can be said to be persons similarly situated with reference to the object of the rules. The object is only to enable that class of plaintiffs who have a monetary claim based on negotiable instruments where certain presumptions arise in their favour or claims of recovery of debt or a liquidated demand for money based on contract or guarantee to have their claims decided upon quickly and so also its recovery. In their very nature these claims are such that the Court can, on examining the affidavits and other materials available under the procedure and on hearing the parties or their advocates, decide whether the defence is good, indifferent or bad and pass necessary order for granting conditional or unconditional leave or refuse leave to defend. This necessarily implies also that the policy underlying the provisions is to provide a check against the possibility of a dishonest or false defence put up by a defendant to frustrate the very object of these provisions and it is with this view that the judicial discretion is vested in the Courts to decide on affidavits whether prima facie the defence discloses a triable issue or not or whether the defence is sham or mala fide or whether the defence discloses such facts as may be deemed sufficient to entitle the defendant to a full defence.

33. Even looked at from the point of view of the disadvantage to be suffered by the plaintiff and the defendant having regard to the object of the legislation, the two of them cannot be said to be similarly situated. In the type of cases

which fall within the ambit of the summary procedure, the plaintiff is assumed to be in need of a speedy disposal of his case and speedy recovery of his claim. Delay in recovery of the claims which are prima facie shown to be good claims would work necessarily greater harm to the plaintiffs by keeping them out of their money by a protracted litigation. The ordinary procedure gives all the opportunity to the defendant to so protract the litigation. If a false suit is filed, the only disadvantage that the defendant suffers is that he has to go through the lengthy procedure, but ultimately he is bound to succeed and furthermore will be entitled to recover the cost of the suit. But if false defence is put up and if the summary procedure is not available, he will be in a position to protract the litigation for years and keep the rightful plaintiff even in a commercial cause out of his money and also put impediments in the ultimate recovery of the amount even after the decree is passed. To avoid this real and far-reaching disadvantage to a person having such a claim in the commercial world the summary procedure is enacted. It is obvious, therefore that even looked at from this point of view and keeping in mind the object of the provisions the plaintiff and the defendant could not be said to be similarly situated and the classification made is reasonable. Under the circumstances it cannot be said that the said provisions are discriminatory.

34. The provisions of the summary procedure as applicable to the City Civil Court at Bombay and those applicable to the City Civil Court at Ahmedabad were challenged respectively in the Bombay High Court and this High Court on the ground of their being violative of the fundamental right guaranteed under Article 14 and it will be useful to refer to these two decisions. In the Bombay High Court, in the decision of Laxmanadas Devidas Kapadia v Mathuradas Dwarkadas (1955) 57 Bom LR 1118 while dealing with this challenge the learned Chief Justice Chagla as he then was has observed that it had often been stated that Article 14 does not require uniformity of application of law. What Article 14 prohibits is a classification which is not upon any rational basis. Article 14 does not prevent the Legislature from providing that laws shall apply differently to different persons or to different localities, if in so providing the Legislature has in mind a rational classification. Art. 14 prohibits a classification which has no rational basis or which is in substance discriminatory in character. The very expression 'discriminatory' means that you apply one law to one party or to one locality and a different law to another party or a different locality without

there being any reasonable object in doing so and the question that we have to consider is whether, when the Legislature conferred the jurisdiction of trying summary suits only upon the High Court and left it to the High Court to apply this provision to any Civil Court subordinate thereto it was passing a law which was discriminatory in character and preventing litigants from enjoying the protection of Art 14. The learned Chief Justice has also observed as regards the object of the summary procedure and stated that the very basis of the summary suits is that where there is a commercial litigation commercial men should get expeditious justice in respect of documents and transactions which are commercial in their nature and which requires a quick disposal in order to give security and confidence to commercial men who are to a large extent responsible for the prosperity of the particular region or city where they reside and where they carry on their business or commerce. If that be the correct view of the reason why special jurisdiction with regard to summary suits is conferred upon the High Court then it cannot be disputed that the city of Bombay is an important commercial city and that special procedure is necessary in suits involving commercial transactions in the High Court of Bombay. For instance, there are rules with regard to commercial causes which make it possible for those causes to be decided more quickly than ordinary long causes. The High Court then, after examining the position of the City Civil Court in Bombay observed that commercial men also go to the City Civil Court as much as they go to the High Court and therefore the High Court thought it desirable that the commercial men going to the City Civil Court should have the same facilities that they have when they come to the High Court and no distinction should be made whether the suit was below Rs. 25,000/- or above Rs. 25,000/-. It was held that there was a clear reasonable basis why the City Civil Court in Bombay was selected by the High Court for conferment of this summary jurisdiction whereas the other Courts in the State of Bombay were not included in the ambit of Order 37. These rules were also attacked on the ground that a selection was made between one kind of litigation and another kind of litigation and that whereas a defendant in a suit to which Order 37 did not apply was not compelled to make a deposit, a defendant in a suit to which summary procedure applied had to comply with this drastic provision of an order for deposit contemplated by O 37. The High Court negatived that contention also on the ground that commercial litigation in its very nature

requires to be differently treated from non-commercial litigation and that it was no use suggesting that any ordinary suit which was tried as a long cause should have the same procedure as a suit in respect of a commercial transaction which required a quick and effective disposal. The learned Chief Justice has further pointed out that the Calcutta High Court, considering the same question, had come to the same conclusion in *Ambalal Purshottamdas & Co. v. Jawaharlal*, AIR 1953 Cal 758.

35. In the case of *Sam M. Haeems v. Samson J. Benjamin*, (1966) 7 Guj LR 87, to which we have already made a reference, the rules under Order 37, Civil Procedure Code and Rules 142 to 148 of Ahmedabad City Civil Court Rules, 1961, came under the challenge of contravention of Article 14. Shelat C. J. as he then was, dealing with the point has observed that it was well settled that in order that a provision of law may avoid the mischief of Article 14 of the Constitution, the classification that is made by such a provision must be a rational one and that rational classification must have a nexus with the object to achieve which that provision is enacted. The object of providing summary procedure under Order 37 and the Rules made by the High Court is to avoid delay and unnecessary costs in suits which can be easily disposed of and which do not involve elaborate issues or require elaborate evidence. Though the impugned rules cause differentiation the classification is a reasonable one and such classification has a rational nexus with the object sought to be achieved by the Legislature providing summary procedure. No doubt the procedure under Order 37 does create a difference between defendants in ordinary suits and defendants in suits to which summary procedure applies. But there is good reason for such classification and for providing different treatment to defendants in different varieties of suits. It has then been observed that in a commercial city like Ahmedabad it was necessary that a special procedure was introduced. If, on consideration of circumstances existing in the different parts of the State, different procedures are prescribed for different Courts and even for defendants residing in different parts of the State, such differentiation cannot be said to be unreasonable, capricious or arbitrary and cannot invite the mischief of Article 14.

36. True it is that in neither of these cases the challenge was made in the manner or on the ground as is tried to be made in the present case, but, as pointed out, even examining from that angle the classification made between the plaintiff and defendant and the differentiation in the treatment to be given to

their causes is based on a rational basis relatable to the very object and policy for which the provisions have been brought into existence. The result is that this contention of the applicant must also fail.

37. As we have indicated hereinabove, the applicant had raised a number of other points including questions on merits of the case. But none of them has been pressed. At the end of the argument, however, the learned Advocate for the applicant prayed that in case the Court was inclined to reject the contentions that he had raised, then four weeks' time may be given to him to deposit the amount in compliance with the order passed by the Small Cause Court. Considering the circumstances, we are inclined to grant this request and we extend the time for depositing the money to 10th April 1967.

38. The result is that except for this change in the order passed by the Small Cause Court for the time to deposit, the order is confirmed and the Civil Revision Application is dismissed with costs.

39. Rule discharged.

GGM/D.V.C.

Rule discharged.

AIR 1969 GUJARAT 141 (V 56 C 24)
M. U. SHAH, J.

Shah Shivlal Bhogilal, Appellant v.
Shah Vadilal Dipchand, Respondent.

Second Appeal No. 480 of 1963, D/-
6-2-1968, against decision of Dist. J.,
Mehsana in Regular Civil Appeal No.
111 of 1962.

Civil P. C. (1908), Ss. 37, 38 and 39
and 47 — Decree passed by Court A —
Territorial jurisdiction transferred from
Court A to Court B — Execution appli-
cation in Court B is maintainable.

If, after a Court has passed a decree,
the local jurisdiction in respect of the
subject-matter of the suit is transferred
by an order of the Government to some
other Court, the application for execu-
tion of the decree may be made either
to the Court which passed the decree or
to the Court to which the local jurisdic-
tion has been transferred. (1881) ILR 6
Cal 513 & (1908) ILR 35 Cal 974 & AIR
1962 Punj 394 & AIR 1956 SC 87 & AIR
1925 Bom 414, Foll. (Para 6)

It is settled law that the Court which
actually passed the decree does not lose its
jurisdiction to execute it, by reason of
the subject-matter thereof being trans-
ferred subsequently to the jurisdiction of
another Court. However, having regard to
the object and purpose of Sections 37 to
39 and construing sections 37 and 38 ac-
cording to the language used therein, the

JL/LL/E564/68

sections empowers the decree-holder to file an execution application either to the Court that actually passed the decree or to the Court that can effectively execute it and in the latter case, it is not necessary to comply with the provisions of section 39 of the Code. The Court to whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of transfer and if it entertains the application with reference thereto it would be the proper exercise of its jurisdiction.

(Para 7)

Cases Referred	Chronological	Paras
(1962) AIR 1962 Punj 394 (V 49)= ILR (1961) 2 Punj 445 (FB).		
Mehar Singh v Kasturi Ram	6	
(1956) AIR 1956 SC 87 (V 43)= (1955) 2 SCR 938, Merla Ramanna v Nallapuraju	5	
(1943) AIR 1943 Mad 449 (V 30)= ILR (1943) Mad 804, Balkrish- nayya v Linga Rao	5	
(1942) AIR 1942 Cal 321 (V 29)= ILR (1942) 1 Cal 289, Masrab Khan v Debnath Mali	5	
(1932) AIR 1932 Mad 418=ILR 55 Mad 801 (FB), Ramier v Muthu- krishna Ayyar	5	
(1931) AIR 1931 Cal 312 (V 18)= ILR 58 Cal 832, Sreenath Chakra- vardi v Priyanath Bandopadhyay	6	
(1925) AIR 1925 Bom 414 (V 12)=89 Ind Cas 87 Jagannath Nathu v Ichharam Naroba Vani	8	
(1908) ILR 35 Cal 974=12 Cal WN 859, Udit Narain v Mathura Prasad	5, 6	
(1901) ILR 28 Cal 238=5 Cal WN 150, Jahar v Kamini Devi	5, 6	
(1881) ILR 6 Cal 513=7 Cal LR 521, Latchman v Madan Mohan Mangaldas N Shah, for Appellant, N V Karlekar, for Respondent.	5 6	

JUDGMENT — This appeal is filed by the original decree-holder against the decision of the Court of the District Judge, Mehsana, given in Regular Civil Appeal No. 111 of 1962 of his Court, thereby upholding the decision of the Court of the Civil Judge (Junior Division), Harij Mehsana District, given in Civil Execution Application No. 10 of 1961 of his Court. By the said order, the learned Civil Judge at Harij had dismissed the execution application on the ground that it was only the Court passing the decree, viz., the Court of the Civil Judge (Junior Division), Chanasma, which had the jurisdiction to entertain and try the execution application and that the Harij Court had no such jurisdiction.

2. The appellant-decree-holder had obtained a money decree against the present respondent (judgment-debtor) in Civil Suit No. 40 of 1952, which was modified by the learned District Judge,

Mehsana, in Civil Appeal No. 47 of 1954 by a decree passed on July 15, 1958. The decree passed in favour of the present appellant was for recovering a sum of Rs. 6124-6-0 with costs and interest from the present respondent. During the pendency of the appeal before the District Court, a new Civil Court, viz., the Court of the Civil Judge (Junior Division) at Harij was constituted and this was by a notification Ex. 22 of the State Government, bearing No. CRC 2154/39/154/III published in the Government Gazette, Part IV-A, on April 2, 1957. By the said notification, it was provided that there shall be a Civil Court subordinate to the District Court, Mehsana, at Harij and that the said Court shall be presided over by a Civil Judge (Junior Division) who shall hold his Court at Harij. It was provided that the local limits of the ordinary jurisdiction of the Civil Judge (Junior Division), Harij, shall comprise the areas within the limits of Sami and Harij Mahals. It was further provided that the whole of the Harij Mahal heretofore included within the local limits of the ordinary jurisdiction of the Civil Judge (Junior Division), Chanasma, shall be excluded therefrom. By Office Order No. 56 of 1957, produced at Ex. 23 dated March 18, 1957, the learned District Judge had ordered that all civil suits, darkhasts, miscellaneous applications, B. A. D. R. applications and other proceedings of civil nature pending for hearing on March 31, 1957, after office hours in the Court of the Civil Judge (Junior Division) Chanasma, arising from area within the limits of Harij Mahal stand transferred to the Court of Civil Judge (Junior Division) Harij, with effect from the 1st April 1957. This latter order was made for transfer of business. It is not in dispute that the parties to the suit resided within the limits of Harij and that the cause of action had also arisen within the said limits. It was after the territorial jurisdiction in respect of the Harij area was transferred to the newly constituted Civil Court of the learned Civil Judge at Harij that the appellant (decree-holder) had filed Civil Execution Application No. 10 of 1961 in the Harij Court. At the date of the decree passed in Civil Appeal No. 47 of 1954 by the Court of the District Judge at Mehsana, thereby modifying the original decree passed by the Chanasma Court, in Civil Suit No. 40 of 1952, the jurisdiction in respect of the area situate within the limits of Harij Mahal was vested in the newly constituted Court at Harij. The execution application was filed on July 14, 1961, and it was indisputably filed within the prescribed period of limitation. However, in the Harij Court, an objection was raised on behalf of the respondent (judgment-debtor) that it was the

Chanasma Court, the Court passing the decree, that had jurisdiction in the matter and that the Harij Court had no jurisdiction. The learned Civil Judge at Harij upheld the objection and dismissed the execution application by his order dated June 18, 1962, and the order was upheld by the learned District Judge in Appeal No. 111 of 1962, against which order, this second appeal is filed.

3. I may here say that on the very day on which the Harij Court had dismissed the execution application, the decree-holder had, by way of abundant caution, rushed to the Court of the Civil Judge at Chanasma, the original Court passing the decree, and filed the execution application No. 38 of 1962 wherein the appellant had prayed that the time taken in good-faith in prosecuting the execution application in the Harij Court be excluded for the purpose of computing the period of limitation. The learned Civil Judge at Chanasma had accepted the appellant's case and found that the earlier execution application was prosecuted with reasonable diligence and in good faith and, therefore, the appellant was entitled to the exclusion of such time as provided under Section 14 of the Limitation Act. The order was upheld by the Court of the learned District Judge at Mehsana and the second appeal filed against that order in this Court has been dismissed by me this day by a judgment delivered separately.

4. The only question which falls for my determination in this appeal and which is a question of some importance is as to whether the Court of the Civil Judge at Harij to which the territorial jurisdiction had been transferred by the aforesaid appropriate notification of the State of Gujarat had the jurisdiction to entertain the execution application in pursuance of a decree passed by the Court of the Civil Judge at Chanasma, which earlier had the jurisdiction in the matter and had passed a decree in the suit. The relevant law to be considered for the purpose is to be found in Sections 38 and 37 of the Code of Civil Procedure, 1908 (Act V of 1908), which I will hereafter refer to as the Code. Section 38 provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 37 of the Code gives definition of the Court which passed a decree and reads:

"The expression 'Court which passed a decree', or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

Thus, initially, it was the Court which passed the decree, namely, the Chanasma Court, that had the jurisdiction. But, by the notification issued by the Government of Gujarat referred to earlier, a new Civil Court subordinate to the District Court, Mehsana, was constituted at Harij and the local limits of the ordinary jurisdiction of the said newly constituted Harij Court comprised the areas of Sami and Harij Mahals and further the whole of the Harij Mahal which was upto the time included in the ordinary jurisdiction of the Civil Judge (Junior Division) at Chanasma was excluded therefrom. The notification, it may be remembered, was published in the Government Gazette on April 2, 1957. It is not in dispute as aforesaid that the parties to the suit resided within the local limits of Harij Mahal and that the cause of action had arisen within the jurisdiction of the local limits of Harij Mahal. Thus, after the date of the passing of the original decree by the Court of the first instance and before the application for execution thereof was made by the appellant decree-holder within the prescribed period of limitation, the territorial jurisdiction of the Chanasma Court had ceased and the jurisdiction was vested in the Harij Court.

5. The question, therefore, is whether it is the Chanasma Court or the Harij Court that has jurisdiction to entertain the execution application or whether both the Courts have jurisdiction in the matter. On this question, there is a conflict of judicial opinion. As considered by their Lordships of the Supreme Court in *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87, remarks at p. 93:

"There is a long course of decisions in the High Court of Calcutta that when jurisdiction over the subject-matter of a decree is transferred to another Court, that Court is also competent to entertain an application for execution of the decree, vide *Latchman v. Madan Mohan*, (1881) 6 Cal 513, *Jahar v. Kamini Devi*, (1901) 28 Cal 238 and *Udit Narain v. Mathura Prasad*, (1908) 35 Cal 974."

Their Lordships have further observed:

"But in *Ramler v. Muthukrishna Ayyar*, AIR 1932 Mad 418 (FB), a Full Bench of the Madras High Court has taken a different view, and held that in the absence of an order of transfer by the Court which passed the decree, that Court alone can entertain an application

for execution and not the Court to whose jurisdiction the subject-matter has been transferred."

As observed therein by the Supreme Court

"This view is supported by the decision in AIR 1942 Cal 321. It is not necessary in this case to decide which of these two views is correct, because even assuming that the opinion expressed in AIR 1932 Mad 418 (FB) is correct, the present case is governed by the principle laid down in *Balkrishnayya v Langa Rao*, AIR 1943 Mad 449.

It was further observed.

It was held therein that the Court to whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer and that if it entertains an execution application with reference thereto it would at the worst be an irregular assumption of jurisdiction and not a total absence of it, and if objection to it is not taken at the earliest opportunity it must be deemed to have been waived, and cannot be raised at any later stage of the proceedings.

Thus it appears that their Lordships of the Supreme Court have in the case taken the view that it was settled law that the Court which actually passed a decree did not lose its jurisdiction to execute it by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another Court. And as regards the competence of the Court to whose jurisdiction the subject-matter has been transferred to entertain an application for execution, their Lordships referred to the conflict of authorities on the subject and held without deciding the point that if the latter Court entertained an application, it would at the worst, be an irregular assumption of jurisdiction and not a total absence of it and that if objection is not taken at the earliest opportunity it must be held to have been waived and cannot be raised at later stages of the proceedings. Thus, although the Supreme Court has not expressed its final opinion in the matter the observations in AIR 1943 Mad 449, that the Court to whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer which are referred to with approval, give an incline of its mind.

6 In a recent decision in *Mehar Singh v Kartari Ram*, AIR 1962 Punj 394 (FB) a Full Bench of the Punjab High Court had an occasion to consider the question. On a consideration of the scheme of the Code and its relevant provisions, viz. Sections 37, 38, 39 and 150 and also of the relevant case-law on the point, the Full Bench has taken the view that where, after a decree for possession of

property and mesne profits has been passed, the local area, in which the property is situated, is transferred to a different Court, it is open to the decree-holder to apply for execution of the decree in the latter Court to which the local area has been transferred, and the Court can directly entertain an application for execution without an order of transfer by the Court which had, in fact, passed the decree. The Full Bench has considered that the object and purpose of Sections 37 to 39 along with other provisions occurring in Part II of the Code is to facilitate the execution of decrees. Besides the fact that a decree-holder should be able to recover what has been held to be due to him by Court, it is the duty of the Courts of law to see that their orders and decrees are enforced and that these orders do not become ineffective on some technical ground if at all possible. The opinion of the Full Bench as expressed, to be found at page 397 of the report, is:

"Sections 37 and 38 when construed according to the language used therein empower the decree-holder to file an execution application either to the Court that actually passed the decree or to the Court that can effectively execute it and in the latter case it is not necessary to comply with the provisions of Section 39 of the Code."

I would here refer to the decision of a Division Bench of the Calcutta High Court in (1901) ILR 28 Cal 238, wherein the learned Judges had an occasion to consider the provisions of Section 649 of the Civil Procedure Code (Act XIV of 1882) which corresponds to Section 37 of the Code of Civil Procedure 1908 which governs the present case. The Calcutta decision has taken the view that the provisions of Section 649 of the Civil Procedure Code are permissive and that if, after a Court has passed a decree, the local jurisdiction in respect of the subject-matter of the suit is transferred by an order of the Local Government to some other Court, the application for execution of the decree may be made either to the Court which passed the decree or to the Court to which the local jurisdiction has been transferred. The view taken by the Full Bench of the Punjab High Court is in consonance with the view expressed in this Calcutta case, as well as with the views expressed in (1881) ILR 6 Cal 513 (1908) ILR 35 Cal 974 and AIR 1931 Cal 312. I am in respectful agreement with this Punjab and Calcutta view.

7 Now it is settled law that the Court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the

jurisdiction of another Court. However, having regard to the object and purpose of sections 37 to 39, and construing sections 37 and 38 according to the language used therein, in my opinion, the sections empower the decree-holder to file an execution application either to the Court that actually passed the decree or to the Court that can effectively execute it and in the latter case, it is not necessary to comply with the provisions of Section 39 of the Act. The Court to whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of transfer and, in my opinion, if it entertains the application with reference thereto, it would be the proper exercise of its jurisdiction. In my opinion, both the Courts would have jurisdiction to entertain the application for execution.

8. My view receives some support from the observations of the Division Bench of the High Court of Bombay consisting of Macleod, C. J. and Coyajee, J., made in *Jagannath Nathu v. Ichharan Naroba Vani*, AIR 1925 Bom 414. In that case, a decree was being executed in year 1921 in the Court of the Senior Judge at Dhulia against both the defendants, both of whom had at the time the properties within the jurisdiction of the Court. However, during the proceedings, the property of defendant No. 2 passed within the jurisdiction of the Jalgaon Court. The decree-holder then presented a Darkhast in Jalgaon Court on August 14, 1923, as the Dhulia Court had held that as far as the second defendant was concerned, it had no jurisdiction as the properties of defendant No. 2 were not in that Court's jurisdiction, as subsequent to the passing of the consent decree by the Dhulia Court, the Jalgaon Court was made a First Class Court, and as the second defendant's property was within the jurisdiction of that Court. The question arose with regard to the further execution of the decree against defendant No. 2 in the Jalgaon Court. The darkhast of 1923 was contested by the second defendant on the ground that the darkhast of 1921 was not a proper step-in-aid of execution not being made to the proper Court. The First Class Subordinate Judge held that the application to the Dhulia Court which passed the decree originally, even after the territorial jurisdiction was transferred to the Jalgaon Court, would be a proper step-in-aid and held that Darkhast filed in his Court was in time. While considering the question of limitation for the execution application, the Division Bench took the view that the original application which was made to the Dhulia Court was a step-in-aid of execution. It was observed that "the Dhulia Court was the Court which passed the decree and after cer-

tain territories within its jurisdiction had been transferred to the Court at Jalgaon, then under the provisions of Section 37, the Jalgaon Court would be deemed to be the Court which passed the decree". I am bound by this decision of the Bombay High Court. In this view of the matter, the Harij Court would be deemed to be the Court which passed the decree and had the jurisdiction to execute the decree.

9. In any event, therefore, in my opinion, both the Courts, viz., the Court of the Civil Judge (Junior Division) at Chanasma and the Court of the Civil Judge (Junior Division) at Harij had the jurisdiction in the matter. The decree and order under appeal holding that the decree-holder was not entitled to execute the money-decree passed by the Chanasma Court through the Harij Court after the constitution of the Harij Court must, therefore, be reversed. I hold that the Court of the Civil Judge (Junior Division) at Harij had the jurisdiction to entertain civil execution application No. 10 of 1931 and that it has been wrongly dismissed. The decree and order under appeal are accordingly set aside and so are the decree and order of the trial Court passed in the execution application. Appeal allowed with no order as to costs in the circumstances of the case.

MVJ/D. V. C.

Appeal allowed.

AIR 1969 GUJARAT 145 (V 56 C 25)*
N. G. SHELAT, J.

Harivallabh Chhotalal Nagori, Appellant v. Ahmedali Rajabhai Kadiani, Respondent.

A. F. A. D. No. 1541 of 1960, D/- 30-11-1967, against decision of Dist. and S. J., Jamnagar in C. A. No. 175 of 1958.

Partnership Act (1932), S. 48 — One partner suing another partner for mortgage money — General account not asked for nor third partner made a party — Suit maintainable.

There is no rule of law which precludes an action being brought by any party to a partnership for recovering any amount from any partner even though, it may have some connection with the partnership concern itself.

In a case where the claim is based on a mortgage deed passed by the defendant partner alone he makes himself liable for the amount borrowed thereunder. When in the mortgage deed there is no reference that the amount has to be accounted

*Only portions approved for reporting by High Court are reported here.

JL/KL/E573/68

for in the partnership and a third partner is neither a party to the deed nor to the suit, even though it has connection with the partnership business and may have to be taken into account if partnership is dissolved, and general accounts taken, it is not that it cannot be separated therefrom and no prejudice is likely to be caused to defendant, if a decree for the amount is passed. General accounts need not necessarily be taken at this stage for such a purpose. Defendant if he so desires can file a suit for general accounts, but he cannot force the plaintiff to sue for dissolution of partnership. AIR 1959 Andh Pra 653 & AIR 1948 Nag 266 & (1909) ILR 32 Mad 76, Rel. on. (Para 7)

Cases Referred: Chronological Paras
(1959) AIR 1959 Andh Pra 653

(V 46) Govula Ramakistiah v. Yerram Yellappa 6

(1946) AIR 1946 Nag 266 (V 33)=

ILR (1946) Nag 301 Hari Shankar Misra v Firm Bansilal Abirchand 6

(1909) ILR 32 Mad 76=19 Mad

LJ 10 Karri Venkata Reddi v. Narasayya 6

P V Hathl for V G Hathl, for Appellant S K. Boorjiwala, for Respondent. JUDGMENT.—

1-4.

6 The contention made out by Mr. Hathl, the learned advocate for the appellant is that the mortgage transaction was quite an independent one and whatever the amount was advanced thereunder was advanced to the defendant personally and not in the capacity of his being a partner of a partnership firm, and that any such advance made under the mortgage deed had nothing to do with the partnership business. He further urged that even if it was advanced for partnership purposes a suit such as the one for the amount advanced to the defendant under a mortgage deed can still lie as neither it is barred by any provision of law nor under any terms of contract either under the mortgage deed or the partnership deed between the parties. It will be open, according to him, to the defendant to file a suit for dissolution of partnership and rendition of general accounts, and the decree passed in this suit can well be accounted for therein. Now both the Courts have found that the amount though advanced to the defendant personally under a mortgage deed, it was advanced for partnership business and for that the defendant had made himself liable for the same. That finding of fact cannot be challenged before this Court in second appeal. It has, therefore to be seen as to whether, with that finding, it is open to him to file a suit for recovering the amount under the mortgage deed.

6. Now one fact is clear that having regard to the terms of the mortgage deed Ex. 8 as also the terms of the partnership deed Ex. 5 entered into between the parties, no bar is created against the plaintiff filing such a suit for recovering any amount advanced to the defendant either in his personal capacity or even as a partner of the firm. Besides, the mortgage deed does not in any way recite any condition to have the claim thereunder only adjusted in the settlement of accounts of the partnership. Another fact to be kept in mind is that, besides the defendant and the plaintiff, there was one another person Daudbhai as a partner in the firm. He is not a party either to the mortgage deed or a party to the suit. The transaction of mortgage was an independent one inasmuch as it created liability for the amount taken by him in his different capacity and not as a partner of the firm and again for the benefit of the firm, in that the other partner Daudbhai had nothing to do and he would not be liable for the same. At the same time, apart from authority, it is clear that there is no provision in the Partnership Act which totally forbids any such suit against one of the partners under a different transaction, even though it has some relation to the partnership business in which event that amount may have to be taken into account while taking general accounts. In such circumstances, it is difficult to say that this suit was not maintainable in this connection. I may well refer to material observations from Lindley on 'Law of Partnership', 11th Edition, at page 668. Those observations run thus:—

"Again if one partner gave to his co-partner a bill or note which was in such a form as to bind not the firm, but the partner who gave it, he might be sued by his co-partner thereon, whatever the state of the account between the two might be, and although the bill or note in question had reference to some partnership transaction, for by giving the bill or note, the demand in respect of which it was given was isolated from the general partnership accounts."

Mr Hathl has referred to some decisions in support of such a proposition and I would refer to them. In the case of Govula Ramakistiah v Yerram Yellappa, AIR 1959 Andh Pra 653, it was held that:

"In cases involving special circumstances one partner can sue another during the subsistence of the partnership without asking for its accounts or dissolution. Thus, if a suit is brought by one partner against another for the recovery of a certain amount, the relief sought should be given to him though it may arise out of partnership business or connected with

It and does not involve taking of general accounts."

The next case referred to was of Hari Shankar Misra v. Firm Bansilal Abirchand, AIR 1946 Nag 266. It was a suit for recovery of a loan advanced by the plaintiff to the partnership and the plea raised in defence was that without asking for general accounts the suit for an isolated item was not maintainable. It was held that though ordinarily disputes between partners inter se are decided in a suit for dissolution of partnership and for accounts, there is nothing in law in special circumstances to prevent a partner acting in different capacity to sue some of his partners for such relief as he is entitled to as flowing from that different capacity unconnected with his capacity as a partner. Another case of Karri Venkata Reddi v. Narasayya, (1909) ILR 32 Mad 76, was referred to. It was a suit for recovery of an amount on a cheque and the defence contended that the suit was not maintainable as a suit for general accounts has to be filed, whereby such amount has something to do with the partnership business. That contention was negatived and it was held that "in regard to suits by one partner against another for a partial account the general rule as applied in India, is that if the account is sought in respect of a matter, which, arising out of partnership business, or connected with it does not involve the taking of general accounts, the Court will as a rule give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial account cannot be ordered under exceptional circumstances.

7. It appears, therefore, clear that there is no rule of law which precludes any such action being brought by any party to the partnership for recovering any amount from any partner even though, it may have some connection with the partnership concern itself. The present case stands far on a better footing. The claim is based on a mortgage deed passed by the defendant alone and whereby he has made himself liable for the amount borrowed thereunder. In that deed no reference has been made that it has to be accounted for in the partnership. One other partner is neither a party to the deed nor in the suit. Even though it has connection with the partnership business and may have to be taken into account if partnership is dissolved and general accounts taken, it is not that it cannot be separated therefrom and no prejudice is likely to be caused to the defendant, if a decree for such an advance made to the defendant is passed

in this suit. General accounts need not necessarily be taken at this stage for such a purpose. It would be open to the defendant to file such a suit for general accounts if he so desired. But it can hardly lie in the mouth of the defendant to say that the plaintiff must sue for the dissolution of partnership, and claim general accounts before he can claim any amount of this transaction with the plaintiff. I, therefore, disagree with the Courts below in that respect and held that the suit is maintainable in law and can be decided on its merits.

DGB/D.V.C.

Appeal allowed.

AIR 1969 GUJARAT 147 (V 56 C 26)

V. B. RAJU, J.

Abdul Aziz Ansari, Applicant v. Bhagwandas Nathubhai Master, Opponent.

Civil Revn. Appln. 567 of 1964, D/- 17-3-1967, from decision of Extra Asst. Judge at Surat, D/- 20-2-1964.

(A) Provincial Small Cause Courts Act (1887), Ss. 24 and 27 — Decree or order to be final and non-appealable must be made by Small Cause Court.

S. 24 provides appeals from certain orders of Court of Small Causes. Before this Section applies, the order must be passed by a Court of Small Causes and not by a Court trying a suit cognizable by a Court of Small Causes but not having powers of such court. Under S. 27 it is only a decree or order made by a Court of Small Causes which is final and non-appealable. A decree passed by a Court which is not a Court of Small Causes but which under powers given by the Act passes it in a suit cognizable by a Court of Small Causes does not fall under S. 27. Such a decree or order would be appealable under the Civil Procedure Code (1908) if appealable under the Code. (Para 1)

(B) Provincial Small Cause Courts Act (1887), Ss. 35, 16, 24 and 27 — S. 35 is an express provision contemplated by S. 16 — Suit first tried by Small Cause Court and subsequently by Court of ordinary civil jurisdiction — Order passed by latter Court — Neither S. 24 nor S. 27 would apply.

S. 35 deals with continuance of proceedings of abolished Courts. That section provides that where a Court of Small Causes is abolished, the proceedings shall continue in a Court having ordinary jurisdiction. That Court, therefore, would be a Court having ordinary jurisdiction but empowered by S. 35 to try suits cognizable by a Court of Small Causes and S. 35 is therefore an express provision contemplated by S. 16 of the

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Act. When that happens, the Court bearing the suit subsequently would not be a Court of Small Causes but would be a Court of ordinary jurisdiction and S 24 will have no application to an order passed by such a Court, nor would S 27 apply AIR 1941 Mad 103 & AIR 1931 All 574 (FB) Rel. on, (1901) ILR 25 Bom 417 & AIR 1935 Mad 919 Dist.

(Para 1)

Cases Referred Chronological Paras
(1941) AIR 1941 Mad 103 (V 28)=
1940-2 Mad LJ 700 Kamalathammal v Harihara 2

(1935) AIR 1935 Mad 919 (V 22)=
69 Mad LJ 443 Ramaswami v Firm of K1 Karu 2

(1931) AIR 1931 All 574 (V 18)=
ILR 54 All 171 (FB) Bhagwati Pande v Badri Pande 2

(1901) ILR 25 Bom 417=3 Bom LR
129 Shankarbhai v Somabhai 2
Mangaldas M. Shah, for Applicant P
D Desai, for Opponent

ORDER — The question in this revision is whether an appeal lies when a suit cognizable by a Court of Small Causes is partly tried by such Court and subsequently tried by a Court which has not the small cause powers, because the first Judge is transferred. Section 35 of the Provincial Small Cause Courts Act deals with such a situation and reads as under—

“Continuance of proceedings of abolished Courts—

35(1) Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit.

(2) Nothing in this section applies to cases for which special provision is made in the Code of Civil Procedure as extended to Courts of Small Causes or in any other enactment for the time being in force

Before the interpretation to be put on this section is considered, I would like to notice certain points. Chapter II of the Provincial Small Cause Courts Act (hereinafter referred to as the Act) provides for the constitution of Courts of Small Causes. Chapter III of the Act deals with jurisdiction of such Courts. Section 15 provides that a Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule. Sub-section (2) provides

(2) Subject to the exceptions specified in that Schedule and to the provisions

of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes

Section 16 then provides as follows—

16 Save as expressly provided by this Act or by any other enactment for the time being in force a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable

Section 16 uses the words Save as expressly provided by this Act If there is such an express provision, a suit cognizable by a Court of Small Causes can be tried by another Court. Section 24 provides appeals from certain orders of Courts of Small Causes. Before this Section applies, the order must be passed by a Court of Small Causes and not by a Court trying a suit cognizable by a Court of Small Causes but not having the powers of such a Court. Section 27 provides:

27 Save as provided by this Act a decree or order made under the foregoing provisions of this Act by a Court of Small Causes shall be final.

It is only a decree or order made by a Court of Small Causes which is final and non appealable. A decree passed by a Court which is not a Court of Small Causes but which under the powers given by the Act passed it in a suit cognizable by a Court of Small Causes does not fall under Section 27 Such a decree or order would be appealable under the Civil Procedure Code if appealable under the Code Now if we turn to section 35 that Section deals with continuance of proceedings of abolished courts. That section provides that where a Court of Small Causes is abolished, the proceedings shall continue in a Court having ordinary jurisdiction. That Court, therefore, would be a Court having ordinary jurisdiction but empowered by Sec. 35 to try suits cognizable by a Court of Small Causes and section 35 is therefore an express provision contemplated by Sec. 16 of the Act. When that happens, the Court hearing the suit subsequently would not be a Court of Small Causes but would be a Civil Court of ordinary jurisdiction and section 24 will have no application to an order passed by such a Court, nor would section 27 apply

2 The learned Counsel for the petitioner relies on the decision in Shankarbhai v Somabhai, (1901) ILR 25 Bom 417 but that is not a case under section 35 of the Act. He also relies on AIR 1935 Mad 919 Ramaswami v Firm of K1 Karu, but in that case sections 24, 16 and 27 have not been considered. There is another Madras ruling in Kamalathammal

v. Harihara, AIR 1941 Mad 103. There it is observed:

"Section 35 does not say that the Court which is empowered thereunder to entertain proceedings owing to a Small Cause Court ceasing to have jurisdiction with reference to the case, should have jurisdiction to try the suit as a Court of Small Causes. It is sufficient if it has jurisdiction to try the suit".

The learned Judge, Patanjali Sastri also referred to the Madras decision in AIR 1935 Mad 919 and made the following observations:

"Section 35 provides not only for the continuance of pending proceedings in the same Court when that Court's jurisdiction is changed, but also for their continuance in a different Court on the abolition of the original Court. Apart from this, if as the learned Judge thinks, there is nothing in section 35 to turn a small cause suit into an original suit it is difficult to see anything in it to turn a civil Court into a Court of Small Causes, so as to attract the application of Section 27 barring appeals in respect of a decree or order made by a Court of Small Causes."

..... The Full Bench decision in ILR 54 All 171=(AIR 1931 All 574) held that a suit instituted as a small cause suit, if tried as an original suit in the circumstances mentioned in section 35 when there was no other Judge in the local area with adequate small cause powers to try it as a small cause suit, should be regarded as an original suit, and the decree passed in it would be appealable."

The learned Judge agreed with the Full Bench view in Bhagwati Pande v. Badri Pande, ILR 54 All 171=(AIR 1931 All 574) that a suit instituted as a small cause suit if tried as an original suit in the circumstances mentioned in section 35 when there was no other Judge in the local area with adequate small cause powers to try it as a small cause suit, should be regarded as an original suit and the decree passed in it would be appealable. I also agree with this view and hold that S. 27 of the Act does not operate in the circumstances of the case to bar an appeal. I, therefore decline to interfere in revision in this matter.

DGB/D.V.C.

Application rejected.

AIR 1969 GUJARAT 149 (V 56 C 27)

V. B. RAJU, J.

Patel Kalidas Devraj and others, Applicants v. Patel Kuverji Asharam, Opponent.

Civil Revn. Appln. No. 610 of 1964, D/- 22-6-1967, from decision of Civil J. Jr. Dvn. at Dhrangadhra, D/- 11-7-1964.

EL/GL/C159/68

Civil P. C. (1908), S. 115 and O. 13, R. 9 — Material irregularity in exercise of jurisdiction — Return of document by Court without following procedure under O. 13, R. 9 and without allowing it to be proved — There is material irregularity in exercise of jurisdiction. (Para 2)

C. C. Gandhi, for Applicants: P. M. Rawal, for Opponent.

ORDER:— The applicants in revision filed a suit for redemption of a mortgage said to have been executed by their ancestor in 1899 in favour of the ancestor of the opponent. According to them, a copy of the document was produced in another suit and the record was in the High Court. The lower Court allowed a witness from the High Court to be called to produce a copy of the mortgage deed said to have been produced in suit No. 109/59. When the witness came from the High Court and produced the whole record, the Civil Judge (J. D.) at Dhrangadhra passed an order that the whole record should be returned. When a witness is summoned to produce a document, the document produced must be kept on record in order to enable the party calling for it to prove it at a subsequent stage. It is ordinarily not proved on the very day. First of all, a document which is called for to be produced by a witness must be proved and kept on record. The question of returning that document comes later. When the document is returned, the procedure laid down in Order 13, Rule 9, Civil Procedure Code, must be followed. The said Order 13, Rule 9, reads as follows:—

"9 (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under Rule 8, be entitled to receive back the same, —

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of;

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided that no documents shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it."

In fact, the applicants are anxious to prove the document. If the document is admissible in evidence and is properly proved, it is to be admitted in evidence. If it is not admissible in evidence or is not properly proved, then it has got to be rejected. Even after it is rejected, it has to be returned under Order 13, Rule 9, Civil Procedure Code, by following the procedure laid down therein. All this has not been done. There is, therefore, a material irregularity in the exercise of jurisdiction, because the document in question is supposed to be a copy of the mortgage deed of 1899 before the Indian Registration Act and the original is supposed to be in possession of the opponent mortgagee, and the copy is said to have been produced by the opponent himself in the other suit. All these questions should have been gone into. The document cannot be returned immediately after it is produced by a witness, who comes under section 139 of the Indian Evidence Act.

2. The application is, therefore, allowed, and the lower Court is directed to keep Ex. 18/1 produced by the clerk of the High Court and return it only after following the procedure laid down in Order 13, Rule 9, Civil Procedure Code, and for that purpose to call the witness from the High Court again. Ex. 18/2 is a public document and it is open for any one to produce a certified copy thereof, and moreover it is only an application by an advocate. There is therefore no need to keep it on record.

GGM/D.V.C.

Petition allowed.

AIR 1969 GUJARAT 150 (V 56 C 28)

A. D. DESAI, J.

Bal Sarda Wd/o. Bhuralal Nyalchand, Applicant v. Patel, Keshavlal Jaitaram, Opponent.

Civil Revn. Appln. No. 548 of 1965, D/- 7-10-1967, against order of Civil J. Jr. Dvn., Vijapur, D/- 30-6-1965.

(A) Succession Act (1925), S. 214 — Production of succession certificate — Trial Court specifying time limit for production of succession certificate — Section only requires production of certificate at any time before decree is passed — Trial Court's order was erroneous. (Para 5)

(B) Succession Act (1925), S. 214 — Original pro-note executed in favour of deceased husband of plaintiff — Original pro-note substituted by a new one in favour of plaintiff — Consideration of

substituted pro-note was initial amount loaned by deceased husband — Succession certificate held not necessary — Fact that consideration of substituted pro-note was initial amount of the original pro-note had no relevance. (Para 4)

Mangaldas M. Shah, for Applicant; S. N. Patel, for Opponent.

JUDGMENT :— This revision petition is directed against the order passed by the learned Civil Judge, Junior Division, Vijapur, in Civil Suit No. 74 of 1964, ordering that the petitioner who is the plaintiff in the suit should apply for obtaining a succession certificate and produce the same in the suit within 2 months from the date of the order.

2. Short facts leading to this petition are that the opponent had borrowed on November 26, 1957 an amount of Rs. 1100 from one Bhurabhai alias Mohanlal Nihalchand who was the husband of the plaintiff. The opponent had executed a pro-note in favour of Bhurabhai Nihalchand which was produced in the suit at Ex. 31. Thereafter the opponent executed another pro-note on November. 4, 1960 for the amount of Rs. 1374/- in favour of the petitioner as guardian of her sons Ramesh, Mukesh and Mahesh. The consideration of this pro-note was the amount of previous loan of Rs. 1100/- advanced by Bhurabhai Nihalchand plus interest thereon. Thereafter the opponent executed another pro-note in favour of the petitioner on May 17, 1961. The consideration of this pro-note consisted of the loan advanced by Bhurabhai plus the interest till the date of the execution of the pro-note. It is on the basis of this pro-note, Ex. 26, that the petitioner had filed the Civil Suit No. 74 of 1964 in the Court of Civil Judge, Junior Division at Vijapur against the opponent to recover the amount of Rs. 1716-57 P.

3. The opponent resisted the suit on various grounds. The opponent denied that he executed the pro-note or that he received any consideration. He also contended that the suit was barred by limitation and that the plaintiff could not institute the suit without obtaining a succession certificate as required by Section 214 of the Indian Succession Act. The learned trial Judge tried the issue as to whether the plaintiff could file the suit without obtaining a succession certificate as a preliminary issue and held that the plaintiff should apply for succession certificate and ordered her to produce the same in the Court within two months, failing which the suit was to stand dismissed.

4. Mr. Shah appearing for the petitioner challenged this order passed by the learned trial Judge and contended, that in this case, it was not necessary for the petitioner to obtain a succession cer-

tificate. The argument was that the petitioner had filed the suit on the basis of the promissory note executed in her favour and that the petitioner did not claim any amount as an heir of her husband and, therefore, no succession certificate was necessary. Now it is stated in the plaint that the opponent had executed a promissory note in favour of the plaintiff on May 17, 1961 and that the opponent did not pay the amount thereof. The plaintiff had, therefore, instituted the suit to recover the amount and the interest on the basis of the contract between the plaintiff and defendant as evidenced by the pro-note. It is evident, therefore, that the petitioner was not claiming any amount in her capacity as an heir to her husband. The plaintiff was claiming the amount due in her own independent right and on the basis of the contract between the parties thereto. Section 214 of the Succession Act, 1925, reads as under:—

"Section 214(1) :— No Court shall

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or,

(ii) a certificate granted under section 31 or Section 32 of the Administrator General's Act, 1913 (III of 1913), and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein, or

(iv) a certificate granted under the Succession Certificate Act, 1889 (VII of 1889), or

(v) a certificate granted under Bombay Regulation No. VIII of 1827, and, if granted after the first day of May 1889, having the debt specified therein.

(2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land, used for agricultural purposes."

The provisions of this Section prohibit the Court from passing a decree against a debtor of a deceased for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person. It is clear that the claim contemplated by the section is a claim made by a person in the capacity of and as a legal representative of the deceased creditor. In the present case the suit was based on the specific contract between

the parties. It is no doubt true that the initial amount was loaned by the husband of the plaintiff and that was the consideration for executing the pro-note Ex. 26 by the opponent. Under the Indian Contract Act the consideration may flow from a third party. The execution of pro-note Ex. 26 created a novatio between the plaintiff and the defendant and the original contract was substituted by a new one. The petitioner was claiming on the basis of the contract which was executed in her favour, and in her own independent capacity and not as an heir of the deceased creditor. It is evident that in these circumstances no succession certificate is required to be produced before the Court in order to enable it to pass a decree in favour of the plaintiff. According to the trial Court a succession certificate was necessary because the consideration of the pro-note on which the suit was based was the initial amount loaned by the husband of the plaintiff, and that the suit of the plaintiff was to recover the said amount loaned by her husband. The trial Court also held that the pro-note Ex. 26 was only an acknowledgment of the debt by the defendant. The learned trial Judge has failed to notice that the consideration of the contract may flow from a third party. The pro-note Ex. 26 clearly indicates that it is a promissory note and not an acknowledgment. It is also not correct to say that the suit is filed to recover the amount due to the husband of the plaintiff but the suit is filed to recover the amount due on the basis of the specific contract between the plaintiff and the defendant. The provisions of Section 214 of the Indian Succession Act, cannot apply to such a case.

5. Next it should also be noted that Section 214 of the Succession Act prohibits the Court from passing a decree unless a succession certificate is produced in the case. In this case, the learned Judge has raised an issue as to whether the plaintiff can institute a suit without obtaining a succession certificate and ordered that the plaintiff should file the certificate within two months and failing to do so ordered the suit to be dismissed. This order is obviously erroneous and contrary to the express provisions of Section 214 of the Indian Succession Act which only requires the production of succession certificate at any time before the decree is passed.

6. The result is that in view of the fact that the plaintiff has filed the suit in her own capacity as the person in whose favour a pro-note was executed, the order passed by the trial Judge requiring the plaintiff to produce the succession certificate is erroneous. I, therefore, set aside the order requiring the

plaintiff to obtain succession certificate and direct that the learned trial Judge should dispose of the suit according to law

7 Rule made absolute with no order as to costs.

VGW/D V C.

Order accordingly.

AIR 1969 GUJARAT 152 (V 56 C 29)

V R. SHAH, J

Ba: Vasanti Wd/o Patel Ishvarlal, Chumanlal, Appellant v Suryaprasad Ishvarlal Patel, Respondent.

A. F O No 42 of 1963 D/- 16-4-1968, against decision of Judge VII Court City Civil Court at Ahmedabad, in Darkhast No 883 of 1961

Limitation Act (1908), Art. 182(1) and (7) — Civil P. C. (1908), Ss 2(2), 2(9), 33 and O 20, Rr 6, 7 and O 23, R 3 — Compromise on 20-3-1958 — Defendant agreeing to pay amount within three months of compromise — Court ordering on 28-3-1958 to draw up a decree in terms of compromise on payment of Court-fee by each party — No Court-fee paid — Dy an order of Court decree prepared and signed on 26-4-1961 bearing date 28-3-1958 — Execution application filed on 28-9-1961 held barred by time — Decree came into existence on 28-3-1958 as it was the date on which judgment was pronounced and the date 20-3-1958 on decree was the correct date.

A compromise purshis was put by the parties before the Court on 20-3-1958 By that compromise defendant was to pay certain amount on account of mesne profits within three months from the date of compromise and it was also agreed that each of the parties shall pay to Government an amount of Rs. 381-4-0 for Court-fees The trial Court on 23-3-1958 ordered that the decree be drawn up in terms of it on payment of Court-fees by each party No amount of Court-fees was paid by either party and no decree was drawn up On an application of the plaintiff to draw up the decree without payment of Court-fees, the Court passed an order on 8-4-1961 to draw up a decree which was prepared and signed on 26-4-1961 But the decree bore the date of 20-3-1958 On an execution application filed on 28-9-1961

Held that the execution application was barred by limitation. (Para 21)

The decree that was drawn up bore the date 20-3-1958 and the same was the correct date as it was a date on which the judgment was pronounced and therefore, the period of limitation should run on the basis that the decree was dated 20th March 1958 If clause (1) of Article

182 of the Limitation Act applied, then the execution application being more than three years from the date of the decree was barred by limitation. If however, clause VII of Article 182 applied even then, the last date on which the payment was required to be made being 20th June, 1958, the execution application was more than three years after that date and therefore also, it was barred by limitation. Case Law discussed. (Para 17)

It could not be said that until the condition was fulfilled, no decree came into existence Trial Court's order did not deal with the passing of the decree As soon as the judgment was delivered, a decree was bound to be passed immediately thereafter There is a distinction between the passing of a decree and drawing up of a decree The passing of the decree is earlier in time and follows as a matter of course as soon as a judgment is pronounced The decree came into existence by provisions of S 33 C, P C, immediately when the judgment was pronounced and it was to bear the date on which the judgment was pronounced. What was postponed by the trial Courts order was drawing up of the decree and not the passing of the decree.

(Paras 13, 18)

Though the decree was to be drawn up only after the Court-fees were paid, that was a condition which the plaintiff could have immediately fulfilled. If she had done what she was directed to do by the Court immediately, the decree could have been drawn up at once If she committed delay in supplying the court-fees and thus allowed time to pass away, without there being drawn up a decree in her favour, it could not be stated that the decree did not come into existence until after she paid the Court-fees or the Court passed the order removing that condition. Case Law discussed.

(Para 18)

Further, the drawing up of the decree had nothing to do with the provisions of Order 23 Rule 3 and therefore there need not be any express order of the Court that the decree should be drawn up Once the Court had expressed its satisfaction about the existence of a compromise or Lawful agreement adjusting the suit, an order recording that compromise was mandatory on the Court, and though there were no express words to that effect in the endorsement of the Court, the fact that it ordered drawing up of a decree would necessarily imply that it made an order recording the compromise, because it was that order itself which was the foundation and basis of the decree, which was ordered to be drawn up Equally the order to draw up the decree necessarily implied that the court had passed a decree.

(Para 13)

Cases Referred:	Chronological	Paras
(1962) AIR 1962 Pat 398 (V 49)=		
1962 BLJR 434, Rajeshwar Rai v. Shankar Rai		12
(1957) AIR 1957 All 114 (V 44)=		
ILR (1956) 1 All 563, Anant Ram v. Basdeo Sahai		20
(1956) AIR 1956 All 121 (V 43),		
Mahomad Hasnain v. Yusuf Husain		19
(1942) AIR 1942 Pat 410 (V 29)=		
ILR 21 Pat 366, Md. Sadique Mian v. Mahabir Sao		15, 16
(1938) AIR 1938 All 539 (V 25)=		
ILR (1938) All 848, Babu Ram v. Gopal Sahai		6, 18
(1924) AIR 1924 Cal 351 (V 11)=72		
Ind Cas 646, Kishori Mohan Pal v. Provash Chandra		17
(1916) AIR 1916 Sind 2 (V 3)=9		
Sind LR 193, Khudadad v. Morio-khan		6, 15
B. J. Shelat, for Appellant;		S. K.
Zaveri, for Respondent.		

JUDGMENT :— The appellant in this appeal is the judgment-creditor and she filed an execution application to execute the decree. It has been dismissed by the executing Court on the ground that it is barred by limitation. It is against this order that this appeal has been brought by the judgment-creditor.

2. At the time when this appeal was taken up for hearing, Mr. Zaveri, learned Advocate for the respondent raised a preliminary objection that an appeal from order cannot lie, but it should have been filed as a First Appeal. The learned advocate for the appellant, Mr. Shelat, agrees to this and both Advocates have no objection to this appeal being treated as First Appeal. I, therefore, direct that this appeal may be registered as First Appeal and I proceed to dispose it of on that basis.

3. The appellant filed the suit for maintenance both past and future, as well as for a declaration of her rights to a share in the property. A compromise purshis was put by the parties before the Court on 20th March 1958. By this compromise the defendant was to pay Rs. 1100/- on account of mesne profits for the period 1st April 1954 to 20th March 1958 within three months from the date of the compromise. The compromise also entitled the plaintiff-appellant to recover that amount with six per cent interest thereon if the same were not paid within three months. In this appeal I am not concerned with the other terms of the compromise except that by the last clause it was agreed that each of the parties shall pay to Government an amount of Rs. 381-4 As. for court-fees.

4. On this compromise purshis, the Court endorsed the following order on the same day.

"The plaintiff and the defendant are present. The compromise is read over and explained to them and they admitted the same. Hence decree be drawn up in terms of it on payment of Court-fees of Rs. 381-4-0 by each party."

No amount of court-fees was paid by either party and no decree was drawn up. On 6th January 1960, the appellant gave an application to draw up the decree without payment of court-fees as directed earlier. On that application, after hearing the parties the court passed the following order on 8th April, 1961.

"I therefore, order that the office should draw up a decree and send its copy to the Collector for recovery of the deficit court-fees from parties shown in the compromise decree." Thereupon the office prepared the decree and it was signed by the learned Civil Judge on 26th April 1961. The decree bears the date of 20-3-1958.

5. The Judgment-creditor appellant filed an application for execution on 28th September 1961. It is filed after more than 3 years from the date of the decree, that is from 20-3-1958. The payment was ordered to be made within three months of that date that is, the last date on which the amount of Rs. 1100/- should be paid by the respondent to the appellant was 20th June 1958. The execution application was more than 3 years from that date also. Naturally, therefore, an objection about the execution application being barred by limitation was taken by the respondent. In order to meet this objection, the learned advocate for the appellant advanced two arguments, namely (1) that by the order dated 8th April 1961, the trial Court amended the decree that was made on 20th March 1958 and that limitation of three years, therefore began to run from the date of the amendment, and (2) that the order made by the learned trial Judge on 20th March 1958 was a provisional judgment and that a final judgment was delivered by the learned trial Judge on 8th April 1961 and therefore the decree is really made on 8th April 1961 and that the application for execution is within the period of 3 years from that date. The learned trial Judge negatived both these contentions. In the appeal before me the first ground, namely, that the order dated 8th April 1961 amounted to an amendment of the decree, was not pressed. It is obvious that the order dated 8th April 1961 does not amend anything. It only removes the impediment which was set by the original order against the drawing up of the decree itself.

6. In support of his argument, that order of the Court made on 20th March 1958 was a provisional judgment and that a final judgment was delivered by the Court on 8th April 1961, Mr. Shelat,

learned advocate for the appellant relied upon a decision in the case of *Khudadad v. Morlokhan*, AIR 1916 Sind 2. He also raised another argument, namely, that the decree was passed on condition and that so long as the condition was not fulfilled no decree came into existence and therefore the decree came into existence only when the condition was removed by the trial Judge on 8th April 1961. He relied for this purpose on a decision in the case of *Babu Ram v. Gopal Sahai*, AIR 1938 All 539.

7. Mr Zaveri, learned advocate for the respondent urged that what was ordered to be postponed by the trial Judge's order on 20th March, 1958 was not the passing of the decree, but the drawing up of the decree, that is the preparation of the decree in accordance with the provisions of Order 20 Rule 6 of the Code of Civil Procedure. He urged that in view of the provisions of Order 23, Rule 3 of the Civil Procedure Code, the decree came into existence as soon as the order was made by the learned trial Judge on 20th March 1958. He pointed out that under Order 20 Rule 7 of the Civil Procedure Code the decree should bear the date on which the judgment was pronounced and since the trial Court made the order on 20th March 1958 the decree rightly bears that date and therefore limitation begins to run from that date. It was further urged by him that the order of the Court on 20th March 1958 directed the appellant and respondent to pay an amount of Rs. 381-4-0 each by way of Court-fees before the decree was drawn up. He urged that it was open to the plaintiff-appellant to pay up this amount immediately after the order was made by the Court on 20th March 1958 and she could have paid the amount on behalf of the defendant also and thus facilitated the drawing up of the decree in order to enable her to execute the same. If she had paid the amount on behalf of the defendant also the said amount could have been adjusted in the execution application. It was, therefore, urged that the condition that was imposed by the order of the learned trial Judge on 20th March 1958, was a condition which it was open for the appellant to fulfil immediately after the order was made. It was also urged that merely because the appellant neglected to pay up that amount and moved the Court afterwards to remove that condition, the appellant cannot now be heard to say that the decree was not passed on 20th March 1958.

8. In the alternative Mr Zaveri argued that even if the decree were really made on 8th April 1961 still the decree bears the date of 20th March 1958 and that date is a part of the decree itself

and the executing Court cannot go behind that fact and try to substitute the same by putting some other date instead of the date which really appears on it on the ground that it was a wrong date. Mr Zaveri also argued that the decree directs the appellant to pay the amount within three months, which would mean that the decree directs the payment to be made at least on 20th June 1958 if not earlier and under Article 182, clause (vii) of the Limitation Act of 1908, the application for execution of the decree should have been made within three years from 20th June 1958 that is on or before 20th June 1961. Since this execution application is made after 20th June 1961, the same is barred by limitation.

9. In order to appreciate the relevant contentions involved in this appeal, it is necessary to refer to certain provisions of the Civil Procedure Code. The word 'judgment' is defined in Section 2(9) as being a statement given by the Judge of the grounds of a decree or order. Section 33 of the Code provides that after the case has been heard, the Court shall pronounce judgment, and on such judgment a decree shall follow. Order 20, Rule 6 provides the manner in which a decree passed by the Court shall be drawn up. Order 20 Rule 7 then provides that the decree shall bear date of the judgment. Order 21, Rule 11 enables the judgment-creditor to make an oral application at the time of passing of the decree for immediate execution thereof by the arrest of the judgment-debtor. This rule therefore provides that a decree for payment of money can be executed even if it is not drawn up according to the provisions of Order 20 Rule 6 of the Code. A decree is defined in Section 2, sub-section (2) as meaning a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy to the suit.

10. Order 23 Rule 3 of the Civil Procedure Code deals with a compromise or agreement adjusting the suit between the parties to a litigation. Under that provision if the Court is satisfied that a suit has been adjusted by any lawful agreement or compromise, the Court shall order the agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

11. A consideration of these provisions of the Code of Civil Procedure, brings out clearly certain conclusions. An order of the Court expressing its satisfaction about the existence of a lawful compromise or agreement adjusting the suit between the parties to it is the basis of an order made by it to record the

same. Such an order recording the compromise or agreement is appealable under the provisions of Order 43 of the Code of Civil Procedure. The Court's statement expressing its satisfaction that there is an agreement or compromise adjusting the suit, therefore, amounts to a judgment, because it provides the ground to the Judge for making an order to record the compromise. Upon such judgment, as directed by the provisions of Order 23, Rule 3, a decree has to be passed by the Court. Section 33 would then come into play and the decree that is ultimately passed under the provisions of Order 23, Rule 3 should bear the same date as the judgment upon which it is based, that is the same date as the date under the endorsement of the Judge about his satisfaction that the compromise or lawful agreement adjusting the suit is proved before him. It is also clear from the provisions of Section 33 that as soon as the judgment is pronounced, a decree is bound to follow it. The decree being a formal expression of the adjudication by the Court, must follow immediately after the judgment of the Court is pronounced. When, therefore, the Judge after pronouncing his judgment proceeds to pass an order in which he incorporates the result of his decision and gives a final adjudication about the rights of the parties in controversy before him, he passes a decree. The final order in the judgment, therefore, amounts to the passing of a decree by the Judge. The drawing up of the decree under Order 20, Rule 6 is a separate and independent act which is subsequent to the passing of the decree. It follows from this that a decree is passed by the Court even if, for the time being, there is no decree drawn up in the form provided under Order 20, Rule 6 of the Code. The passing of the decree, is, therefore, independent and earlier to the drawing up of a decree. The decree is bound to bear the date on which the judgment was pronounced. It does not matter that the decree was drawn up a long time after the judgment was pronounced. This position is clear from the various provisions of the Civil Procedure Code referred to above.

12. In the case of *Rajashwar Rai v. Shankar Rai*, AIR 1962 Pat 398, the Court considered the various provisions referred by me above and has held as follows:

"Reading Ss. 2(2), 2(9), 33 and O. 20, Rr. II, 6 and 7 together it must be held that the 'decree' as defined in Section 2(2) comes into existence as soon as the judgment is pronounced. It does not necessarily mean the formal decree which is prepared in accordance with Section 33 and Order 20 Rule 6. The definition of the word 'decree-holder' in Sec. 2 (3) makes it further clear that the decree-holder means a person in whose favour a decree has been

passed as soon as the judgment has been pronounced, and not necessarily a person in whose favour a decree has been formally prepared, as required by Section 33."

13. The main question, therefore, which falls to be considered in this appeal is as to when was the judgment upon which this decree is based was pronounced. If the judgment was pronounced on 20th March, 1958, then the decree rightly bears the date of 20th March 1958. If, as urged by Mr. Shelat, the final judgment was pronounced on 8th April, 1961, then the decree should bear the date '8th April 1961' and not '20th March 1958'. In order to understand this position, it is necessary to analyse the provisions of Order 23, Rule 3 of the Code of Civil Procedure and then to interpret the order passed by the Court on 20th March 1958 in the light of this analysis. The provisions of Order 23, Rule 3 require the Court to take three steps each one after the other. The first step that is taken by the Court is to give a finding about its satisfaction that a suit has been compromised or adjusted by an agreement between the parties: if such satisfaction is arrived at, then the next step to be taken by the Court is to make an order recording the compromise or agreement; and it is only after such an order is made, that the Court shall proceed to the third step of passing a decree in accordance with the terms of the compromise. The drawing up of the decree has nothing to do with the provisions of Order 23, Rule 3 and therefore, there need not be any express order of the Judge that the decree should be drawn up. If a decree is passed unconditionally, it is the duty of the office to draw up the decree and place it before the Judge for his signature. That is what is required by the provisions of Order 20, Rule 6 of the Code. In the instant case, the trial Judge has recorded his satisfaction about the existence of a compromise or lawful agreement whereby the suit has been adjusted. The second requisite requirement is wanting because there is no express order made by the learned trial Judge that the compromise is recorded. The third requirement is also absent in so far as specific words are concerned because there is no direction or order passing a decree in accordance with the terms of the compromise. There is, however, an order that the decree shall be drawn up in accordance with the terms of the compromise on payment of an amount of Rs. 381-4-0 by each party. Though, therefore, there is absence of any express statement recording the compromise or passing a decree, still the above direction to the office necessarily implies the recording of compromise and passing of a decree. Once the Court has expressed its satisfaction about the existence of a compromise or lawful

agreement adjusting the suit, an order recording that compromise is mandatory on the Court, and though there are no express words to that effect in the endorsement of the learned Judge the fact that he ordered drawing up of a decree would necessarily imply that he made an order recording the compromise, because it is that order itself which is the foundation and basis of the decree, which is ordered to be drawn up. Equally the order to draw up the decree necessarily implies that the Judge has passed a decree. Therefore, even though the second and third steps are not to be found in express language in the judgment of the learned trial Judge, still, in the circumstances of the case there is no doubt that they are implied in the order itself. I would, therefore, proceed on the basis that there is an order recording the compromise. The expression of satisfaction by the learned trial Judge along with the order to record the compromise will be the judgment on the basis of which the decree is passed. This order is dated 20th March 1958 and therefore the decree that is passed will also bear that date. It should be noted that what is postponed is not the 'passing' of the decree but the 'drawing up' of the decree. As I stated above the passing of the decree and the drawing up of the decree are two separate and independent acts. The passing of the decree is earlier in time and follows as a matter of course as soon as a judgment is pronounced. It is by the force of the statute itself, namely the provisions of Section 33 of the Code that a decree comes into existence immediately when a judgment is pronounced. Therefore since the learned trial Judge has postponed the drawing up of the decree it follows that he has not postponed the passing of the decree. The decree therefore, in terms of the compromise has been passed as soon as the judgment was pronounced on 20th March 1958 and since the decree has been passed on that date, it must bear that date. The drawing up of the decree would not invest the decree-holder with any new right which he did not possess at the time of passing of the decree. Even if there was no decree drawn up by the office it was open to her (plaintiff appellant) to ask for execution of the decree. It was also open to her to immediately comply with the requirement imposed by the Court, namely, the payment of Rs 381-4-0 as Court fees on her behalf as well as an equal amount on behalf of the defendant in order that the decree should be drawn up. If she paid the amount on behalf of the defendant it would be open to her to ask for the recovery of that amount in execution. Therefore, if the drawing up of the decree is postponed until the plaintiff does

a certain act and it is competent to the plaintiff to do that act immediately, the law will fill presume that the plaintiff has done that act immediately and therefore, even if the plaintiff delays the doing of that act still the decree, when drawn up, will bear the date on which the judgment was pronounced on the basis that the plaintiff has removed the impediment immediately after the pronouncement of the judgment.

14. The order dated 8th April 1961 has no more effect than removing the impediment which postponed the drawing up of the decree. This impediment could have been removed by the plaintiff paying the amount of Court fees. In this case, however, on her application, the Court itself removed the impediment which it has put on the drawing up of the decree. The order dated 8th April 1961, therefore, does not introduce any new factor in the consideration of this case. Whether the impediment was removed by the Court of its own motion or on the application of the plaintiff or whether the impediment was removed by the plaintiff by paying the amount herself, the legal effect will be the same, namely, that the way is open to draw up the decree. But since the decree has been passed on the date on which the judgment has been pronounced the decree whenever drawn up will bear the date of the judgment. There is no amendment of the decree by the order dated 8th April 1961. The amendment of the decree will arise provided the terms or contents of the decree are in any way changed. The decree that came into existence on 20th March 1958 was in terms of the compromise purshis and by the order dated 8th April 1961, there is no change or alteration in any of the terms of the compromise purshis. Therefore, there is no amendment of any part of the decree. In my opinion, on a consideration of the relevant provisions of the Civil Procedure Code, it appears that the decree that is drawn up rightly bears the date 20th March 1958.

15. Mr Shelat relied on a decision in the case of AIR 1916 Sind 2. There what happened was that the learned Judge decreed the suit subject to certain conditions about payment of the balance of purchase money and damages of Rs 150/- to the defendant. The Judge however ordered that the decree should not be drawn up until the plaintiff paid penalty in respect of deficit stamp on a sale-deed. The period for paying the penalty was extended by various orders from time to time and ultimately the penalty was paid by the plaintiff on 21st November 1913. The defendant filed an appeal which was time barred from the date of

the judgment, but it was within time from the date on which the decree was prepared. On an interpretation of the order passed by the Court as regards the drawing up of the decree, the Sind Court came to the conclusion that what was pronounced by the Court at the earlier time was a provisional judgment to the effect that the Court was prepared to decide the suit in accordance with that judgment, but the Court would not do so until the plaintiff paid the penalty under the Stamp Act. It is obvious that if the penalty under the Stamp Act were not paid, the document would remain inadmissible in the evidence and the judgment which was pronounced on that day would not be a correct judgment. The Court, therefore, considered that it was a provisional judgment which the Court was prepared to pronounce provided the plaintiff paid the penalty. When the plaintiff paid the penalty, the Court made a final judgment ordering the preparation of the decree. That is not the position here. There is no question of a provisional judgment, because nothing has remained to be decided after the Court made the order on the compromise purshis. All that the Court did was to postpone the drawing up of the decree itself. In my opinion, this decision does not apply to the facts of the present case. I may note that this decision was referred to in a decision in the case of *Md. Sadique Mian v. Mahabir Sao*, AIR 1942 Pat 410 and there also that Court has distinguished this case on the ground that the effect of that order was to pronounce a provisional judgment which did not become operative until the decree was prepared. The Patna High Court has also held that in the Sind case there was no complete adjudication until the condition was satisfied.

16. Mr. Zaveri mainly relied upon two decisions. The first is in the case of AIR 1942 Pat 410 (supra). In that case a preliminary decree for mesne profits had been passed and a Commissioner was appointed by the Court to ascertain the amount of mesne profits. The Commissioner submitted his report which was accepted by the Court on 6th of January 1936 and the Court passed the following order on that day:

"Let final decree be prepared in terms of the Commissioner's Report. No decree shall be prepared unless deficit court fees are paid."

On a consideration of the provisions of the Civil Procedure Code as well as certain other cases, the Patna High Court came to the conclusion that the Judgment was pronounced on 6th January 1936 and that the condition for the preparing of the decree did not alter the date of the decree. It also held that the moment the plaintiff paid the deficit court fee in ac-

cordance with the order, the decree would have been automatically drawn up. It was held that though the Court fee were paid on 1st December 1938, the decree that was ultimately drawn up rightly bore the date 6th January 1936.

17. The second decision on which Mr. Zaveri relied is to be found in the case of *Kishori Mohan Pal v. Provash Chandra*, AIR 1924 Cal 351. In that case there was a final partition decree and under the Stamp Act of 1899 a decree for partition is chargeable with duty to the amount prescribed by Art. 45 of Schedule I of the Act and the expense of providing the proper stamp is to be borne by the parties to the decree in such proportions as the Court directs. The result is that a decree for partition is not formally drawn up until paper bearing the proper stamp is supplied to the Court. The decree is then engrossed on the stamp paper and signed by the Judge. In the above case the decree was signed by the Judge on 2nd January 1920, as the stamp paper was furnished only a short time before that day. The question arose whether the limitation should run from the date on which the decree was passed, namely, from 25th March 1914 or it should run from the date on which the decree was drawn up, that is from 2nd January, 1920. The Court, while considering this question, held as follows:

"The delay in signing the decree was due not to any fault of the Court or to any cause beyond the control of the parties, but solely to the delay of the parties in supplying the requisite stamp paper. Any party desiring to have the decree executed might have furnished the stamp paper at any time leaving the expense of providing it to be adjusted by the Court in connection with the costs of the execution."

In this case also it was held that the mere fact that the decree is not drawn up because the plaintiff or some other party to the suit has failed to provide the stamp paper, it would not alter the date of the decree which is the date on which the judgment is pronounced. In my opinion, having regard to the facts of this case, it is clear that the decree that is drawn up bears the date 20-3-1958 and the same is the correct date as it is a date on which the judgment was pronounced and therefore, the period of limitation should run on the basis that the decree is dated 20th March 1958. If clause I of Article 182 of the Indian Limitation Act applies, then the execution application being more than three years from the date of the decree is barred by limitation. If however clause VII of Article 182 applies, even then, the last date on which the payment was requir-

ed to be made being 20th June 1958 the execution application is more than three years after that date and therefore also, it is barred by limitation.

18. Mr Shelat, on behalf of the appellant urged that this was a decree which was passed on condition and therefore, until the condition was fulfilled, no decree came into existence. A mere perusal of the order made by the learned Civil Judge on the compromise purshis clearly indicates that Mr Shelat's argument is not correct. What the learned Civil Judge has directed is that the decree should be drawn up after the requisite court fees are paid. The learned Judge's order does not deal with the passing of the decree. As I stated above, as soon as the judgment is delivered, a decree is bound to be passed immediately thereafter. Therefore, there is a distinction between the passing of a decree and drawing up of a decree and what is postponed by the learned Judge's order in the instant case is drawing up of the decree and not the passing of the decree. Again, it is no doubt true that the learned Judge has ordered that the decree is to be drawn up only after the court fees are paid. But this was a condition which the plaintiff could have immediately fulfilled. If she had done what she was directed to do by the Court immediately, the decree could have been drawn up at once. If she commits delay in supplying the court fees and thus allows time to pass away, without there being drawn up a decree in her favour, it cannot be stated that the decree did not come into existence until after she paid the Court fees or the Court passed the order removing that condition. Mr Shelat relied upon a decision in the case of AIR 1938 All 539. In that case the Court passed a decree for money on condition that the decree-holder deposited the necessary court fees in Court. That was a case, therefore, where the passing of the decree was made conditional on the fulfilment of the direction of the Court to deposit the Court fees. If the passing of the decree is made conditional on a certain act being done by the plaintiff then it can be urged that no decree has come into existence until the condition is fulfilled. This is not a case however, where the drawing up of the decree was postponed. This case, therefore, can be distinguished on its facts and it does not apply to the order passed by the learned Judge.

19. Mr Shelat then relied upon a decision in the case of Mahomed Hasnain v Yusuf Husain, AIR 1956 All 121. On the basis of this authority Mr Shelat urged before me that the Court had no authority to make any order for payment of Court fees. He referred to Order 23,

Rule 3 of the Code of Civil Procedure and stated that as soon as the Court is satisfied about the existence of the compromise or agreement adjusting the suit it is the duty of the Court to pass a decree. He stated that in the instant case, the learned Civil Judge of his own motion postponed the drawing up of the decree by imposing a condition for payment of Court fees. He stated that the Court itself has failed in performing its own duty and for the failure of the court, the appellant could not be penalised. As I stated above, since the passing of the decree has not been postponed the question whether the appellant has been penalised by the Court's order or not is not a question which is relevant for consideration at this stage. As I stated above, the compromise purshis itself makes provision for payment of that amount of court fees by the appellant-plaintiff to the Government. The Court thought that the payment of court fees to the Government should be made by paying the same into the Court. The Court, therefore, seems to have passed that order on its own interpretation of what the consent terms provided. It cannot, therefore, be said that the plaintiff has been penalised by the Court's order. It was open to the plaintiff, even in the absence of a formal drawn up decree to make an application for execution of the decree and if necessary to insist that the Court should draw up the decree without any payment of court fees by her in Court. In my opinion, this argument of Mr Shelat, does not appear to be correct. No other point was pressed on behalf of the appellant by Mr Shelat.

20. Mr Zaveri, on behalf of the respondent also raised an alternative argument that even if the date of the judgment be taken as 8-4-1961 still the execution application is barred by limitation. He argued that the payment is to be made within three months from the date of the compromise purshis and therefore the payment should be made on 20th June 1958 at the latest. He relied upon the provisions of clause VII of Article 182 of the Limitation Act and stated that the application for execution should have been made on or before 20th June, 1961. He also argued that the decree in fac bears date '20-3-58.' He argued that the date is an integral part of the decree itself and the executing Court has no jurisdiction to go behind the decree and find out whether the date '20-3-1958' is the correct date or whether that date should be substituted. For this purpose he relied upon a decision in the case of Anant Ram v Basdeo Sahai, AIR 1957 All 114. However, in view of the fact that I have accepted, the first ground advanced by Mr Zaveri, I do not think that it will be necessary for me to go into any detail-

ed examination of the questions raised in these two alternative arguments.

21. The result, therefore, is that the trial Court's order holding the execution application to be barred by limitation is correct. This appeal, therefore, fails and is dismissed with costs.

LGC/D.V.C. Appeal dismissed.

AIR 1969 GUJARAT 159 (V.56 C 30)

J. M. SHETH, J.

Bai Galal Ramshi, Applicant v. Vrajlal Ichhashanker and others, Opponents.

Civil Revn. Appln. No. 371 of 1968, D/- 5-4-1968, from decision of Civil Judge, Jr. Division at Talaja, D/- 17-2-1967.

Civil P. C. (1908), S. 115(c) and O. 6, R. 17 — Application for amendment of written statement — Rejection of application for delay in filing — Court acts illegally and with material irregularity — Case comes within S. 115(c).

A plain reading of O. 6, R. 17 indicates that amendment can be allowed at any stage of the proceedings. No doubt, the Court is empowered in an appropriate case to put the petitioner who wants to amend the application to terms. This rule further lays down that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The Court however is not justified in rejecting the amendment application on the ground that the application had been given after a long time. AIR 1968 Guj 236 & AIR 1964 SC 1341, Foll.

(Para 10)

Where the court rejects the amendment application on the ground of delay it acts in breach of the provisions of law embodied in O. 6, R. 17 and hence it acts illegally or with material irregularity in the exercise of its jurisdiction which comes within the scope of S. 115(c).

(Para 13)

The court acts illegally and with material irregularity in relation to the procedure also by refusing to allow amendment which may ultimately affect the decision of the suit.

(Para 16)

Cases Referred: Chronological Paras

(1968) AIR 1968 Guj 236 (V 55)=

(1967) 8 Guj LR 649, Prabhudas v. Bhogilal 8, 12

(1966) AIR 1966 SC 153 (V 53)=

Civil Appeal No. 163 of 1963, D/- 26-4-1965, Pandurang v. Maruti 13, 16

(1966) 1966-7 Guj LR 589=ILR

(1966) Guj 660, Ishwarlal v. State of Maharashtra 28

(1964) AIR 1964 SC 497 (V 51)=

1963 All LJ 1068, S. S. Khanna v. F. J. Dillon 9

JL/L/E565/68

(1964) AIR 1964 SC 1336 (V 51)=

(1964) 3 SCR 495, Manindra Land & Building Corporation Ltd. v. Bhutnath Banerji. 13, 16

(1964) AIR 1964 SC 1341 (V 51)=

(1964) 5 Guj LR 55, Abbasbhai v. Gulamnabi 13, 16

(1963) AIR 1963 Guj 195 (V 50)=

1963-4 Guj LR 698, Shantilal Chunilal v. Shantilal Fulchand 11, 14

(1959) AIR 1959 SC 492 (V 46)=

(1959) Supp. (1) SCR 733, Chaube Jagdish Prasad v. Ganga Prasad 11, 16

(1953) AIR 1953 SC 23 (V 40)=

1953 SCR 136, Keshardeo v. Radha Kissen 11, 13

(1949) AIR 1949 PC 156 (V 36)=

76 Ind. App. 67, Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras 11, 13

(1949) AIR 1949 PC 239 (V 36)=76 Ind

App 131, Joychand Lal v. Kamalaksha Chaudhury 11, 13

(1948) AIR 1948 Nag 258 (V 35)=

ILR (1948) Nag 16, Narayan Soneji v. Sheshrao Vithoba 13

(1927) AIR 1927 All 358 (V 14)=

ILR 49 All 454, Babu Ram v. Munnalal 11, 13

(1925) AIR 1925 Mad 585 (2) (V 12)=

48 Mad LJ 349, Kariya Goundan v. Tirikkaivelu Chetty 11

(1917) AIR 1917 PC 71 (V 4)=44

Ind App. 261, Balkrishna Udayar v. Vasudeva Ayyar 11, 16

(1885) ILR 9 Bom 432, Hari Bhikaji v. Naro Vishvanath 11, 13

(1883-84) 11 Ind App 237=ILR 11 Cal 6 (PC), Amir Hasan Khan v. Sheo Baksh Singh 11

K. M. Parikh, for Applicant; D. U. Shah, for Opponents.

ORDER :— This is a revision petition filed by the original defendant against the plaintiffs-opponents under Section 115 of the Civil Procedure Code. The opponents filed a Civil Suit No. 31 of 1967 in the Court of the Civil Judge, (J. D.) Talaja for recovery of possession of suit land from the petitioner. According to them, they are the owners of the suit land and are in possession of it. The petitioner obstructs their possession and has made an application in the Mamlatdar's Court to have it mutated to her name, claiming the land to be hers.

2. The petitioner filed a written statement on 24th July, 1967 and denied the claim of the opponents and challenged the maintainability of the suit.

3. On 9th February, 1968, by an application Ex. 21, she sought permission for an amendment of a written statement. By that application she wanted to take up three further contentions in regard to maintainability of the suit. One of them was that there was a previous suit between the parties and due to the

decision given in that suit, the suit was barred by res judicata. Another contention was that the suit being a suit for taking possession of the suit land on the ground of ownership, the market value of the land being over 10 000/- rupees at the date of the suit, the Court has no jurisdiction to hear the suit. The alternative contention that was to be taken up was that the suit was barred by limitation. Another alternative contention was about adverse possession.

4 The learned Civil Judge Junior Division, Talaja, Mr R. H. Nanavati, rejected this application on the ground that the suit was filed on 24th July 1967 and there was absolutely nothing to prevent the defendant from taking up all the contentions that she now proposes to take. Merely, because the proposed contentions are important, they cannot now be permitted to be taken up. All the proposed contentions are new. He therefore does not see any reason to allow that application at that stage. On these grounds, the application has been rejected by the learned Civil Judge. This is one of the unpugned orders which is assailed in this revision application by the petitioner. Another application, Ex. 22 was given stating that the value of the subject-matter being over Rs 10 000/-, the Court has no jurisdiction to hear the suit. She therefore prayed that before hearing of the suit commenced, Mamlatdar or any other officer be appointed as a Commissioner for making the valuation of the land which according to the petitioner can be valued at Rs. 35 000/-. That application was also rejected stating that the applicant may lead evidence herself to substantiate her contention, if permissible. The petitioner has come in revision against that order also.

5 The learned Advocate Mr Parikh, appearing on behalf of the petitioner firstly contended that the learned Civil Judge had committed an illegality by ignoring the provisions of law and thereby had failed to exercise the jurisdiction vested in him. He urged that before the recording of evidence commenced, the petitioner had sought permission to allow her to amend the written statement. The contentions which the petitioner intended to take up by that amendment were very material contentions and most of them were contentions of law, which would go to the root of the case, if the petitioner succeeded in showing the soundness of those contentions. He conceded to the position that those contentions were new contentions. The amendment application, which sought for a permission to take up those contentions, cannot be rejected on the aforesaid grounds. These were the additional grounds which the petitioner wanted to urge in support of her say that the suit was not maintain-

able as well as entertainable and should be dismissed. She was not making out any new case. These were the only new grounds to support her case that the suit was not maintainable and the suit should be dismissed on that ground.

6 He also invited my attention to the provisions of Order 6 Rule 17 of the Civil Procedure Code. He also urged that the present case would also be covered by clause (a) or (b) of Section 115 of the Civil Procedure Code as the petitioner wants to take up a contention regarding jurisdiction. The petitioner also wants to take up a contention regarding res judicata. She wants to take up a contention regarding limitation. All these questions are questions which, if decided in favour of the petitioner would go to the root of the case and the suit would be liable to be dismissed on those grounds. It was, therefore urged that the present case was also covered by clause (a) or (b) of Section 115 of the Civil Procedure Code. In my opinion, this argument of Mr. Parikh is not well founded. The Court has not decided the correctness or otherwise of these contentions. What the Court has decided is whether this amendment application should be allowed or not. The question therefore, that really arises for consideration will be whether the case is covered by clause (c) of Section 115 of the C. P. Code or not.

7. The learned Counsel Mr D. V. Shah, appearing on behalf of the respondents firstly, contended that the present case could not be said to be a case decided within the meaning of Section 115 of the Civil Procedure Code. He, therefore urged that no rights of the parties have been decided finally. Part of the controversy between the parties has not been decided. That being the position, the present case could not be said to be a case decided within the meaning of Section 115 of the Civil Procedure Code. He invited my attention to a decision of a Division Bench of this Court in support of his argument.

8 In the case of Prabhudas v Bhogilal, 1967 8 Guj LR 649=(AIR 1968 Guj 236) a Division Bench of this Court has made the following observations—

"A case decided within the meaning of Section 115 Code of Civil Procedure is not confined to an entire suit or proceeding but includes an issue or a part of a suit or proceeding and if an order decides an issue or a part of a suit or proceeding, it would be a case decided within the meaning of Sec. 115. If an order decides some right or obligation which is in controversy between the parties in the suit or proceeding a part of the suit or proceeding whether it forms the subject-matter of a separate

ed and determined by a court of competent jurisdiction and meanwhile the land should remain attached and continue in the custody of Sardar Ghulam Nabi, Numberdar. Pursuant to this order of the learned Magistrate the respondents 1 to 4 filed a civil suit on 6th April 1965 in the court of the Sub Judge Rajouri, being civil suit No. 14 of 1965, for declaration to the effect that the land comprising Khasra Nos. 17 (measuring 23 kanals 3 marlas with Kotha thereon), and 21 (measuring 3 kanals 19 marlas) was in their possession as owners, and land comprising Khasra No. 638/514/517/241 (measuring 36 kanals and 3 marlas) was in their possession as tenants under the State till 16th April, 1960. In para 4 of the plaint it was alleged that the cause of action arose from 6th November 1962 the date of the Sub Divisional Magistrate's order. This suit was dismissed for default of plaintiffs' appearance on 26-8-65 the date fixed for plaintiffs' evidence. Thereafter on 26-4-1966 the plaintiffs-respondents 1 to 4 filed suit No. 8 of 1966 in the same court and for the same relief as was sought by them in the previous suit No. 14 of 1965. As in the previous suit so in para 4 of the plaint of this suit also it was alleged as follows:

(Original in Urdu omitted—Ed.)

3. Waris Ali, the petitioner herein, resisted the suit inter alia on the grounds that the previous suit having been dismissed for default of plaintiffs' appearance, the present suit was barred under Order 9, Rule 9 of the Civil Procedure Code read with Section 12 thereof and was also liable to dismissal as it had not been filed within the period of limitation prescribed by the Limitation Act.

4. On the pleadings of the parties the following preliminary issues were struck in the case:

(1) Was a Civil suit, Ahad Mir and others versus Waris Ali, prior to this suit dismissed for default of plaintiffs on 26th August 1965 by this court, if so what is the effect of this suit? O. P. D.

(2) Is the suit time barred? O. P. D.

5. After hearing the arguments advanced by the learned counsel for the parties, the trial court vide its order dated 31-12-1966 came to the conclusion that the suit was neither hit by Order 9, Rule 9 Civil Procedure Code nor was it time barred. It is this order that has been challenged by Waris Ali in the present revision petition.

6. On behalf of the petitioner Mr. Salaria has reiterated before me that the subsequent suit having been brought on the same cause of action as the previous one which was dismissed for default of plaintiffs' appearance was barred under

Order 9 Rule 9 of the Code of Civil Procedure and having been brought more than 3 years after the 6th of November 1962—the date of the final order of the Sub Divisional Magistrate, ought to have been dismissed as time barred. Both these contentions of the learned counsel are in my opinion untenable.

7. With regard to the first contention of the learned counsel it may be pointed out that though the phraseology used in para 4 of both the plaints is identical the cause of action in the previous and the subsequent suit is not in substance the same. According to the directions of the Sub Divisional Magistrate the land was to continue to remain under attachment till the determination of the rights of the plaintiffs by a court of competent jurisdiction. In the circumstances the continuance of attachment is to be treated as a continuance of the original wrong and so long as the attachment continues, cause of action also continues. As in case of a claim for partition (See AIR 1952 All 427 and AIR 1956 Pat 143) or for fixation (See AIR 1959 Punj 252) and recovery of rents and profits against a trespasser so in a case of the present nature, the cause of action must be deemed to be recurring.

8. The other contention of the learned counsel is also devoid of force. The property in dispute having been attached by the Sub Divisional Magistrate, under Section 146 (1) of the Criminal Procedure Code (as then in force)* and passed into Custodia Legis, the legal position is that the possession of Supardar is to enure for the benefit of person having title to the property on the material date. Article 47 of the Limitation Act to which reference has been made by the learned counsel for the petitioner is confined to cases in which an order for possession has been made in favour of one of the parties. No order having been made in respect of the property in favour of any one of the parties, that article has no application and as held in AIR 1929 Mad 38(2) the consequences of the operation of Section 28 of the Limitation Act cannot ensue. This view also receives support from the rulings reported in (1876) ILR 1 Mad 309; (1903) ILR 26 Mad 410; (1907) ILR 30 Mad 12 and AIR 1964 Andh Pra 109. Article 142 of the Limitation Act has also no application as the order of attachment under Section 146(1) does not cause dis-

*The Code of Criminal Procedure (Amendment) Act, 1956 (XLII of 1956) and the Code of Criminal Procedure (Amendment) Act, 1957 (XXVII of 1957) came into force on the 1st of August, 1964—See SRO 177 dated 24th June, 1964 published in the Jammu and Kashmir Government Gazette dated 16th July, 1964.

possession or discontinuance of the possession of the rightful owner. See AIR 1916 Cal 751. To a case of this nature Section 23 of the Limitation Act can be aptly said to apply and continuance of attachment would be treated as a continuing wrong. As such the suit cannot be held to be time barred even though brought after the expiry of three years from the date of the final order of the Criminal Court exercising power under Section 146 (1) of the Criminal Procedure Code as then in force. I am supported in this view by a catena of authorities more especially those reported in AIR 1916 Cal 751 AIR 1922 Cal 419 AIR 1933 Pat 224 and AIR 1938 Pat 212.

9 For the foregoing reasons I find no merit in this revision application which is dismissed with costs.

AKJ/D V C. Revision dismissed.

AIR 1969 JAMMU AND KASHMIR 50
(V 56 C 12)

M JALAL-UD DIN, J

S Bishan Singh, Applicant v Murti Shivji, Non-Applicant.

Civil Pevn No 50 of 1968 D/ 2-8 1968
Civil P C. (1968) Section 115 and O 14, R 5 — Expression "Case decided" — Meaning — Expression does not mean conclusion of entire proceeding — It covers part of the proceedings in which some claim or right is decided — Order under O 14, R 5 — Revision maintainable. AIR 1938 Mad 496 and AIR 1967 Punj 389 (FB) and AIR 1953 Bilaspur 33 and AIR 1964 SC 497, Rel on. (Paras 4 and 5)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mys 1 (V 55) =
(1967) 1 Mys LJ 148 (FB) Mysore State Road Transport Corporation v Mysore Revenue Appellate Tribunal 6
(1967) AIR 1967 Punj 389 (V 54) =
ILR (1968) 1 Punj 694 (FB) Krishan Kumar Grover v Smt. Parmeshri Devi 4
(1964) AIR 1964 SC 497 (V 51) =
(1964) 4 SCR 409 S S Khanna v. F J Dillon 4
(1958) AIR 1958 Mad 496 (V 45) =
1958-1 Mad LJ 212, Muhamad Abdul Rahman v Peer Muhammad 4
(1953) AIR 1953 Bilaspur 33 (V 40), Khazana v Surjan 4
S Avtar Singh, for Applicant, Sh. Janak Lal Sehgal, for Non-Applicant.

ORDER This revision petition is directed against the order dated 15-12-1967 passed by the Sub Judge, Jammu in a suit for possession brought by Murti Shivji plaintiff respondent against S Bishan Singh and another. The trial court raised issues in the case and

thereafter an application was moved on 16-11-1967 by the defendant applicant in the court below seeking amendment of the issues as indicated in the application. Objections were invited by the trial court from the plaintiff and after hearing arguments it decided the application against the defendant-applicant holding that there was no necessity to amend or add any more issue in the case. Against this order the defendant has come up in revision before this Court.

2. A preliminary objection has been raised on behalf of the plaintiff respondent that the revision is not competent inasmuch as the order passed by the trial court does not purport to be a case decided within the meaning of section 115 of the Code of Civil Procedure.

3. Elaborate arguments were advanced on both sides respecting the preliminary objection and a number of authorities were cited for and against the proposition. I will first of all deal with the preliminary objection raised before me.

4. It is true that the expression 'case decided' is not defined in the Code of Civil Procedure but upon a general construction of the expression it would follow that the words "case decided" as used in Sec 115 of the Code do not mean the entire proceeding concluded but it includes within its ambit a part of the proceeding as well. Thus where the court below decides a part of the proceeding in a suit in which some claim or right is decided that order is amenable to the revisional jurisdiction of the High Court and the High Court will undoubtedly interfere, if it finds that the trial court has exercised its jurisdiction in an illegal way or has omitted to exercise its jurisdiction or the order passed has occasioned failure of justice as contemplated in clause (d) of Section 115 of the Code. The same point arose for consideration before Subramanyam, J in AIR 1958 Mad 496. That was a case where the trial court had dismissed the application of the defendants for deletion of an additional issue. It was held that the District Munsiff (the trial Court) had acted with material irregularity in the exercise of his jurisdiction in framing an issue necessitating the determination of the dispute which appears to exist inter se as between the defendants. The revision in that case was entertained and allowed.

Again in AIR 1967 Punj 389 (FB) Kapoor, J who delivered the judgment on behalf of the Full Bench observed that "the scheme of the Civil Procedure Code read as a whole seems to negative the legislative intentment that the revisional jurisdiction should not be exercised against interlocutory orders where an appealable decree can ultimately be passed. Under Section 115 of the Code every non appealable order affecting the decision of the case is open to challenge in appeal from the final decree. If the legislative intentment is to the said effect, then in no case can the High Court call for the record per-

maintaining to an interlocutory order or entertain a revision against an interlocutory order and the High Court must withhold its hands on the simple ground that the order impeached is interlocutory. This legal position is unacceptable for it can be sustained neither on principle nor on authority." From this the proposition deducible is that Section 115 of the Code is to be construed for advancing the cause of justice and in this manner if there is a material legal infirmity in the order passed by the trial court section 115 can be invoked so as to cover such interlocutory orders. "The word 'case' the learned Judge proceeded to observe "used in Section 115 includes part of the case also and Section 115 is, therefore, applicable to such interlocutory orders."

The Bilaspur High Court has also pronounced upon this question vide AIR 1953 Bilaspur 33 where it has laid down that "the decision of the lower Court in rejecting the defendant-petitioner's application for framing the necessary issue is a decision on a substantial question in controversy between the parties affecting their rights and therefore amounts to a case decided". The point it seems was also elaborately discussed by their Lordships of the Supreme Court in AIR 1964 SC 497. The principle enunciated in the said authority is that the power of the High Court under Section 115 is exercisable in respect of "any case" which has been decided. Their Lordships proceeded to observe that once it is granted that the expression "case" includes a part of the case there is no escape from the conclusion that the revisional jurisdiction of the High Court may be exercised irrespective of the question whether an appeal lies from the interim decree or order passed in the suit. Any other view would impute the legislature an intention to restrict the exercise of this salutary jurisdiction to those comparatively unimportant suits and proceedings in which the appellate jurisdiction of the High Courts is excluded for the reasons of the public policy.

5. It would thus appear that the scope of Section 115 is extended even to interlocutory orders in which no appeal lies but where the lower court has exercised jurisdiction illegally or with material irregularity or has assumed jurisdiction which it has none while passing the impugned order in which some claim or right is decided. Thus an order passed under Order 14, Rule 5, Civil P. C. can be said to be a part of proceeding and a case decided within the meaning of Section 115 of the Code. It would be pertinent to compare the language employed in Order 14, Rule 5 with O. 6, R. 17. Almost the same words are used in both the rules. There is ample authority for the proposition that the orders passed under Order 6, Rule 17 are revisable. There is thus nothing to assume that orders passed under Order 14, Rule 5 are not revisable if they have been passed in exercise of

illegal jurisdiction or if the same has occasioned failure of justice to a party.

6. Judged from this, it would appear that the present revision petition which has been directed against the interlocutory order passed by the court below in dismissing an application under Order 14, Rule 5 of the Civil Procedure Code is revisable. Here the grievance of the applicant is that his application for amendment and recasting of the issues has not been decided on merits. The court below has not considered the pleadings of the parties and has failed to frame issues in the case in accordance with the averments made in the pleadings. Thus while dismissing the application the court below has acted with material irregularity in the exercise of its jurisdiction and this has occasioned failure of justice.

7. I, therefore, overrule the preliminary objection and hold that the revision is competent.

8. As regards the merits of the revision I find that there is considerable force in the argument of the learned counsel for the applicant that the issues framed by the trial court do not deal with the real controversy between the parties and that it is necessary to recast and amend the issues with a view to determine the material propositions of fact and law at which the parties are at issue. I had the occasion of perusing the pleadings of the parties. The plaintiff does not say in his plaint as to how and when and in what character did the defendant No. 1 come to occupy the suit property nor is it in the plaint that the property was sublet by the defendant No. 2 to defendant No. 1 during the continuance of the tenancy of the defendant No. 2, in violation of the terms of the original tenancy. Nor has a copy of the judgment of the High Court been attached along with the plaint so that it could be found out as to what were the precise observations made by the High Court regarding the character of the possession of the defendant No. 1 in the judgment inter partes. The defendant appellant has, in his written statement, categorically repudiated the title of the plaintiff and has in so many words pleaded that the plaintiff was never in possession of the suit property.

It would appear from the plaint, when read as a whole, that the possession of the defendant No. 1 over the suit property does not arise from any contractual obligation. The case of the plaintiff lies in a narrow compass so far as the plaint is concerned. It would have been well for the trial court to have examined the parties in elucidation of the pleadings so that the all material propositions of fact could have been brought to light and the position clarified. But this has not been done. The argument of the learned counsel for the plaintiff respondent that his client could not sue for possession of the suit property against the defendant

No 1 during the continuance of the tenancy of the defendant No 2 and that the plaintiff was constructively holding the property through the defendant No 2, is understandable. But even then, the plaintiff must show as to when and how did the defendant No 1 enter upon the premises and in what character. The plaintiff (in a suit for possession) has to prove his case independently against the defendant No 1 who has set up a title in himself. In such a situation the plaintiff must also prove that his possession over the suit property whether independently or constructively through defendant No 2 dated back 12 years from the institution of the suit. If any authority is meant for the proposition it is AIR 1968 Mys 1 (FB). That was a suit for possession where the plaintiff had alleged that the defendant was the tenant but the defendant on the other hand had repudiated this allegation and had set up title in himself. Hegde, J who delivered the judgment on behalf of the Full Bench, proceeded to observe that the plaintiff had to prove not only his title in the property but also that he had been in possession of the property within 12 years next before the institution of the suit. The argument of the plaintiff in that case that Article 144 of the Limitation Act was applied to the case was repelled and it was held that the appropriate Article applicable to the case was 142 of the Limitation Act. There is no necessity for me to quote any other authority in support of the proposition enunciated above.

9 I would, therefore, allow this revision petition and direct that the trial court to first examine the parties and thereafter recast the issues in the light of the observations made above.

GGM/DVC

Revision petition allowed

AIR 1969 JAMMU AND KASHMIR 53
(V 50 C 13)

S MURTAZA FAZL ALI C. J AND
JASWANT SINGH, J

Abdul Samad and others Petitioners v
The State of J and K., Respondent.

Writ Peta. No 97 of 1968 D/ 27-8-68,
from judgment of Gurus J., D/ 27 I 1968

(A) Letters Patent (Jammu and Kashmir)
Clause 12 — Judgment — Meaning —
Order even if it does not finally dispose of
the suit pro tanto, is a "judgment" if it
determines the rights of parties — Orders of
character specified in Section 104 and
Order 43, Rule 1, Civil P. C. except CL (J)
are judgments AIR 1955 Bom 266 and
AIR 1952 Nag 357 (FB), Foll.; (1872) 8
Beng LR 433 and (1912) ILR 35 Mad 1
(FB) and AIR 1942 Lah 85 (FB) and AIR
1953 SC 198 and AIR 1960 Cal 582 and
AIR 1965 J and K 118 and AIR 1927 Rang

IL/IL/D894/68

139 and (1936) 40 Cal WN 1264, Ref
(Paras 13 and 16)
(B) Forest Act (1927), Sections 52 and
2 (b) — Forest produce — Removal and
conversion of Timber from trees marked for
felling — Right given to contractor —
Money claimed by Government from the
contractor is the price of forest produce.
AIR 1960 Madh Pra 152 and AIR 1956 SC
17 and AIR 1957 Him Pra 1, Rel. on.

(Para 27)
(C) Forest Act (1927), Section 52 —
Validity — Provisions of Sec. 52 and Sec-
tions 90 and 91 of J and K. Land Revenue
Act do not violate Article 14 of the Consti-
tution and are valid.

Article 14 of the Constitution forbids
unjust or class legislation but permits rea-
sonable classification for purposes of legis-
lation. The demand on account of the
price of the forest produce being a public
demand and its expeditious realization be-
ing necessary in public interest, the provi-
sions for recovery of the demand as arrears
of land revenue are based on intelligible dif-
ferentia or reasonable classification having
a clear nexus to the object sought to be
attained. The contention that Section 52
of the Forest Act gives uncanalised discre-
tion to the officer, whose duty it is to re-
cover the amount to discriminate between
the two defaulters similarly situate is not
well founded as the section merely confers
on the officer an additional power to re-
cover the amount in an effective and exp-
editious manner. The duty of a Recovery
Officer being to act in the interests of public
revenue, to prevent its evasion and to exer-
cise his power for its efficient collection the
presumption is that he will act honestly and
it is hardly likely that he would discriminate
between a defaulter and a defaulter in the
matter of application of the provisions of
Section 52 of the Forest Act. The depri-
vation of property or personal liberty if
any resulting from an action under Section
52 of the Forest Act read with Sections 90
and 91 of the J and K. Land Revenue Act
is in accordance with the procedure estab-
lished by law AIR 1953 SC 404 and AIR
1960 SC 457 and AIR 1962 SC 1764 Rel.
on.

(Paras 29, 40 and 41)
Section 52 of the Forest Act cannot also
be held to infringe Article 14 of the Consti-
tution merely because it gives the authority
an option of realizing the arrears of price
of the forest produce either by bringing a
suit or realizing it as arrears of land reve-
nue. Article 14 of the Constitution does
not at all limit the choice of remedies. It
hardly stands to reason that a conscientious
recovery officer would resort to the lengthy
and arduous remedy of a suit when speedy
and effective method of recovery of the
arrear dues is possible under Section 52 of
the Forest Act read with Sections 90 and 91
of the Land Revenue Act. AIR 1956 SC
20 and AIR 1957 Mad 23, Rel. on.

(Para 83)

Cases Referred:	Chronological	Paras	
(1968) AIR 1968 Andh Pra 83			(1942) AIR 1942 Lah 95 (V 29) =
(V 55) = 1968 Cri LJ 294 (FB),			ILR (1942) Lah 491 (FB), Firm
J. V. Krishnaiah v. Sub-Collector			Shaw Hari Dial and Sons, Madras
Guntur		41	v. Sohna Mal Beli Ram 9
(1968) AIR 1968 Andh Pra 156			(1936) 40 Cal WN 1264, Kumar
(V 55), Konduri Buchi Rajalingam			Gangadhar Bagla v. Kanti Chander 15
v. State of Andhra Pradesh		41	(1927) AIR 1927 Rang 139 (V 14) =
(1965) AIR 1965 J and K 118			ILR 5 Rang 99, Arumugam Chettyar
(V 52) = 1965 Kash LJ 244, Kaniz			v. Kanappa Chettyar 14
Fatima v. Khushia		12	(1918) 249 US 152 = 63 Law Ed
(1962) AIR 1962 SC 1764			527, Middleton v. Texas Power and
(V 49) = (1963) 2 SCR 297,			Light Co. 86
Shanti Prasad Jain v. Director of			(1912) ILR 35 Mad 1 = 21 Mad LJ
Enforcement		62	1 (FB), Tuljaram Raw v. Alagappa
(1960) AIR 1960 SC 457 (V 47) =			Chetty 9, 11
1960 Cri LJ 654, Kangshari Haldar			(1872) 8 Beng LR 433 = 17 Suth WR
v. State of West Bengal		61	364, Justices of the Peace for the
(1960) AIR 1960 All 692 (V 47) =			Town of Calcutta v. Oriental Gas
ILR (1960) 1 All 689 (FB), Stand-			Co. 9, 11
ard Glass Beads Factory v. Shri			B. Sen, O. C. Mathur, J. N. Bhan, T.
Dhar		11	Hussain and I. Shahdad, for Petitioners;
(1960) AIR 1960 Cal 582 (V 47) =			Garg, D. N. Mahajan and A. N. Raina, for
64 Cal WN 861, Mohamed Felu-			Respondent.
meah v. S. Mondal		11	JASWANT SINGH, J.: This is an appeal
(1960) AIR 1960 Madh Pra 152			under Clause 12 of the Letters Patent
(V 47) = 1960 Jab LJ 321, Mulam-			from the order dated 27-1-1968, made on
chand Ratilal Asathi v. State of		22	the original side of this court by Hon'ble
Madhya Pradesh			Gurtu, J. vacating the temporary injunction
(1958) AIR 1958 SC 538 (V 45) =			restraining the defendant-respondent from
1959 SCR 279, R. K. Dalmia v.		29	realizing the balance of royalty said to be
S. R. Tendolkar			due on the basis of the agreements (dated
(1957) AIR 1957 SC 688 (V 44) =			17th Katik 2008 and 9th January, 1961) for
1957 Cri LJ 1030, Collector of			sale and purchase of the right of conversion
Malabar v. Erimmal Ebrahim		41	and removal of timber from the trees marked
Hajee			for felling in compartments Nos. 22 (Rest)
(1957) AIR 1957 Him Pra 1			South Lolab B Coupe, 94, North Lolab B
(V 44), Gajjan Mal Mohan Lal v.		25	Coupe, 51, 52a, 52b, and 53 (a) South Lolab
State of Himachal Pradesh			and 86 North Lolab of Kamraj Forest divi-
(1957) AIR 1957 Mad 23 (V 44) =			sion Kashmir North Circle. The temporary
1956-2 Mad LJ 185, Kuppuswamy			injunction which has been vacated appears
Gramani R. v. State of Madras	40, 41		to have been issued on 30-11-1967 on plain-
(1956) AIR 1956 SC 17 (V 43) =			tiff-appellant's application in Civil Suit No.
(1955) 2 SCR 919, Ananda Behera		21, 22	33 of 1967 for recovery of Rs. 2256541
v. State of Orissa			(claimed as loss alleged to have been suf-
(1956) AIR 1956 SC 20 (V 43) =			fered by the appellants on account of the
1956 Cri LJ 129, Purushottam			failure of the Government to fulfil an im-
Govindje Halai v. B. M. Desai	36, 41		plied warranty of soundness in respect of
(1955) AIR 1955 Bom 266 (V 42) =			trees and timber) and permanent injunction
ILR (1955) Bom 499, Mansata Film			restraining the defendant from realizing the
Distributors Calcutta v. Sorab Mer-			royalty in regard to the aforesaid compart-
wanji Modi		11	ments.
(1953) AIR 1953 SC 10 (V 40) =			2. During the pendency of this appeal,
1953 SCR 254 = 1953 Cri LJ 180,			the plaintiffs-appellants filed additional
State of Punjab v. Ajaib Singh	41		grounds of appeal on 30th July, 1968 chal-
(1953) AIR 1953 SC 198 (V 40) =			lenging the constitutionality of Sections 91
1953 SCR 1159, Asrumoti Debi v.			and 92 of the Land Revenue Act as also
Kumar Rupendra Deb	10		Section 52 of the Forest Act. By order
(1953) AIR 1953 SC 404 (V 40) =			dated 31-7-1968, the appellants were per-
1953 Cri LJ 1621, Kedar Nath v.			mitted to raise the questions relating to the
State of West Bengal	60		validity of Section 52 of the Jammu and
(1952) AIR 1952 Nag 357 (V 39) =			Kashmir Forest Act and Sections 59, 60, 61,
ILR (1952) Nag 471 (FB), Mano-			72, 90 and 91 of the Jammu and Kashmir
har Damodhar v. Bali Ram Ganpat	10		Land Revenue Act subject to the maintain-
(1950) AIR 1950 SC 27 (V 37) =			ability of the Letters Patent Appeal. A few
51 Cri LJ 1383, Gopalan v. State	41		days earlier i. e. on 27-7-1968, the appel-
of Madras			lants also filed a writ petition contending
			inter alia that the amount of rupees fifteen
			lacs claimed as royalty in respect of com-

partments Nos 51 to 53 of South Lolab Range Kamraj Division was not due from them as there was an implied warranty of soundness in respect of the trees and timber which was not fulfilled by the respondent. The appellants also challenged the constitutionality of Sections 59, 61, 62 and 72 of the Land Revenue Act as also Section 52 of the Forest Act on the ground that these provisions were violative of Articles 14, 19 and 31 of the Constitution of India. On the following day i.e. 31st July 1968 the appellants filed another application styled as application for amending the writ petition contending inter alia that they had been arbitrarily discriminated in the matter of grant of remissions in respect of rot trees/timber as against large number of persons similarly situate. It was further contended in the petition by the appellants that there is no rationale behind such discrimination that the Government had arbitrarily failed to adjust the remissions against the amount of royalty sought to be realized from them, that the provisions of Ss. 90 and 92 of the Land Revenue Act which made the provisions of Chapter VII including Sections 59, 61, 62 and 72 thereof applicable to the recovery of other demands are also ultra vires as being violative of Articles 14, 19 and 31 of the Constitution of India.

8. As desired by the respondent and as agreed to by the appellants the writ petition of which notice was taken by the respondent on 31.7.1968, subject to all just exceptions, was taken up along with the aforesaid Letters Patent Appeal.

4. This judgment shall dispose of both the Letters Patent Appeal and the Writ Petition.

5. On behalf of the respondent a preliminary objection had been taken as to the maintainability of the appeal. It has been contended that the order appealed against is not a judgment within the meaning of Clause 12 of the Letters Patent of the High Court of Jammu and Kashmir and consequently no appeal lay. While elaborating his preliminary point Mr Garg has contended that the term "judgment" has been used in the aforesaid Clause 12 of the Letters Patent in the sense of a final order or decree and not in the sense of an order giving directions in the nature of interim relief i.e. it has not been used in the sense of an order which does not adjudicate the rights of the parties and that in any case it cannot cover a preliminary or an interlocutory order. He has further argued that as the impugned order does not finally decide the rights of the parties and is merely in the nature of an interim order, the appeal is not competent.

6. Mr Sen, the learned counsel, for the appellants, has on the other hand urged that the word "judgment" as used in the aforesaid clause of the Letters Patent can not be given a narrow meaning, that it is

not synonymous with the word "decree" and that it is not the same thing as a final order.

7. The learned counsel have in support of their respective contentions relied on a number of rulings of the various High Courts in India, who have held divergent views with respect to the connotation of the word "judgment".

8. I have given my earnest consideration to the preliminary objection raised by the learned counsel for the respondent, but I am of the view that it cannot be allowed to prevail.

9. The word "judgment" was interpreted in *Justices of the Peace for the Town of Calcutta v Oriental Gas Co.*, (1872) 8 Beng LR 433 to mean a decision which affects the merits of a question between the parties by determining some right or liability. Sir Richard Couch, the then Chief Justice of that court delivering the judgment for the court observed—

"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

In *Tuharam Rows case* (1912) ILR 35 Mad 1 (FB) Sir Arnold White observed—

"I think too an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment but with a view to rendering the judgment effective if obtained) namely—an order on an application for an interim injunction or for the appointment of a receiver is a judgment within the meaning of the clause."

In the same judgment *Krishnaswami Ayer J* observed.—

"The question still remains whether the order in incidental proceedings for attachment or arrest before judgment for a temporary injunction or for appointment of receiver are judgments within the meaning of the term as used in Clause 15. Such proceedings are not natural steps for the determination of the cause and they are remedies though provisional in character and the judicial determination of those proceedings may well be deemed to be analogous to the disposal of the original petition which determines the right of the parties. The decisions in such cases may well be treated as interlocutory judgments."

In *Firm Shaw Nari Dial and Sons Madras v Sohna Mal Beli Ram*, reported in AIR 1942 Lah 95 (FB) it has been held that the word "judgment" in Clause 10 is not synonymous with decree.

10. In *Manohar Damodhar v Bali Ram Ganpat*, AIR 1952 Nag 357 (FB) their Lordships of the Nagpur High Court, after

reviewing the entire case law, held as under

"A judgment in Clause 10 of the Letters Patent means a decision in an action whether final, preliminary, or interlocutory which decides either wholly or partially but conclusively in so far as the court is concerned, the controversy which is the subject of the action. It does not include a decision which is on a matter of procedure, nor one which is ancillary to the action even though it may either imperil the ultimate decision or tend to make it effective. The decision need not be immediately executable per se but if left untouched, must result inevitably without anything further, save the determination of consequential details in a decree or decretal orders, that is to say an executive document directing something to be done or not to be done in relation to the facts of the controversy. The decision may itself order that thing to be done or not to be done or it may leave that over till after the ascertainment of some details but it must not be interlocutory having for its purpose the ascertainment of some matters or details prior to the determination of the whole or any part of the controversy."

The question was left open by the Supreme Court in a ruling reported in AIR 1953 SC 198.

11. In *Mansata Film Distributors Calcutta v. Sorab Merwanji Modi*, AIR 1955 Bom 266, it was held as follows:—

"It is well settled that interlocutory orders can also be judgments and it is not necessary that a court should pass a final decree or a final order in order that an appeal should lie. Now, when you have an interlocutory order which is purely procedural in character, or as it has been said, which is nothing more than a step towards obtaining a final adjudication in the suit then undoubtedly such an order would not constitute a judgment within the meaning of Clause 15. But if an interlocutory order determines the right of a party even "pro tanto" then the party whose right has been affected would have the right to appeal against that order.

In *Standard Glass Beads Factory v. Shri Dhar*, AIR 1960 All 692 (FB) their Lordships observed as follows:—

"Judgment in Clause 10 includes a "final judgment", a "preliminary judgment" and an "interlocutory judgment" all of which expressions are used in the Letters Patent. The term "judgment" does not necessarily exclude an order. An order of a single Judge of the High Court dismissing an appeal against an order granting a temporary injunction is an order which finally determines the right of a party to a specific temporary relief. It stems from a suit and its purpose is to make the judgment if obtained, fully effective. It is neither an order which merely regulates procedure nor an order made on an application which is merely a step towards obtaining a final ad-

judication. Such an order is neither a final judgment nor a preliminary judgment which had been assumed to mean a judgment which determined the right to the relief claimed but which requires further proceedings to be taken before the suit or appeal is finally disposed of. The order should be held to be an interlocutory judgment. Such an order is a judgment and consequently appealable under Clause 10."

In AIR 1960 Cal 582, it has been held:—

"A judgment within the meaning of Cl. 15 cannot be construed as a decree under the Civil P. C. The test of judgment as laid down in (1912) ILR 35 Mad 1 (FB) is only a variant of the one laid down in (1872) 17 Suth WR 364. The test laid down in the latter case is not exhaustive."

12. In a division bench ruling of this court, reported in AIR 1965 J and K 118, it was held that the word "judgment" used in the Letters Patent should be given a liberal construction.

13. On a careful consideration of the aforesaid authorities, we think that the tests laid down by the Nagpur and Bombay High Courts in the aforesaid rulings are sound and should serve as useful guides for determining the right of appeal under Cl. 12 of our Letters Patent. Respectfully agreeing with and following the enunciation of law in those rulings, we find that the order, in the instant case, though it does not finally dispose of the suit pro tanto determines the rights of the parties and amounts to a judgment as contemplated by Clause 12 of the Letters Patent.

14. That apart we think that there are more compelling reasons for holding that an order like the one in the present case is appealable. This would be evident presently. The meaning of the term "judgment" was also considered by their Lordships of the Rangoon High Court in *Arumugam Chettyar v. Kanappa Chettyar*, AIR 1927 Rang 139, where it was held as follows:—

"where an appeal from an order is allowed by the Civil P. C. the court will construe such an order as a judgment within the meaning of Cl. 13 of the Letters Patent."

This test appears to accord with the provisions contained in Section 60 of our erstwhile Constitution Act, 1996, which provided as follows.

"Except as provided by any enactment for the time being in force an appeal from the original decree or from any order against which an appeal is permitted by any law for the time being in force passed or made by a Single Judge of the High Court shall lie to a bench consisting of two other judges of the High Court."

15. It is noteworthy that the jurisdiction exercised by the High Court in relation to the administration of justice in the court before the commencement of the

Constitution of Jammu and Kashmir has been preserved by Section 102 thereof. The above quoted Section 60 of our erstwhile Constitution (which has to be taken as supplemental to the Letters Patent) when read with Section 117 and Order XLIX of the Civil Procedure Code makes applicable the provisions of Section 104 and Order 43 Rule 1 of the Civil Procedure Code to orders passed by a Single Judge on the original side of the High Court. Reference in this connection may be made to the following passage occurring in *Kumar Gangadhar Bagla v Kantu Chander*, (1936) 40 Cal WN 1264.

"I would point out that it is clear from Section 117 of the Code of Civil Procedure and still clearer from Order 49 Rule 3 Civil P C that both section 104 and Order 43 Rule 1 do apply to the High Court."

16 The legal position that emerges therefore is that orders of the character specified in Section 104 and Order 43 Rule 1 Civil P C excepting clause (J) thereof would be construed as judgments and an appeal against any one of such orders would lie to the Division Bench of the High Court notwithstanding the fact that it is passed by one of the judges of the High Court sitting on the original side.

17 For the foregoing reasons the preliminary objection raised by the learned counsel for the respondent cannot be sustained and is overruled.

18 After debating the preliminary point Mr Sen appearing for appellants has urged that the writ of Demand for Rs 15 lacs issued to his clients by the Collector at the request of the forest authorities should be quashed as it suffers from various legal and constitutional vices. He has in support of his plea raised the following main contentions—

1 That the Writ of Demand issued by the Collector is incompetent as neither Sections 90 and 91 of the Land Revenue Act nor Section 52 of the Forest Act is attracted in the instant case.

2 That Section 52 of the Forest Act does not apply to the present case as no money is due from the appellants.

3 That Section 52 of the Forest Act and Sections 90 and 91 of the Land Revenue Act according to which the amount is sought to be realised as arrears of land revenue are unreasonable and are hit by Article 14 of the Constitution as the Certificate of the officer whose duty it is to realise an arrear is to be treated as final and as the said provisions permit the use of coercive machinery without affording an opportunity of challenging the correctness of the amount which is determined unilaterally by the forest authorities.

4 That Sections 59, 60, 61, 72, 80 and 91 of the Land Revenue Act are unconstitutional and void under Article 13 (1)

of the Constitution of India being repugnant to Articles 19 and 21 thereof.

5 That there has been discrimination in the matter of remissions.

19 I shall now take up serially the various points urged by the learned counsel for the appellants.

20 Elaborating his first ground of attack Mr Sen has contended that the money claimed from his clients is not recoverable as it cannot be said to be payable on account of the price of the forest produce. This contention of the learned counsel for the appellants appears to be wholly misconceived. The term "price" in the aforesaid expression—forest produce—has been used in its ordinary accepted connotation of consideration or amount for which a thing is bought and sold. The term "sale" has been defined in Section 54 of the Transfer of Property Act, as meaning of transfer of ownership in exchange for a price paid or promised or part paid and part promised.

21 In *Ananda Behera v State of Orissa*, AIR 1956 SC 17, their Lordships of the Supreme Court, described the grant of a license to enter on land and carry away fish as a sale of a right to carry away fish in specific portions of the lake over a specified future period, that is to say a sale of a profit à prendre.

22. In *Mulamchand Ratilal Asathi v State of Madhya Pradesh*, AIR 1960 Madh Pra 152, following the dictum laid down in AIR 1956 SC 17, it has been held that the right to propagate and collect lac in some of the forests of Balaghat district is sale of forest produce and the amount due on that account to be the price of the forest produce within the meaning of the Forest Act.

23 The indenture in the instant case between the Government on the one hand and the appellants on the other is headed as Agreement for Purchase of Standing Trees on lump sum basis and the tenor of the agreement shows that the right of extraction of timber from the trees and their removal was by way of sale to the appellants. In ground No 6 of the Memo of the Letters Patent appeal also it has been admitted by the appellants that the timber was sold to them. In the circumstances, it cannot be denied that there was sale of timber by the Government in favour of the appellants on a lump sum basis and that the amount settled for extraction and removal of timber by the appellants with the Government was the price of the timber.

24. Now let us see as to whether the timber the right of extraction and removal of which was given to the appellants by the aforesaid indenture falls within the definition of the term "forest produce". This term has been defined in Section 2 (b) of the Forest Act to include

(a) The following whether found in or brought from a forest or not that is to say—

(i) Timber, charcoal, trees, and leaves, flowers and fruits and all other parts of produce not herein before mentioned of trees.

(ii) Plants not being trees (including Kuth, grass, Creepers, reeds, and moss) and all parts of produce of such plants.

.....
A cursory perusal of the above definition would make it clear that the term "forest produce" includes timber.

25. Reference in this connection may also be usefully made to *Gajjan Mal Mohan Lal v. State of Himachal Pradesh*, AIR 1957 Him Pra 1, where it was held that the expression "forest produce" would include timber.

26. As already stated both the agreement executed by the appellants in favour of the Government in respect of right of conversion and removal of timber from the aforesaid compartments and the grounds of appeal filed by the appellants in this court show that the trees in question were purchased by them for a price specified in the agreement.

27. I am, therefore, unable to accede to the submission of the learned counsel for the appellants that the money claimed by the Government cannot be considered to be on account of the price of the forest produce as conceived by Section 52 of the Forest Act. The first ground of attack accordingly fails and is repelled.

28. I next pass on to the second ground of attack namely that Section 52 of the Forest Act does not apply as moneys claimed are not due. The attack made under this head is two pronged namely that the amount is not actually due and secondly, that the amount cannot be claimed and the appellants cannot be made liable as the timber sold to them turned out to be rot, unsound, and unmarketable. Regarding the first part of the contention it may be stated that I need not go into it in any great detail as this is a disputed matter and has to be gone into in the course of the suit. Suffice it to say that according to the affidavit filed by the Secretary to the Government Forest department, more amount than that acknowledged by the appellants in the suit is due to the Government and no document in the form of any receipt etc. has been produced before us by the appellants to show that payments in excess of the admitted ones have been made to the Government, and that the amount claimed is incorrect. *Prima facie*, therefore, it appears that the money are due from the appellants on account of the price of the forest produce. Any observation made herein is, however, purely for the purpose of the disposal of the contention raised by the learned counsel for the appellants and shall not deter the learned trial Judge from coming to a contrary conclusion if on the evidence adduced before him, it is established that no amount by way of price of the forest produce is due to the Government from the appellants. The other

part of the contention that the amount is not recoverable as it represents the price of the trees, which turned out to be unsound and unmarketable, has not been seriously pressed before us. Moreover, it may be stated that the point has (for the purpose of disposal of the application for grant of temporary injunction) been gone into with great care by the learned Single Judge and there is no reason to come to a conclusion different from that arrived at by him. The second ground of attack, therefore, also fails.

29. This takes me to the third ground of attack. The contention of Mr. Sen in this behalf is that Article 14 of the Constitution is involved in three ways firstly, that Section 52 of the Forest Act confers an unguided discretion on the officer whose duty it is to realise the amount due as arrears of land revenue and leaves him free to discriminate between two defaulters similarly situate, secondly, that the certificate issued by the Recovery Officer is to be treated as final and no opportunity of being heard in the matter of ascertainment of the amount due or challenging the correctness of the amount which is unilaterally determined by the officer is afforded to the alleged defaulter and thirdly, that the coercive machinery provided for the realization of the arrears as land revenue is very harsh and there is no right of appeal against any of the coercive orders that may be passed. All these contentions are in my opinion without any substance. It is well settled^{*} that Article 14 of the Constitution forbids unjust or class legislation but permits reasonable classification for purposes of Legislation. The demand on account of the price of the forest produce being a public demand and its expeditious realization being necessary in public interest, I think the provisions for recovery of the demand as arrears of land revenue are based on intelligent differentia or reasonable classification having a clear nexus to the object sought to be attained. The contention that Section 52 of the Forest Act gives uncanalised discretion to the officer, whose duty it is to recover the amount to discriminate between the two defaulters similarly situate is not well founded as the Section merely confers on the officer an additional power to recover the amount in an effective and expeditious manner. The duty of a Recovery Officer being to act in the interests of public revenue, to prevent its evasion and to exercise his power for its efficient collection the presumption is that he will act honestly and it is hardly likely that he would discriminate between a defaulter and a defaulter in the matter of application of the provisions of Section 52 of the Forest Act.

30. In *Kedar Nath v. State of West Bengal*, AIR 1953 SC 404, where the point for

^{*}See *R. K. Dalmia v. S. R. Tendolkar*, AIR 1958 SC 538.

determination was whether Section 4 of the West Bengal Criminal Law Amendment (Special) Courts Act, 1949, which provided for allotment by the State Government in its discretion to the special courts particular cases for trial, it was held that there is no violation of the right to equality before law enshrined in Article 14 of the Constitution.

31. Again in *Kangshari Halder v State of West Bengal*, AIR 1960 SC 457, it was held that an Act giving the executive an option for sending a case for trial to a Special Court is not necessarily violative of Article 14 of the Constitution.

32. Then again in *Shanti Prasad Jain v Director of Enforcement*, AIR 1962 SC 1764 = (1963) 2 SCR 297, it was held that an Act giving power to an administrative Tribunal trying an offence to send a case to a court for trial if the case demands more severe punishment is not violative of Article 14 of the Constitution.

33. Section 52 of the Forest Act cannot also be held to infringe Article 14 of the Constitution merely because it gives the authority an option of realizing the arrear of price of the Forest Produce either by bringing a suit or realizing it as arrears of land revenue. Article 14 of the Constitution does not at all limit the choice of remedies. It hardly stands to reason that a conscientious recovery officer would resort to the lengthy and arduous remedy of a suit when speedy and effective method of recovery of the arrear dues is possible under Section 52 of the Forest Act read with Sections 90 and 91 of the Land Revenue Act.

34. The contention of the learned counsel for the appellants that no opportunity of challenging the correctness of the amount claimed is afforded to the alleged defaulter is also devoid of substance. The contention seems to overlook Section 72 of the Land Revenue Act which provides that the person against whom proceedings for recovery of an arrear are taken may, if he denies his liability for the arrear or any part thereof and pays the same under protest made in writing at the time of payment and signed by him or his agent, institute a suit in a Civil Court for the recovery of the amount so paid.

35. The further contention of the learned counsel for the appellants that the remedy by way of suit under Section 72 of the Land Revenue Act is very arduous and vexatious as the alleged defaulter has to deposit the amount claimed from him before bringing a suit is also untenable. In a modern welfare State the necessity of realizing public dues expeditiously and swiftly being very urgent, the provision cannot but be held to be in public interest. If it were not so the clever scheming and recalcitrant defaulters would evade the dues for years to come and thus would not only impede but paralyse the efficient functioning of the machinery of the Government by bringing it to the brink of financial disaster. It is

well known that payment of tax was a condition precedent to the maintainability of appeal against an order under Section 46 (1) of the Income-tax Act (1922) but that provision has never been held to be invalid as being hit by Article 14 of the Constitution.

36. The last contention that the machinery provided for realization of the arrears of land revenue is harsh is equally devoid of force. It is worthwhile to refer in this connection to *Purshottam Govindje Halai v. B. M. Desai*, AIR 1956 SC 20 where after considering the coercive machinery provided by various States for realizing the arrears of land revenue it was observed as follows—

"On looking round the Union one finds that there is machinery in every State for recovery of land revenue which are State demands. Each State in its wisdom has devised a machinery which it has considered appropriate and suitable for the recovery of its own public demand. As was laid by the Supreme Court of America in *Middleton v. Texas Power and Light Co.*, (1918) 249 US 152 at p. 157

"There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people that its laws are directed to problems made manifest by experience and its discriminations are based upon adequate grounds."

37. It is conceded that each State is well within its rights to devise its own machinery for the recovery of its own public demand and that no person belonging to one State can complain that the law of his State is more rigorous than that of the neighbouring State. The reason is obvious for the people of one State are not similarly situated as people of another State. Their needs as understood by their own legislature, are different from those of the people of other State. If in the matter of recovery of arrears of land revenue defaulters of one State cannot complain of denial of equal protection of the laws on the ground of the differences in the modes of recovery prevailing in other States, can it be said to be reasonable for the Union to adopt for the recovery of its public demand from defaulters of each State the same mode of recovery of public demand prevailing in that State?

38. Here the defaulters are classified on a territorial or geographical basis and this basis of classification has precisely the same correlation to the object of the Indian Income Tax as it has to the object of the different Public Demands Recovery Acts. The object of the two Acts in this behalf are in 'pari materia' and the same considerations must apply to both. People of each State are familiar with and used to the coercive processes which each State finds it necessary to impose on its own people for the recovery of public demand and there can be no hardship and consequently no objection to their being put to the same

processes for the recovery of the Public demand of the Union."

39. The contention that the Land Revenue Act does not make a provision for appeal against a coercive order is also misconceived as Section 11 provides for appeal from every order made by a Revenue Officer under the Act.

40. The contention of the learned counsel for the appellants would also be found to have been effectively answered by the observations made by their Lordships of the Madras High Court in Kuppuswamy Gramani v. State of Madras, AIR 1957 Mad 23, where while examining the provisions of Section 52 of the Madras Revenue Recovery Act, (Act 2 of 1864) it was observed:—

"The contention of the learned counsel for the petitioner may be briefly stated thus. The sums payable to the Government are amounts payable in respect of commercial transactions which are similar to those that are entered into between two persons. The clause makes an unreasonable discrimination between the Government and a person other than the Government.

In the case of the Government they can decide for themselves whether and what amount is due from the other party. They can recover that amount by resorting to the coercive process under the Revenue Recovery Act. In the case of any other person he files a suit for the ascertainment of the amount due, obtains a decree and executes that decree through Court. This discrimination in favour of the State and against other persons which enables the State to decide its own cause and recover the amount by summary procedure offends the principle of equal protection of the Laws enshrined in Article 14 of the Constitution. Alternatively, it is contended that the operation of the impugned clause should be confined at least to admitted debts.

There cannot be any doubt that the impugned clause discriminates the State from any other person in the matter of realising a debt. But the question is whether the said act of discrimination can be justified on the basis of a reasonable classification. What is the object and purpose of the classification in this case? Is there any reasonable basis for it, having regard to the difference between the persons classified? The purpose of the classification is apparent.

The modern democratic State is not a police State. It is within a Welfare State or one attempting to become a welfare State. Its activities are manifold permeating the daily life of society. It takes on hand many social and ameliorative activities and to implement the same enters into commercial transactions with other persons. The present one is one of such transactions entered into by the State in discharge of the duties of the Welfare State. If it is the duty of the State to implement such poli-

cies, it is equally its duty, if it should function effectively, to realize the amounts spent on such activities as early as possible.

Public interests demand that such dues should be collected expeditiously. In this context no private individual can be put on a par with the State. Nor does the impugned clause finally preclude the affected party from getting his rights decided in a court of law. Section 59 of the Act saves such a right. The provisions of Ss. 52 and 59 in my view attempt to reconcile the paramount interests and duties of the State with the just rights of private individuals. The classification, therefore, is not arbitrary.

There is reasonable basis for the classification having regard to the obvious differences between the State and the private individual in their relations to the object underlying the impugned Legislation. I, therefore, hold that the classification is not arbitrary but is based upon difference pertinent to the subject in respect of and for the purpose for which it is made."

Bearing in mind the ratio decidendi of the above cases, I am of the view that the provisions contained in Section 52 of the Forest Act and Sections 90 and 91 of the Land Revenue Act are not hit by Article 14 of the Constitution of India.

41. Apart from all this, it passes my comprehension as to how the method employed for recovery as arrears of land revenue of the amount claimed on account of the price of the forest produce, can be challenged by the appellants when in Cl. 10 of the agreement dated 9th January 1961, which is not alleged to have been illegally procured, they themselves have agreed that all outstandings under the agreement may be recovered as arrears of land revenue. The said clause of the agreement is reproduced below for facility of reference:—

"For failure to pay any instalment of the purchase money or any part thereof on the date fixed, the movement of the purchaser (s) timber shall be stopped at the discretion of the Conservator of Forests. All the outstandings of this lease including compensation and penalty under the agreement will be recovered as arrears of Land Revenue." Let me now consider the fourth contention of the learned counsel for the appellants namely that Sections 59, 60, 61, 72, 90 and 91 of the Land Revenue Act are void being repugnant to Articles 19 and 21 of the Constitution of India. There is no question of the infringement of Articles 19, 21 and 31 as both the property and personal liberty are to be taken away lawfully. Reference in this connection may be made with advantage to the following observations made in Collector of Malabar v. Erimmal Ebrahim Hajee, AIR 1957 SC 688, where their Lordships of the Supreme Court dealing with the question of the validity of Section 46 (2) of the Income-tax Act (1922) and Sec-

tion 48 of the Madras Revenue Recovery Act (Act 2 of 1864) observed as follows —

"What we have to consider in this appeal at the outset, is whether either S 48 of the Act or S 46 (2) of the Indian Income-tax Act or both offend Arts 14, 19, 21 and 22 of the Constitution. The decisions of this court in Gopalan's case, (AIR 1950 SC 27), in State of Punjab v Ajai Singh, 1953 SCR 254 = (AIR 1953 SC 10) and in 1955-2 SCR 887 = (AIR 1956 SC 20) are to be borne in mind in deciding this question.

It was held by the majority of the learned Judges in Gopalan's case, AIR 1950 SC 27 that the right "to move freely throughout the territory of India" referred to in Art. 19 (1) (d) of the Constitution was but one of the many tributes included in the concept of the right to "personal liberty" and when a person is lawfully deprived of his personal liberty without offending Art. 21, he cannot claim to exercise any of the rights guaranteed by sub-cl (a) to (e) and (g) of Art. 19 (1) for those rights can only be exercised by a free-man.

In that sense therefore Art. 19 (1) has to be read as controlled by the provisions of Art. 21 and the view that Art. 19 guarantees the substantive right and Art. 21 prescribes a procedural protection is incorrect. The decision in Gopalan's case AIR 1950 SC 27 has been followed in this court in a series of cases and that decision must now be taken as having settled once for all that the personal rights guaranteed by sub-cl (a) to (e) and (g) of Art. 19 (1) are in a way dependent on the provisions of Art. 21 just as the right guaranteed by sub-cl (f) of Art. 19 (1) is subject to Art. 31. If the property itself is taken lawfully under Art. 31 the right to hold or dispose of it perishes with it and Art. 19 (1) (f) cannot be invoked. Like wise if life or personal liberty is taken away lawfully under Art. 21, no question of the exercise of fundamental rights under Art. 19 (1) (a) to (e) and (g) can be raised. Under Art. 21 "procedure established by law" means "procedure enacted by a law made by the State, that is to say the Union Parliament or the Legislature of the States". Again in *J V Krishniah v Sub-Collector Cudur*, AIR 1968 Andh Pra 83 (FB) while examining Sections 5 and 13 of Madras Revenue Malversation Regulation (9 of 1822) it has been held as follows —

"Articles 21 and 22 of the Constitution are not attracted when a citizen is detained or kept in custody in accordance with the procedure established by law. As such where arrests are made under the Madras Revenue Malversation Regulation only to recover government dues the arrest and detention cannot be regarded as coming within Articles 21 and 22 and the Articles do not apply to such a case."

The following observations made in *Konduri Buchi Rajalingam v State of Andhra Pradesh*, AIR 1968 Andh Pra 156, may also in

this connection be reproduced with advantage —

"There is no doubt that the restriction is clearly a reasonable restriction within the meaning of the Article 19 (5) of the Constitution and having regard to the view taken in *Kuppuswamy's case*, AIR 1957 Mad 23, the power of the Government to bring property to sale under S 52 of the Act cannot be construed as infringing the fundamental right of the petitioner under Art. 19 (1) (f) of the Constitution. Whatever deprivation of the property may result from the proposed action under Section 52 it would be under an authority of law, the law being Section 52 of the Act. It is open to the petitioner to seek redress in a civil court under Section 59 of the Act which is a proper and effective remedy if the petitioner is aggrieved by the action taken by the State under Section 52 of the Act."

Judging the matter in the light of the above principles, I hold that deprivation of property or personal liberty, if any, resulting from an action under Section 52 of the Forest Act read with Sections 90 and 91 of the Land Revenue Act is in accordance with the procedure established by law.

42 The fourth ground of attack also, therefore, fails.

43 Regarding the fifth and the last contention of the learned counsel for the appellants that there has been discrimination in the matter of remission of royalty it would be observed that the averment made by the appellants is very vague and does not give details of the circumstances in which the various defaulters were situated or in which they were discriminated. Moreover, it has not been shown by the appellants that in making the alleged discrimination any law or rule having the force of law has been violated. This contention must also, therefore, be rejected. The appellants may, if so advised, approach the Government for relief on equitable grounds.

44 For the foregoing reasons both the appeal and the Writ Petition fail and are hereby dismissed but in the circumstances of the case without any order as to costs.

45 MURTAZA FAZL ALI C. J. : I agree.

GGM/DVC

Appeal and petition dismissed.

AIR 1969 JAMMU AND KASHMIR 60
(V 56 C 14)

JASWANT SINGH, J

Abdul Rashid Shalla, Petitioner v Jagdish Lal and others, Opposite Party

Criminal Ref No 61 of 1967 D/- 8-1-1968 from order of City Munsiff Magistrate, 1st Class Srinagar D/- 24-3-1967

Criminal P C (1898), Section 432 (added by J and K. Act 27 of 1957) — Reference

IL/JL/E247/68

to High Court — Conditions under which a trial magistrate can make a reference explained.

The High Court is not an advisory body and it is not open to any Magistrate to refer any question of fact for the opinion of the High Court. The only provision entitling a trial Magistrate to make a reference is the one contained in Section 432 of the Code of Criminal Procedure which was added by the State Legislature vide Act No. 27 of 1957.

For such a reference the following conditions must concur. 1. The Court must be satisfied that a case pending before it involves a question as to the validity of any Act, or Ordinance or any provision contained in an Act, or Ordinance. The question involved must be real and substantial. A mere plea by a party that an Act or Ordinance or provision contained in an Act or Ordinance is ultra vires or a mere doubt entertained by the Court would not be enough. If the court is not so satisfied, it should proceed with the trial and leave the aggrieved party to move the High Court under section 105 of the Constitution of Jammu and Kashmir and continue the trial until such a motion is admitted and trial stayed by the High Court. 2. The determination of the said question must be necessary for the disposal of the case. 3. The Court must be of the opinion that such Act or Ordinance, or provision is invalid or inoperative. 4. The said Act or Ordinance or provision must not have been already declared by the High Court to which the court is subordinate or by the Supreme Court to be invalid or inoperative. (Para 1)

J. L. Chowdhry, for Petitioner; Ishwar Singh and K. N. Raina, for Opposite Party.

ORDER: This reference made by the City Munsiff, Magistrate Ist Class, Srinagar, which seeks directions from this court regarding delivery and custody of Bus No. JKA 3845 appears to me to be totally misconceived and incompetent. Under the provisions of Section 438 of the Code of Criminal Procedure, it is only a Sessions Judge or a District Magistrate who can after examination under Section 435 of the Code of Criminal Procedure, of the record of any proceeding or otherwise make a reference to the High Court.

The High Court is not an advisory body and it is not open to any Magistrate to refer any question of fact for the opinion of the High Court. The only provision entitling a trial Magistrate to make a reference is the one contained in Section 432 of the Code of Criminal Procedure which was added by the State Legislature vide Act No. 27 of 1957. The said section reads as under:—

(1) "Where any court is satisfied that a case pending before it involves a question as to the validity of an Act, or Ordinance

or of any provision contained in an Act or Ordinance, the determination of which is necessary for the disposal of the case and is of the opinion that such Act or Ordinance or provision is invalid or inoperative but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor and refer the same for the decision of the High Court.

(2) Any court making a reference to the High Court under sub-section (1) may, pending the decision of the High Court thereon, either commit the accused to jail or release him on bail to appear when called upon." A careful study of the above provision of Law will show that for its applicability, the following conditions must concur.

(1) The Court must be satisfied that a case pending before it involves a question as to the validity of any Act, or Ordinance or any provision contained in an Act, or Ordinance. The question involved must be real and substantial. A mere plea by a party that an Act or Ordinance or provision contained in an Act or Ordinance is ultra vires or a mere doubt entertained by the Court would not be enough. If the Court is not so satisfied, it should proceed with the trial and leave the aggrieved party to move the High Court under Section 105 of the Constitution of Jammu and Kashmir and continue the trial until such a motion is admitted and trial stayed by the High Court.

(2) The determination of the said question must be necessary for the disposal of the case.

(3) The Court must be of the opinion that such Act or Ordinance, or provision is invalid or inoperative.

(4) The said Act or Ordinance or provision must not have been already declared by the High Court to which the Court is subordinate or by the Supreme Court to be invalid or inoperative.

2. It is only when all these conditions are satisfied that a trial Magistrate has the power to make a reference to the High Court. In no other case can a trial Magistrate make a reference to the High Court. As the requirements of the aforesaid provisions contained in Section 432 of the Code of Criminal Procedure are not satisfied in the present case, the reference is wholly untenable.

3. The reference accordingly fails and is hereby rejected. The record shall go back to the trial Magistrate who shall dispose of the matter expeditiously according to law.

BDB/D.V.C.

Case remitted.

AIR 1969 JAMMU AND KASHMIR 62
(V 56 C 15)

FULL BENCH

S M FAZL ALI, C J, J N BHAT,
JASWANT SINGH, ANANT SINGH AND
R N CURTOO JJ

Syed Suraj-ul Din and another Appellants
v Karim Dar and others, Respondents

Civil Second Appeals Nos 33 and 38 of
1965 D/ 31 7 1968 against order of Dist.
J., Srinagar D/ 6-3-1965

(A) J and K. Right of Prior Purchase
Act (2 of Smt. 1933), Section 14 (as amend-
ed by Act 23 of 1959) — Suit for pre-
emption — Amendment of the Act improv-
ing defendant-vendee's title — Amendment
not retrospective — Vendee cannot take
advantage — AIR 1965 J and K 62 (FB),
Overruled. (Majority view)

Majority view (Ali, C J and Bhat, J
dissenting) — According to the law obtain-
ing in the State of Jammu and Kashmir a
vendee cannot improve his position after
the date of sale so as to defeat the right of
prior purchase of the plaintiff AIR 1965
J and K 62 (FB) Overruled. 3 J and K. LR
210 Rel on. (Paras 38 56 61)

Secondly if a Statute is passed during
the pendency of a suit for pre-emption
giving a better and superior right to the
defendant vendee, such a right cannot be
utilized by the vendee in order to defeat
the right of pre-emption where the Amend-
ing Act is not specifically retrospective
(Paras 41 46 57)

Per Bhat, J., dissenting (Ali, C J agree-
ing with him) — The right to get the prop-
erty in preference to the vendee although
an inchoate one upto the date of the deci-
sion of the first court, comes into existence
effectively with a decree in favour of the
plaintiff and even that may not entitle him
to the property The vendee has the right
to improve his status in any legitimate
manner upto the date of the decree Case law
discussed. (Paras 17, 20)

(B) J and K. Laws Consolidation Act
(Smt. 1977), S 4 (1) (b) — Constitution
of Jammu and Kashmir (1957), S 157 —
Advice tendered by Board of Advisers —
Command Order of the Ruler accepting
advice — Becomes law of the State.

Per Jaswant Singh, J (Anant Singh, J
agreeing with him) The order of the Ruler
of the State of Jammu & Kashmir who was
an absolute sovereign could not but be re-
garded as a law He was the Supreme
Legislature, the Supreme Judiciary,
and the Supreme Head of the execu-
tive and there were no constitu-
tional limitations upon his authority His
commands were binding in the same way
as any other law and they could override all
other laws which were in conflict with

them AIR 1955 S C. 352, AIR 1958 S.C.
60 & AIR 1960 SC 862, Rel. on.

(Para 68)

Therefore the command order which in
effect ordained that the priority must be
determined with reference to the date of
sale and not with reference to the date of
institution or the decision of a suit for pre-
emption subsequently brought by one of the
claimants became the law of the land. 8
J and K LR 210, Rel. on.

(Para 37, 48)

Per Bhat, J (Ali, C J agreeing with
him) The acceptance of the advice of the
Board of Judicial Advisers by His Highness
would not be tantamount to His passing
or promulgating any law but would at best
be an interpretation of the provisions of
some law, in this case the Right of Prior
Purchase Act. Even otherwise in the pre-
sent case the competent legislature of the
State has passed the Amending Act No. 23
of 1959 Therefore this Amending Act will
supersede the previous laws in force in the
State under Section 157 (3) of the Consti-
tution of Jammu and Kashmir whether they
were in the shape of statutory legislation or
any command, proclamation or Phirman
issued by His Highness the Maharaja. There-
fore if this Amending Act gives any protec-
tion to the vendees the previous state of
law as laid down by His Highness in ac-
cepting the advice of the Board of Judicial
Advisers will stand repealed to the extent
it is inconsistent with the Amending Act.

(Paras 9 23)

(C) J and K. Right of Prior Purchase
Act (2 of 1933) Section 14 — Amendment
of by J and K. Act of 23 of 1959 —
Amendment not retrospective — Does
not affect prior rights of agnates and co-
sharers (Majority view)

Majority view — A close scrutiny of the
provisions of the Amending Act of 1959
shows that there is nothing in the said Act
which ordains that the amendment should
be given a retrospective effect. The amend-
ment brought about in Section 14 by
Amending Act which gave a priority to a
tenant over an agnate and a co-sharer has
therefore no retrospective effect and the
right which has already vested in an agnate
could not be divested and superseded by a
tenant who had no right of pre-emption at
the date of the sale on the basis of the
amendment enacted after the institution of
the suit for pre-emption. (1963) 3 SCR
684, Distinguished.

(Paras 39 40 49 53)

Per Bhat, J (dissenting) If we accept the
test that a pre-emptor must retain his right
upto the date of decree then obviously if
any legislation is passed by any competent
legislature which deprives the pre-emptor
of continuing with his suit or defeats his
suit, it has to be applied to his case. The
vendee stands on a firmer footing if the
legislature confers upon him a better title
than he had before to be able to defeat the

rights of the pre-emptor than he had if he had to take resort to other actions either his own or somebody else's to improve his status. In this case when the suits were still pending in the trial court the amendment came in the form of Amending Section 14 of the Right of Prior Purchase Act by means of an Act No. 23 of 1959 and the vendees had a better or a complete answer to the suits of the plaintiffs.

(Para 22)

Per Ali, C. J. (Dissenting):— If a right of pre-emption can be defeated by a defendant vendee by improving his title or acquiring a superior right by an act inter vivos even after the suit is filed but before a decree is passed, there is no reason why the same end cannot be achieved by the vendee defendant through operation of law which is passed during the pendency of the suit but before a decree is passed. The question in such cases is not that the Act is retrospective, but it resolves itself to the fact that the Act having been passed prevents the claim of pre-emption from ripening into a full fledged right with the result that the right thus dies a natural death because the vendee has acquired a superior right by operation of law.

(Paras 26, 27)

(D) Constitution of India, Article 141 — Advice by Board of Advisers in Jammu and Kashmir accepted by the Ruler — Supreme Court of India can overrule it.

Per Bhat, J.— Under Article 141 of the Constitution of India, the law laid down by the Supreme Court shall be the law of the land. If there is any authority on the interpretation of any legal enactment whether by the Privy Council or by any other authority, which is contrary to the interpretation put by the Supreme Court on the same provisions of law, the Supreme Court view will prevail. It is a very well settled principle that all courts in India are bound to follow the decisions of the Supreme Court even though they are contrary to the decisions of the House of Lords or of the Privy Council. AIR 1956 Bom 586 and AIR 1955 Nag 293, Ref. to.

(Para 10)

Per Ali, C. J.—The decision of the Board of Judicial Advisers is merely an interpretation of law which has been accepted by His Highness the Maharaja Bahadur, but if it is held to be no longer good law in view of the pronouncement of the Supreme Court the said law loses its statutory force and cannot be said to be binding on the High Court of Jammu and Kashmir which has to follow the mandate of the Supreme Court under Article 141 of the Constitution of India.

(Para 29)

Per Anant Singh, J.—After the integration of the State of Jammu and Kashmir with the Union of India, the decision of the Supreme Court can well override the decision of His Highness Board but the Supreme Court has not done it so far in any of its

decisions. The decisions of the Board therefore must be deemed to have been the law for the State until the Legislature undid it by its enactment. (Para 54)

(E) Civil P. C. (1908), Preamble — Interpretation of Statutes — Retrospective effect — (Interpretation of Statutes).

Any amendment in substantive law is not retrospective unless expressly laid down or by necessary implication inferred. Procedural laws are always retrospective in operation.

(Paras 22, 24, 46, 57)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 J and K 44 (V 54) = 1967 Kash LJ 83 (FB), Collector v. Habib-Ullah-Din		20
(1966) AIR 1966 Punj 374 (V 53) = ILR (1966) 2 Punj 125 (FB), Ramji Lal Ram Lal v. State of Punjab		13, 18
(1965) AIR 1965 J and K 62 (V 52) = 1965 Kash LJ 105 (FB), Master Sewanath v. Faqir Chand		10, 13, 29, 38, 55
(1963) 1963-3 SCR 884 = (1963) 2 SCJ 659, Amir Singh v. Ram Singh		15, 25, 26, 27, 39, 46, 51
(1962) AIR 1962 J and K 79 (V 49), Satar Mohd. v. Saraf-ud- din		18
(1960) AIR 1960 SC 862 (V 47) = (1960) 3 SCR 311, Sarwar Ali v. State of Hyderabad		88
(1960) AIR 1960 SC 1368 (V 47) = (1961) 1 SCR 248, Radha Kishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi		19, 52
(1960) AIR 1960 J and K 112 (V 47) = Nabin Ganai v. Mohd. Ismail		18
(1958) AIR 1958 SC 838 (V 45) = 1959 SCR 878, Bishan Singh v. Khazan Singh		10, 17, 25, 29, 37, 38, 50, 53, 54, 55
(1956) AIR 1956 SC 60 (V 43) = Director of Endowment, Govt. of Hyderabad v. Akram Ali		88
(1956) AIR 1956 Bom 586 (V 43) = ILR (1956) Bom 693, I.-T. Commr. v. Shrinibai		10
(1955) AIR 1955 SC 352 (V 42) = Ammeer Unnisa Begum v. Mahboob Begum		88
(1955) AIR 1955 Nag 293 (V 42) = ILR (1954) Nag 392, Punjabai v. Shamrao		10
(1954) AIR 1954 Raj 231 (V 41) = ILR (1954) 4 Raj 310, Sankarlal v. Poonamchand		13, 14
(1952) AIR 1952 Raj 5 (V 39) = ILR (1951) 1 Raj 329, Gopichand v. Meenalal		18
(1944) AIR 1944 Lah 172 (V 31) = ILR 1944 Lah 473 (FB), Faiz Mohammad v. Fajar Ali Khan		19

- (1941) AIR 1941 Lah 433 (V 28) =
43 Pun LR 581 (FB), Madho Singh
v James R R Skinner 13, 37, 49
- (1932) AIR 1932 PC 57 (V 19) =
ILR 54 All 180, Hans Nath v
Ragho Prasad 13, 25
- (1924) AIR 1924 All 82 (V 11) =
ILR 45 All 709 Baldeo Misir v
Ramlagan Shukul 13
- (1917) AIR 1917 Oudh 390 (V 4) =
41 Ind Cas 909, Sitla Baksh Singh
v Jagdat 13
- (1909) 4 Ind Cas 337 = 1909 Pun
Re 91 (FB) Dhanna Singh v Gur
Baksh Singh 13, 37
- (1899) ILR 21 All 441 = 1899 All
WN 163 Ram Gopal v Piar Lal 13
- (1894) 136 Pun Re 1894, Dhani Nath
v Budhu 17
- (1890) ILR 12 All 234 (FB) Deoki
nandan v Sn Ram 17
- 3 J and K LR 210 Dharam Singh v
Sitaram 7 9 29 37
- J N Bhan and S P Vohra, for Appel
lants Ishwar Singh and R N Kaul, for
Respondents

J N BHAT, J: Two suits for possession of agricultural land, one for 4 kanals under survey No 951 in village Dadompura and the other for 9 kanals 14 marlas under survey No 936 situate in the same village were brought by Syed Siraj ul Din and Syed Ahmed Shah against Karim Dar and others. The cases were instituted on 11-9-1958 and on 10-6-1959 respectively. In the first case Ahad Shah was the vendor while in the second suit Syed Mohd. Shah was the vendor. In the first case the alleged sale consideration was Rs 1000 and in the second it was Rs 1500. The plaintiffs alleged that they were the heirs (agnates) of the vendors and co-sharers in the land sold.

2. The defence of the vendees was that they were the tenants of this land, they denied the relationship of co-sharers of the plaintiffs vis a vis the vendors.

3. A number of issues were raised in the suit. The trial court held that the vendees were tenants of the land in question, the plaintiffs were the heirs of the vendors and held the price as entered in the sale deeds as proved but held that on the basis of Act No XXIII of 1959 which came into force on 26-10-1959 the defendants being tenants of the land had a superior right to that of the pre-emptors, it dismissed the suits on 5-9-1962. On an appeal before the learned District Judge Srinagar, the issue of consideration was not pressed. Further the plaintiffs being co-sharers of the vendors also was not pressed. But the plaintiffs were held to be the heirs of the vendors. Agreeing with the finding of the trial court that the defendants were the tenants and they could improve their title upto the date of the decree, the learned District Judge dismissed the appeals by his order dated 6-3-1965. The plaintiffs have come in further

appeal to this court against these findings. The finding of fact recorded by both the Courts below is that the pre-emptors are the heirs of the vendors and the vendees are the tenants of the land sold.

4. The case came up before a Single Judge of this court who referred them to a Division Bench. Later on the Division Bench by means of its order dated 29th of May, 1968 referred the cases to a Full Bench and the cases were heard by the Full Court. The two propositions that were referred to the Court were whether or not the defendants can by improving their title during the pendency of the suit defeat the right of pre-emption. Secondly if a statute is passed during the pendency of the suit for pre-emption giving a better and a superior right to the defendant vendees, whether such a right can be utilised by the vendees in order to defeat the right of pre-emption where the Act is not specifically retrospective.

5. The sole question that has arisen for determination in these cases is whether the amending Act No XXIII of 1959 can have any application to the facts of this case. As will be clear from the statement of facts given above the lands were transferred in the year 1958 sale deeds having been executed on 11-6-1958 and registered on 12-6-1958. The suits were instituted on 11-9-1958 and 10-6-1959. The Amending Act came into force on 26-10-1959 that is after the sales in question and after the institution of the suits. The provisions of this amending Act have to be reproduced before I take up the arguments advanced by the learned counsel for the parties. Section 2 of this Amending Act amends Section 14 of the Right of Prior Purchase Act, 1993 and states

"14. Persons in whom right of prior purchase vests in respect of sale of agricultural land and village immovable property. Notwithstanding anything contained in any law, rule or custom but subject to the provisions of Section 13 the right of prior purchase in respect of agricultural land and village immovable property shall vest

(a) Where the sale is by a sole owner or occupancy tenant or in the case of land or property jointly owned or held, by all the co-sharers jointly. Firstly in the tenant cultivating such land where the sale of agricultural land and in the tenant occupant thereof where the sale is of village immovable property, and

Secondly — in the persons in order of succession who but for such sale would be entitled on the death of the vendor or vendors to inherit the land or property sold." sub-section (b) of Section 14 also has been amended but it is admitted before us that that provision of law does not apply to these cases. Therefore on the findings of the lower courts the contest with respect to this property is between the heirs of the vendors and the tenants cultivating the land.

lay down any rule, which, directly or indirectly affects the undoubted inherent powers of the High Court to pass orders, to prevent grave and substantial injury to the parties.

But in our view the salutary practice to be followed in this High Court should be that ordinarily the High Court will not entertain a revision unless the aggrieved party approached an inferior Court in the first instance and will not deviate from that practice, except on special exceptional or extraordinary grounds. When there are no such grounds, the mere fact that a revision has been admitted by this Court cannot make any difference in the enforcement of the rule of practice, for the party who with open eyes ignored the practice and filed a revision direct in the High Court, cannot take advantage of his deviation from the rule of practice."

2. Having conceded the right of a party to approach this court direct under Section 435, we do not think it proper to fetter the right by insisting on exceptional or extraordinary grounds being made out for entertaining the petition. What could be 'exceptional or extraordinary grounds' is not clear from the judgment of the learned Chief Justice. Could a party be permitted to plead that the High Court is nearer to him than the Sessions Court or that according to him better legal aid is available in the High Court centre, to justify his coming direct to the High Court? We do not think that in entertaining the petition any such grounds could be considered proper or sufficient. The plea that the Sessions Judge or the District Magistrate has no inherent power to make orders of stay and therefore the party would be justified in approaching this Court direct, is also not correct. The section itself confers on the Sessions Judge and the District Magistrate the power to suspend execution of the sentence or order and also to release the accused on bail. But the Sub-Divisional Magistrate does not possess such a power even though he also is possessed of revisional jurisdiction under Section 435. In his case the records will have to be forwarded to the District Magistrate for passing such interim orders. This power of passing interim orders of suspension could be exercised even when a recommendation under Section 438 is made. It is, therefore, difficult for a party to find exceptional or extraordinary grounds to justify his action in approaching this Court direct. The result would be that without first approaching the lower Court, it would be impossible for an aggrieved party to approach this Court because of the insurmountability of the condition imposed.

The Gujarat and Patna High Courts have expressed themselves in favour of

a party approaching the High Court without first approaching the Sessions Judge or the District Magistrate. A Single Bench of the Gujarat High Court in *Suraj Mohan v. State*, AIR 1967 Guj 126 has observed:—

"It was then said that the applicant has not gone to the Sessions Court against an order passed by the learned Magistrate and has come directly to this Court. Ordinarily it is true that the High Court is reluctant to entertain the petition in revision directed against any order passed by the Magistrate. But even if he had gone to the Sessions Court, it was not possible for it to pass any adequate orders and it would have been required to refer the matter to the High Court for having suitable orders in the matter. That would have taken a good lot of time and the purpose behind the claim in the petitioner would obviously be frustrated. There is no bar under any provision of law, saying that an application in revision cannot lie directly to the High Court and that it must always come through the Sessions Court." To the same effect is the Division Bench ruling of the Patna High Court in *Sahdev Mandal v. Honga Murmu*, AIR 1967 Pat 223.

3. We cannot shut our eyes to the glaring fact that the Sessions Judge or the District Magistrate is incompetent to render adequate relief to an aggrieved party invoking the revisional jurisdiction vested in them under Section 435. If the Court is satisfied that the revision is frivolous, the petition will be dismissed, but on the other hand if it is satisfied that the order of the Subordinate Magistrate has to be vacated, a report to that effect will have to be forwarded to this Court under Section 438. In either case, the party will have to appear in this Court and present his case again. It is true that if the District Magistrate or the Sessions Judge reports in favour of the accused, he need not be represented in the High Court, particularly when the illegality of the conviction or the severity of the sentence is patent. But, as a general rule the accused is also served with notice on the reference, and he appears either personally or through pleader. In all cases where the Sessions Judge or the District Magistrate refuses to make a reference, the petitioner has a right to approach this Court. The effect is that an aggrieved party is put to the trouble of presenting his case in two Courts one after the other.

The view, that if this practice is followed, the work of the High Court would be minimised, does not appear to us to be convincing. The High Court, in any event, will have to be approached by the

aggrieved party at the final stage and it is unreasonable to think that the High Court would cease to be flooded with petitions of this kind if the restriction is tightened. Effective orders can be passed by the Sessions Judge and the District Magistrate, only in dismissal of complaints under Sections 203 and 204 (3) in orders of discharge. In all other instances the District Magistrate or the Sessions Judge sitting in revision, can only make a reference as contemplated in Section 438 if satisfied that the order under revision is wrong and calls for interference. We would also like to point out that it is not correct to say that the jurisdiction vested in the Sessions Judge and the District Magistrate on the one hand, and the High Court on the other, is "concurrent" in the strict sense of the term. The expression "concurrent" connotes "joint and equal in authority". In other words, the two agencies or units should possess co-equal powers, but in the present instance the power is not co-equal as we have already seen.

4. There is also another handicap and that takes us to the question of limitation. Article 131 of the new Limitation Act prescribes a period of 90 days for entertaining an application of this nature and the period would run from the date of the decree or order or sentence sought to be revised." The period has to be reckoned from the date of the order of the Magistrate and not of the Sessions Judge declining to make the reference. On this matter, the Patna High Court would observe in AIR 1967 Pat 223 cited already:

"We therefore, hold that in a case, where a party makes an application in revision to this Court for setting aside an order of a Magistrate passed in a proceeding under Section 145 Code of Criminal Procedure the period of ninety days prescribed by Article 131 of the new Limitation Act is to be counted from the date of the order of the Magistrate, and that, in such a case, the petitioner is not bound to approach the Court of Session before coming to this Court."

Normally some time would elapse before the Sessions Judge is able to pass an order either declining to refer or making a reference and by that time the period of ninety days would in most cases run out. In such a situation, without an application for condonation of delay, the revision petition would not be entertained. The pendency of the petition in the Sessions Court no doubt could be urged as ground for the delay and it is possible that the Court may view the ground liberally and excuse the delay. That apart, the fact remains that the party is put to additional expenses, on that count.

When the law confers a right on a party he must be able to enjoy the right without shackles or snag obstructing him. To avail himself of a remedy held out by the Code, the party is asked to approach first a tribunal with no power to render the relief. This in effect is putting the party in double-jeopardy. We are of the view that it would be improper to compel a party having a strong case in his favour under Section 438 of the Code, to approach first the Sessions Judge or the District Magistrate. He should not be compelled to do so except in cases where the Sessions Judge or the District Magistrate is capable of passing effective orders, as in a case of discharge or dismissal of complaint. In all other revisional matters the aggrieved party may approach this Court direct if so inclined.

5. We would answer the reference in the above terms.
LGC/D V C. Order accordingly.

AIR 1969 KERALA 130 (V 56 C 32)

P GOVINDAN NAIR AND V P.
GOPALAN NAMBIYAR, JJ.

E. A. Thomman and another, Petitioners v Regional Transport Officer, Ernakulam and another, Respondents.

Original Petns. Nos. 1476 and 1831 of 1968 and 535 and 930 of 1967, D/- 4-3-1968

(A) Constitution of India, Art. 246, Sch. 7, List 2, Item 56 — Kerala Motor Vehicles (Taxation of Passengers and Goods) Act (25 of 1963), Pre., S. 3 — Act imposes tax on passengers and goods and not on operators or on their income — It is within the competence of State Legislature — AIR 1952 Pat 359 (SB) & AIR 1954 Mad 569 & AIR 1951 SC 1480 & AIR 1962 Madh Pra 108 & AIR 1953 Mys 49, Foll. (Paras 9, 13)

(B) Constitution of India, Arts. 14, 226 — Kerala Motor Vehicles (Taxation of Passengers and Goods) Act (25 of 1963), Ss. 3, 18 — Constitutional validity of Act — Provisions alleged to be discriminatory on ground that tax payable by passenger or owner of goods must depend not on the distance that he travelled or the distance for which the goods were carried out but on total distance that vehicle travelled a day — Discrimination affecting passengers or owners of goods but not writ petitioners who are operators — Petitioners, held not entitled to raise such a point — Provisions, held to be not discriminatory. (Para 16)

(C) Constitution of India, Art. 19 — Tax Laws are not beyond clutches of Art. 19 — Mere imposition of tax by

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itself does not infringe Art. 19 — There must have been crippling of trade or business — Kerala Motor Vehicles (Taxation of Passengers and Goods) Act (25 of 1963), Pre. — Act has not imposed any restriction on operators — They have been utilised merely for facilitating collection of tax imposed on passengers and owners of goods — Operators cannot rely on Art. 19 to challenge validity of the Act. (Paras 17, 18)

(D) Constitution of India, Art. 265 — Kerala Motor Vehicles (Taxation of Passengers and Goods) Act (25 of 1963), Pre., Ss. 3, 43, 44 — Taxing statute must itself provide for payment and collection of tax from such person as are made liable by the impost — Provision for collection of tax held to be unsatisfactory.

The Kerala Motor Vehicles (Taxation of Passengers and Goods) Act, is not a law for the purpose of enabling the collection of any tax imposed by any other statute. This is a regulatory measure in relation to the matters provided in that statute. Provision has been made for the State to give directions to the State Transport Authority. That provision in so far as it pertains to directions relating to fares and freights is contained in S. 43 wherein sub-section (1) states with reference to what matters the directions enumerated under that section can be given. The matters are the advantages offered to the public, trade and industry by the development of motor transport, the desirability of co-ordinating road and rail transport, the desirability of preventing the deterioration of the road system and the desirability of preventing uneconomic competition among motor vehicles. And by notification in the Official Gazette it is provided that the State Government may issue directions to the State Transport Authority, inter alia, regarding the fixing of fares and freights for stage carriages, contract carriages and public carriers. Ss. 44 (3), 43 and 60 are made purely for the purpose of the Motor Vehicles Act. (Para 26)

If the tax under the Act is not on the operator and is an impost on the passenger or on the owner of the goods, it is not a relevant consideration at all in the matter of giving directions under S. 44 (3) or in the matter of fixation of the fares under S. 44 (3) by the State Transport Authority. When a taxing statute has impugned a tax on a particular class of persons that statute or at least the rules framed under the statute must itself provide for the payment and the collection of the tax from such persons as are made liable by the impost. The amount claimed must be neither more than the tax imposed nor less. If more is claimed from the passenger or the owner of the goods there will be no authority of law

for it. And if only less is claimed the operators will have to make up the difference for which also there is no authority of law. So it must be ensured that the precise amount alone is collected from the passenger and the owner of the goods. This cannot be achieved by the method said to have been adopted viz., fixation of enhanced fare under the Motor Vehicles Act. This is a very unsatisfactory way of making provision for the collection of a tax imposed by a statute. AIR 1962 Madh Pra 108 & AIR 1954 Mad 569, Disc. (Paras 26, 29)

Provision must be made expeditiously for the collection of the tax from the passenger as tax specifying the quantum calculated and computed on the basis of the provision of the Act. This will of course be payable to the operator who has been made liable to pay the tax to the State. It is for the State Legislature and/or the State Government to take such steps as are necessary to provide the machinery. AIR 1952 Pat 359 (SB), Ref. (Paras 30, 41)

(E) Constitution of India, Part 13, Articles 301, 304 (b) — Scope — Kerala Motor Vehicles (Taxation of Passengers and Goods) Act (25 of 1963), Pre., S. 3 — Burden imposed by tax held to be reasonable.

A merely regulatory measure will not attract Part XIII of the Constitution and there can be no question of violation of Art. 301 and therefore no necessity to satisfy Art. 304 (b). AIR 1961 SC 232 & AIR 1962 SC 1406 & AIR 1964 SC 925, Rel. on. (Para 21)

But the Kerala Motor Vehicles (Taxation of Passengers and Goods) Act is not a purely regulatory measure. It is a taxing statute. It impugns Article 301 and it can stand only if it satisfies Article 304 (b). (Para 22)

The burden imposed by a tax on trade would prima facie be reasonable and in the public interest because it is intended for raising money "in order to carry on the function of Government and to sustain the manifold welfare activities undertaken by it". The fact of Presidential sanction for the Act has also to be given its due weight and importance. The tax imposed by the impugned Act is on the passengers, collectible from the operators, who could, and should reimburse themselves from the passengers. And there is therefore no question of the tax imposed casting such burden as would crush the industry or drive the operators out of existence. AIR 1964 SC 925, Rel. on. (Paras 38, 40, 41)

Cases Referred: Chronological Paras
(1966) O. P. No. 396 of 1966 (Ker) 14
(1964) AIR 1964 SC 925 (V 51)=
(1964) 5 SCR 975, Khyerbari Tea
Co., Ltd. v. State of Assam 14, 20,
23, 37

- (1963) AIR 1963 SC 1667 (V 50)=
(1963) 50 ITR 171 Rai Ram-
krishna v State of Bihar 14, 23
- (1963) AIR 1963 Mys 49 (V 50).
H. K. Swaranavar Nashar v State
of Mysore 52
- (1962) AIR 1962 SC 1406 (V 49)=
(1963) 1 SCR 491, Automobile
Transport Ltd. etc. v State of
Rajasthan 20, 23
- (1962) AIR 1962 Madh Pra 108
(V 49)=1962 Jab LJ 214, Madhya
Pradesh Transport Co., Pvt. Ltd.
v State of Madhya Pradesh 12, 24,
25, 26 29
- (1961) AIR 1961 SC 232 (V 48)=
(1961) 1 SCR 809 Atiabari Tea
Co Ltd and Khayerbari Tea Co.
Ltd. v State of Assam 19, 20
- (1961) AIR 1961 SC 652 (V 48)=
(1961) 3 SCR 242, Diamond Sugar
Mills Ltd. v State of U P 6
- (1961) AIR 1961 SC 1480 (V 48)=
(1962) 1 SCR 517 Sainik Motors
Jodhpur v State of Rajasthan 12
- (1954) AIR 1954 Mad 569 (V 41)=
ILR (1954) Mad 887, P Mathuraj
Pillai v State of Madras 11 12, 28, 29
- (1952) AIR 1952 Pat 359 (V 39)=
ILR 31 Pat 493 (SB) Atma Ram
Budhla v State of Bihar 10, 11, 12, 30
- (1919) 4 Law Ed 579=4 Wheat 316,
Mc Cullock v Maryland 17

K. Raghavan Nair, for Petitioner, (In O P No 1476 of 1966) K. Neelakanta Menon, for Petitioner, (In O P No 1831 of 1968) V. R. Krishna Iyer and Prabhakaran, for Petitioners (In O P No 535 of 1967) & (In O P No 930 of 1967); Advocate-General, for Respondents, (in all appeals)

GOVINDAN NAIR, J.—These writ applications were heard along with a batch of other writ applications where common questions have been raised. It is agreed that the decision in these cases will govern the other petitions as well.

2 The petitioners in these writ applications are all 'operators' within the meaning of that term as defined in Section 2 (b) of the Kerala Motor Vehicles (Taxation of Passengers and Goods) Act, 1963, (hereinafter called 'the Act'). They impugn the validity of the Act. The grounds on which the Act is challenged may be grouped under five heads: (a) the enactment though it purports to be under Item 56 of List II of the Seventh Schedule to the Constitution really does not fall within the ambit of that entry; in fact it has trespassed on legislative powers vested with the Union Parliament and is a colourable piece of legislation and is incompetent, (b) the Act violates Part XIII of the Constitution, particularly Article 301 thereof, and does not satisfy the requirements of Article 304 (b), (c) the Act infringes Arti-

cle 14 of the Constitution, (d) that it is against the provisions in Article 19 (1) (g) and finally (e) that even if the Act is construed to have imposed the burden of the tax on the 'goods and passengers' it is still ineffective because of lack of provisions in the statute or rules made thereunder for collection of the tax from the passenger and/or the owner of the goods

3 We shall deal with these arguments serially. But before doing so, it is necessary to refer to the salient provisions in the Act to understand its scope and ambit. We may refer first to the preamble of the Act which runs thus—

"Whereas it is expedient to provide for the levy of a tax on passengers and goods carried in stage carriages and public carrier vehicles in the State of Kerala " This is followed by the important charging Section, Section 3, which we shall extract in full.

"Levy of tax on passengers and goods. — On and from the date of commencement of this Act, there shall be levied and paid to the Government, a tax on all passengers, luggage and goods carried by stage carriages and on all goods transported by public carrier vehicles, at the rate of 10 naye paise in the rupee on the fares and freights, payable to the operators of such stage carriages and at the rate of 5 naye paise in the rupee on the freights payable to the operators of such public carrier vehicles

Provided that in the case of all goods transported by public carrier vehicles for export out of the territory of India, no tax under this section shall be payable

Provided further that no tax shall be levied on any passenger, luggage or goods carried in a stage carriage, if the total distance permitted to be covered by such stage carriage in a day, does not exceed eighty kilometres

Explanation I. For the purpose of this proviso, "export" shall not include movements of goods from one port in the territory of India to another port in the said territory

Explanation 2. For the removal of doubts it is hereby declared that —

(i) in respect of passengers luggage or goods booked through over the railways and any road transport service, the tax payable under this Act shall be calculated only on the fares and freights payable on such passengers, luggage or goods for the distance on the road covered by the taxable vehicle

(ii) no tax shall be payable under this Act on goods carried by any vehicle owned by any department of the Central Government or by the Railways."

Section 4 provides for the composition of tax on an application by the operator which term means "any person whose

name is entered in the permit as the holder thereof". Section 5 enjoins that in respect of every taxable vehicle, meaning thereby "a stage carriage, or a public carrier vehicle, which is referred to in Section 3", the operator shall deliver or cause to be delivered a return in the prescribed form and Section 6 enjoins that the operator shall pay the tax payable during any month to a Government treasury and the receipt evidencing such payment forwarded to the prescribed officer before the 15th day of the month immediately succeeding. There is a further provision made in Section 7 for action being taken where no returns have been filed or when the returns filed by the operator appear to be incorrect or incomplete. Section 8 provides for steps to be taken against the operator in case of escapement of tax. Penalty can be imposed on the defaulter under Section 9 and Section 10 contains a provision for the recovery of tax due under Sections 7, 8 and 9.

It is clear from Sections 11 and 12 that a transferee of a motor vehicle will be liable for the tax that should have been paid by the transferor and that no taxable vehicle shall be used on any public road in case any tax or penalty payable in respect thereof remains unpaid or where returns required by Section 5 have not been filed. Section 15 provides for offences and penalties and Section 17 for composition of offences. There is provision made in Section 18 for reduction of tax in certain cases and Section 19 contains the power of Government to notify exemptions. The only other provision that we need notice is that contained in Section 20 which empowers the Government to make rules. These powers as normally, are expressed in Section 20 (1) in very wide terms, namely, to make rules to carry out the purpose of the Act and in enumerating the specified powers without prejudice to the generality of the provision in Section 20 (1), it is inter alia provided in Section 20 (2) (g) that rules may be made for any other matter for which there is no provision or no sufficient provision in the Act and for which provision is, in the opinion of the Government, necessary for giving effect to the purposes of the Act.

4. On the basis of these provisions counsel appearing in these cases urged that notwithstanding the preamble to the statute which speaks in fairly clear and unequivocal terms that the object is to levy a tax on passengers and goods carried in stage carriages and public carrier vehicles in the State and notwithstanding the repetition of the same words in the key section, as we may call it, Section 3, which is the charging Section, and further provision being made in Section 19 empowering the Government by

notification to exempt or reduce the tax or the rate on any specified class of passengers, luggage or goods, the statute has in effect, if not actually, imposed the tax on the operator, namely, the person whose name is entered in the permit as the holder thereof.

This submission is made on the basis of the provision contained in Sections 5 to 10 and the further provisions contained in Sections 11 and 12 as well as those in what we may call the penal provisions of the statute. The argument is that though the legislature has chosen to use the language of the Constitution contained in Item 56, of List II of the Seventh Schedule to the Constitution which speaks of "taxes on goods and passengers carried by road or on inland waterways" they have imposed the tax not on the passengers or on the goods, in the sense on the owners of the goods, but on the persons who carry these passengers or goods, namely, the operators. It is on this basis that it is urged that the statute is a colourable piece of legislation.

Our attention has been invited to Item 89, in List I, of the Seventh Schedule to the Constitution dealing with powers of Parliament and it was emphasised that that entry permits legislation imposing taxes on railway fares and freights but there is no corresponding entry in the State List empowering the State Legislature to impose any such tax. It is also urged that whenever provision is to be made by legislation regarding carriage of passengers and goods the framers of the Constitution have stipulated for it, though not expressly for imposing tax, in Item 30, of List I of the Seventh Schedule to the Constitution. Item 30 states 'carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels'.

Emphasis also was laid on Entry 57 of List II of the Seventh Schedule to the Constitution providing for "taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of Entry 35 of List III". And it is said that full and ample powers have been granted by this entry on the State Legislature to impose taxes on vehicles and therefore necessarily on the owners of those vehicles. It is said that there are very few entries in all the three lists taken together which have indicated specified persons as taxable. Reference was made in this connection to Items 30 and 31 in the State List, List II of the Seventh Schedule to the Constitution, which grant powers of legislation in respect of money-lenders and inn-keepers respectively. Entry 89 in List I of the Seventh Schedule, was also referred to where provision is made for terminal taxes on goods or passengers.

Apart from these entries, pointing to certain specified classes of persons, the only other entry pointing in the same direction is the one contained in Item 56 of List II of the Seventh Schedule which again speaks of taxes on goods and passengers carried in a particular manner.

5 These according to counsel for the petitioners indicate a pattern and it is said that the entries where reference is made to persons or class of persons the power given is to impose taxes on those persons. And it is urged with emphasis that it is impossible to read taxes on passengers at any rate, as taxes in anybody else than passengers. These entries, therefore, it is urged, must be understood not in any limited sense but in its full amplitude as all legislative entries in a Constitution should be, but must be given only its reasonable connotation as has been ruled by the Supreme Court in *Diamond Sugar Mills Ltd. v State of Uttar Pradesh*, AIR 1961 SC 652. Their Lordships observed in that judgment:—

"In considering the meaning of the words in the entries in the Seventh Schedule, the Courts have on the one hand to bear in mind the salutary rule that the words conferring the right of legislation should be interpreted liberally and the powers conferred should be given the widest amplitude on the other hand they have to guard themselves against extending the meaning of the words beyond their reasonable connotation, in an anxiety to preserve the power of the legislature."

6 We are warned that we should not show any such anxiety and that reasonably and fairly read, the entry in question, Item 56 of List II of the Seventh Schedule to the Constitution, permits the imposition of a tax only on the passenger and the owner of the goods and not on the operator.

7 In regard to this aspect of the case it is not the contention of the State Government as stated in the counter affidavits that have been filed in O P Nos 1476 of 1966 and 535 of 1967 that the enactment has imposed a tax on the operator. On the other hand, they say specifically in paragraph 10 of the counter affidavit in O P No 535 of 1967—

"The tax under the impugned Act is on the passenger and the owners of goods transported. It is levied at a proportion to the fares and freights. The operator is only made the collecting agent for administrative convenience. That will not in any way alter the nature of the tax. It is not a tax on the income of the operator as alleged by the petitioner."

8. It is therefore really unnecessary for us to go into the larger and perhaps

more vexed question as to the real ambit and scope of Item 56 in List II of the Seventh Schedule to the Constitution. When we say so we are not ignoring the contention that has been raised in his argument by counsel appearing for the State that even if we come to the conclusion that the statute is a taxing enactment imposing a tax on the operator as defined in the Act, it is still within the legislative competence of the State. We shall not ignore this and we shall advert to the contention and the authorities that have been relied on in support of the contention. But as we have indicated, we do not think it is necessary to pronounce any opinion in this case regarding that aspect.

9 The Act in question came in the wake of a number of similar enactments passed in different parts of the Indian Union which had been challenged before courts wherein the scope and effect of those statutes were interpreted. Invariably it has been held that those statutes imposed the tax only on the passengers and goods and not on the operator or on his income. The Act in question was passed after the judicial pronouncements interpreting the scope and ambit of similar legislation were rendered. The opinion expressed uniformly was that the statutes imposed the tax only on the passengers and goods and not on the operator or his income. In these circumstances it is difficult to assume that the State Legislature in passing the enactment on similar if not identical terms, was passing a statute to serve a purpose different from those to be served by those statutes. The purpose was construed to be to impose the tax burden on the passengers and the goods, in other words the incidence of the tax to fall on the passengers and the owner of the goods. We wish to clarify that what we mean and understand by the incidence of tax falling on a person is that the tax must fall on a person from whom there is no further possibility of shifting the burden to anybody else.

10 It has been clearly stated construing similar statutes that the object was to tax the passengers and goods in the sense which we have indicated, the earliest of such pronouncements was made more than a decade before the State Legislature brought into operation, on 1-7-1963, the Act. We may refer to the decision of the Patna High Court in *Atma Ram Budhia v State of Bihar* AIR 1952 Pat 359 (SB) which dealt with the Bihar Finance Act, (17 of 1950) particularly Section 12 thereof, which imposed an identical tax on passengers and goods. It is useful to extract the section because we are unable to see any difference in substance between the wording of that

section and the wording of the charging section in the Act.

"From and after the commencement of this Act, there shall be charged, levied and paid to the State Government, a tax on all passengers carried by motor cabs, stage carriages and contract carriages and on all goods transported by public carriers at the rate of two annas in the rupee on all fares and freights payable to owners of such motor cabs, stage carriages, contract carriages or public carriers".

Apart from this charging section, there was no further or additional provision anywhere in the statute concerned which threw any light on the scope and effect of the statute. No doubt Rules 9, 10 and 13, framed under that statute gave further indications or perhaps threw light on the obscure provisions contained in the statute and these rules have also been relied on by the Court in coming to the conclusion that the tax imposed by that statute was a tax on the passenger in the sense that the incidence of the tax fall on him, and there was no tax imposed on the operator or on his income.

11. Hardly two years later, a similar statute passed by the Madras Government was challenged before the High Court and the decision of the Madras High Court is in *P. Mathurai Pillai v. State of Madras*, AIR 1954 Mad 569. The only difference between the charging section in that case and the section which was considered by the Patna High Court was the existence of a proviso to Section 3 of the Madras Act. We shall read the section as well as the proviso:—

"Levy of tax on passengers and goods—
From and after the commencement of this Act, there shall be levied and paid to the Government, a tax on all passengers, luggage and goods carried by stage carriages, and on all goods transported by public carrier vehicles, at the rate of nine pies in the rupee on the fares and freights payable to the operators of such stage carriages and at the rate of six pies in the rupee on the freights payable to the operators of such public carrier vehicles:

Provided that the fare charged by an operator inclusive of the tax leviable under this section, shall not exceed the maximum fare prescribed by the Government under the Motor Vehicles Act, 1939, and in force at the commencement of this Act;"

We are leaving out the second proviso to the Section as it is not material for our purpose. Construing the section, their Lordships, Chief Justice Rajaman-nar and Justice Venkatarama Aiyar came to the conclusion that it was possible to discern from the charging section as well as the proviso that the incidence of the tax was on the passenger and the goods.

They also referred to the decision in the Patna case which we have adverted to and observed as follows:—

"It was held in the above Patna case that although the statute did not expressly authorise the carriers to collect the tax from the passengers and consignors of goods, yet the statute must be construed to have implicitly granted this right to them. Both the main provision as well as the first proviso of Section 3 of the Madras Act also appear to indicate that the tax can be passed on to the passenger or consignor of goods, though there is no express provision to that effect. If the tax leviable under the section is not contemplated as one which would be eventually collected from the passenger or consignor, the proviso becomes unintelligible, because it speaks of the fare charged by an operator inclusive of the tax leviable under the section."

So it was ruled that the Act was not incompetent as one imposing a tax on the income of the operator.

12. These decisions of the Patna and Madras High Courts were noticed by the Supreme Court in construing a similar enactment passed by the Rajasthan State where again the same conclusion has been reached. We may refer to the decision in *Sainik Motors, Jodhpur v. State of Rajasthan*, AIR 1961 SC 1480. In Sections 4 and 5 of the Statute that was considered by the Supreme Court, the Rajasthan Passengers and Goods Taxation Act (18 of 1959), there were indications that the tax imposed was on the passenger and or the owner of the goods. But the passage in paragraph 9 of the Judgment clearly indicates that Courts have been consistently taking the view that similar enactments are intended to impose tax on the passenger and goods. We may usefully extract a portion of paragraph 9 of the judgment in the case:—

"(9)
The explanation to Section 3 (1) lays down that even if passengers are carried or goods transported without the charge of fare or freight, the tax has to be paid as if fare or freight has been charged. This clearly shows that the incidence of the tax is upon passengers and goods, though the amount of the tax is measured by the fares and freights. A similar argument was not accepted by the Madras High Court in *Mathurai Pillai v. State of Madras*, ILR (1954) Mad 867= (AIR 1954 Mad 569), and the same view was expressed in *Atma Ram Budhia v. State of Bihar*, ILR 31 Pat 493= (AIR 1952 Pat 359) (SB). In our opinion, the charging section does not go outside Entry No. 56."

To complete the series, we may also refer to two other decisions. The Madhya

Pradesh High Court in *Madhya Pradesh Transport Co. Private Ltd. v. State of Madhya Pradesh*, AIR 1962 Madh Pra 108 took the same view

It is unnecessary to go into details excepting to state that the only further thing discernible from the statute of the Madhya Pradesh case so far as the charging section is concerned is the inclusion of the words "(inclusive of tax)" within brackets after the word 'fare' occurring in the charging section. The statute was construed as imposing a tax on the passenger and on the goods. The Mysore High Court also took the same view in *H. K. Swarnanarash v. State of Mysore*, AIR 1963 Mys 49. Though reported in 1963, this decision was rendered as early as 1961.

13. It is in the wake of these pronouncements that the Act came to be passed. The charging section, the preamble and Section 19 clearly indicate that the purpose, the scope, the ambit and the effect of the Act cannot be or was never intended to be anything different from those of the enactments which have been discussed and construed in the decisions already referred to by us. We therefore accept the argument of counsel for the State based on the contentions raised in the counter affidavits filed in these cases that the Act is a statute imposing a tax on passengers and goods and not an enactment imposing a tax on the operators or on their income or on the fares and freights. It is no doubt true that on the operators have been cast onerous tasks in the form of submitting returns, of paying the tax, of facing prosecution or inflections against running of vehicles if taxes have not been paid or returns have not been submitted. But these are familiar provisions resorted to by legislatures, and justifiably we think, because it has not been urged before us that the legislature cannot choose the most convenient point or convenient person from whom a tax imposed by a State is to be collected. We therefore understand the various provisions in the Act which have been adverted to by us and which have been relied on by counsel appearing for petitioners, as only enabling provisions made in the statute for the purpose of facilitating the collection of tax imposed by the statute. This tax, as we understand the statute and for the reasons that we have stated, is a tax on the passenger and/or on the goods.

14. But before leaving this aspect, we must notice the argument advanced by counsel that Item 56, of List II of the Seventh Schedule to the Constitution is comprehensive enough to enable the legislature to impose a tax on the operator. This point was urged by counsel appearing for the State mainly on the basis of the observations contained in two

judgments of the Supreme Court; one in *Rai Ramakrishna v. State of Bihar*, AIR 1963 SC 1667 and the other in *Khyerhan Tea Co Ltd. v. State of Assam*, AIR 1964 SC 925. It is contended by counsel for the State on the basis of the observations contained in paragraph 13 of the judgment in AIR 1963 SC 1667 that the Supreme Court has pronounced that a tax can be imposed on a person other than the owner of the goods (the enactment in question related to a tax on the carriage of goods). On the other hand, counsel for the petitioners urged that these observations must be understood in the light of the clear decision of the Court that the statute considered therein is a statute imposing tax on passengers and goods.

Similar observations are contained in paragraphs 19 to 23 of the Judgment in AIR 1964 SC 925. And these have also been relied on by counsel on behalf of the State and have been tried to be explained by Counsel for the petitioners. We do not regard these observations as conclusive. The only decision in which a clear and categorical view has been expressed is the decision in O P 396 of 1966 of this Court dismissing the Original Petition in limine. The correctness of this decision has been challenged before us by counsel on behalf of the petitioners. As we said the question does not arise in view of the definite pleading by the State that the tax in question is only one on the passengers and our finding that the Act has imposed the tax on the passenger and goods. We therefore express no opinion about the correctness or otherwise of this decision. This may have to be considered when the occasion arises.

15. Coming now to the arguments advanced by counsel on the basis of Article 14 of the Constitution, the provisions in the Act relied on by counsel for so contending are those contained in the second proviso to Section 3, explanation 2 to the same section and Section 18. The second proviso to Section 3 states that 'no tax shall be levied on any passenger, luggage or goods carried in a stage carriage, if the total distance permitted to be covered by such stage carriage in a day, does not exceed eighty kilometres'. And Explanation 2 (u) states that 'no tax shall be payable under this Act on goods carried by any vehicle owned by any department of the Central Government or by the Railways'. Section 18 states that the particular class of co-operative societies detailed in that section need pay only one half of the rates payable under this Act.

16. It is contended that to state that the tax payable by a passenger or owner of goods must depend not on the distance that he travelled, or the distance for which the goods were carried but on the total

distance that the vehicle travelled a day is a provision discriminatory and without any rational basis because it will depend upon the accident of a person getting into one or other of the vehicles, one travelling less than 80 kilometres and the other travelling beyond 80 kilometres; the first not having to pay tax, the second having to pay the full tax. Similar is the argument with reference to the vehicles owned by any department of the Central Government or by the Railways. If the statute is a statute imposing tax on the passengers and goods, as we have held it is, the discrimination, if any, affects the passenger or the owner of the goods and not the writ petitioners before us who are nearly six hundred in number. None of them is a passenger or owner of goods. We do not think therefore that this is a point that the petitioners are entitled to raise in this batch of cases. For the same reason we are unable to hold that Section 18 is discriminatory.

It is no doubt contended in the counter affidavit that has been filed that there is a reasonable classification and the intention is to help co-operative societies, that co-operative societies are permitted to retain one-half of the collection made by them, that is, such of those co-operatives that fall under Section 18. We do not think there is any basis for this contention. The tax is to be paid by the passenger and the concession contained in Section 18 must also be a concession to the passenger concerned. What justification there is for these concessions it is not for us to consider in these cases because no passenger or owner of goods is before us.

17. Next we pass on to the alleged violation of Article 19 of the Constitution. The mere imposition of a tax by itself cannot be said to infringe Article 19 of the Constitution. Tax laws are not beyond the clutches of Article 19 when the Court is satisfied that by the impost of the tax there has been a crippling of trade or business. Constitutional authorities have clearly stated and this has been accepted by the highest Court in this country that a power of taxation is a sovereign power of the State which should not ordinarily or lightly be interfered with by the Courts. We may refer to a passage from Cooley's Constitutional Limitations in this regard:—

"The power to impose taxes is one so unlimited in force and so searching in extent, that the Courts scarcely venture to declare that it is subject to any restriction whatever, except such as rest in the discretion of the authority which exercises it."

And Marshall, Chief Justice in *McCullock v. Maryland*, (1819) 4 Law Ed 579 observed:—

"The power of taxing the people and their property is essential to the very existence of the Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power is found in the structure of the Government itself."

18. Wide as these observations are, we are aware that our Courts have taken the view that in a given circumstance there is power in the Court to scrutinise the effect of a tax and see whether it is violative of Article 19 of the Constitution. Whatever that be, we do not think that the Act has imposed any such restriction on the petitioners before us. We have said that they have been utilised, if we may use that word, merely for the purpose of facilitating the collection of the tax that has been imposed, as we have held, on the passengers and the owners of the goods by the Act. This being so it is idle for them to urge that they can rely on Article 19 of the Constitution. So we negative this contention as well.

19. This leads us to the contention raised by counsel on behalf of the petitioners that the Act impugns Part XIII of the Constitution, particularly Article 301 and that it does not satisfy the requirement of Article 304 (b). It is no longer open to any person to contend that a taxing statute is beyond the purview of the restrictions and limitations imposed by Part XIII of the Constitution. The matter has been set at rest by the Supreme Court in *Atiabari Tea Co. Ltd. and Khayerbari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232. We shall refer to the relevant passages from the judgment dealing with the effect of taxes of this nature imposed by statutes on Article 301. After an analysis of the provisions of the Constitution, particularly those contained in Part XIII thereof, their Lordships of the Supreme Court observed:—

"Thus the intrinsic evidence furnished by some of the articles of Part XIII shows that taxing laws are not excluded from the operation of Article 301 which means that tax laws can and do amount to restrictions freedom from which is guaranteed to trade under the said Part. Does that mean that all tax laws attract the provisions of Part XIII whether their impact on trade or its movement, is direct and immediate or indirect and remote? It is precisely because the words used in Article 301 are very wide, and in a sense vague and indefinite that the problem of construing them and determining their exact width and scope becomes complex and difficult. However, in interpreting the provisions of the Constitution we must always bear in mind

that the relevant provision 'has to be read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another' Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions, but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate direct or remote adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are therefore, satisfied that in determining the limit of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be Does the impugned restriction operate directly or immediately on trade or its movement?"

Their Lordships then considered the material provisions of the Act. Assam Taxation (on Goods carried by Roads or Inland Waterways) Act (13 of 1954), and came to the conclusion.—

"It is thus obvious that the purpose and object of the Act is to collect taxes on goods solely on the ground that they are carried by road or by inland waterways within the area of the State. That being so the restriction placed by the Act on the free movement of the goods is writ large on its face. It may be that one of the objects in passing the Act was to enable the State Government to raise money to keep its roads and waterways to repairs but that object may and can be effectively achieved by adopting another course of legislation. If the said object is intended to be achieved by levying a tax on the carriage of goods it can be so done only by satisfying the requirements of Article 304 (b)".

20 The provisions of the enactment considered by the Supreme Court in the case referred to are similar. If not identical to those contained in the Act excepting that the Act imposes a tax on passengers in addition to goods. So the dicta which we have extracted must apply in testing the validity of the Act. So we have to hold *prima facie* that Article 301 is attracted and has been infringed by the Act and it can only be saved if the provisions to Article 304 (b)

have been complied with. It is the case of the State that these provisions have been complied with. Before we come to this question, we may refer to the other pronouncement of the Supreme Court which has modified to some extent what is stated in the decision just referred to. The case we have in mind is the one in *Automobile Transport Ltd., etc. v. State of Rajasthan*, AIR 1962 SC 1406

It has been held therein that regulatory and/or compensatory taxes will not attract Article 301 of the Constitution at all. In other words when the tax is purely of a regulatory nature or even if it is a compensatory one there is no question of Article 301 being violated and naturally the statute need not comply with the provision in Art. 304(b). We must however hasten to add that the question as to whether compensatory taxes are outside the ambit of Article 301 is a matter still open notwithstanding the pronouncement contained in the decision in AIR 1962 SC 1406 for in a later judgment in AIR 1964 SC 925, Justice Galendragadkar said that the question, raised for consideration again in that case would have been referred to a larger Court if it was necessary to decide it. We may extract the passage in question.—

"It would immediately be noticed that though the majority view in the *Automobile Transport (Rajasthan)* case, (1963) 1 SCR 491=(AIR 1962 SC 1406) substantially agreed with the majority decision in the case of *Atiabari Tea Co.*, (1961) 1 SCR 809=(AIR 1961 SC 232) there would be a clear difference between the said two views in relation to the scope and effect of the provisions of Article 304 (b). According to the majority view in the case of *Apabari Tea Co.*, (1961) 1 SCR 809=(AIR 1961 SC 232) if an Act is passed under Article 304 (b) and its validity is impeached, then the State may seek to justify the Act on the ground that the restrictions imposed by it are reasonable and in the public interest, and in doing so, it may for instance, rely on the fact that the taxes levied by the impugned Act are compensatory in character. On the other hand, according to the majority decision in the *Automobile Transport (Rajasthan)* case, (1963) 1 SCR 491=(AIR 1962 SC 1406) compensatory taxation would be outside Article 301 and cannot, therefore, fall under Article 304 (b). If in the present case it had been urged before us that the tax levied by the Act is compensatory in character, it would have been necessary to consider the question once again by constituting a larger Bench.

.....
If the Act had been compensatory in character, it would have become necessary for us to consider the whole position

once again, because it would obviously be unfair and unjust that the earlier Act should have been struck down though it was compensatory in character and in testing the validity of the present Act, it should be open to the petitioners to contend that its compensatory character is irrelevant to the enquiry under Article 304 (b)

21. So it may now be taken that a merely regulatory measure will not attract Part XIII of the Constitution and there can be no question of violation of Article 301 and therefore no necessity to satisfy Article 304 (b). It is not however possible to go any further than that.

22. The Act is not a purely regulatory measure. It is a taxing statute. It impugns Article 301 and it can stand only if it satisfies Article 304 (b). According to the State, the statute only imposes reasonable restrictions in the public interest. And counsel has been at pains to point out that the impact of the various taxes imposed by the Vehicles Taxation Act and the Act in this State compare very favourably with the burdens imposed by similar enactments in the State of Madras and Mysore or even in Bombay and it is urged on the basis of the statements contained in paragraphs 17 to 20 of the counter-affidavit in O. P. No. 535 of 1967 that we must hold that the impost is a reasonable restriction in the public interest.

23. The two cases which went up to the Supreme Court where the question had been considered and where it has been held that the impost of a tax is reasonable and in the public interest are reported in AIR 1962 SC 1406 and AIR 1964 SC 925. In both these cases data was furnished before the Court and it was proved to the satisfaction of the Court that the impost was only for the purpose of covering the expenses of maintaining the roads or the inland waterways which the Court held afforded facilities for the free flow of trade and in fact contributed to the growth of free trade and intercourse.

In the earlier case it was found that the amount collected by way of tax under the particular statute was less than half of the amount spent for the maintenance of roads. And in the latter case though it was not urged by the Attorney-General that the tax in question was of a compensatory nature, he relied on the details furnished for the purpose of establishing his contention that enormous sums of money had been spent for the purpose of maintaining the inland waterways and the tax collected under the statute is only a small portion of those expenses. So it was held that the tax was reasonable and in the public interest. Unfortunately for us, we have no material before us.

The statements in the affidavits that have been filed do not contain the details on the basis of which it is possible to come to any conclusion as to whether this tax is of the nature of the taxes imposed by the statutes which were considered by the Supreme Court in the decisions referred to. Strictly speaking in the absence of specific details furnished before us we should accept the statements contained in the affidavits in support of the petitions and hold that the Act impugns Article 301 and it has not been established before us that Article 304 (b) has been satisfied. The observations of the Supreme Court in AIR 1963 SC 1667 indicate that when once the infringement of Article 301 is established, the burden is on the State to show that notwithstanding the infringement, restrictions imposed by the Act are reasonable and in the public interest. But we think that there will be miscarriage of justice if we come to a conclusion on insufficient data.

And we consider it inappropriate to strike down a statute which has been in the statute book for more than four years now, on mere burden of proof or lack of material. In fact we are unable to pronounce on this subject without the additional facts being placed before us. We therefore direct the State to file additional affidavits before this court giving details regarding the amount collected by way of tax under the impugned Act and the amount, if any, spent for the purpose of maintaining or making roads or for such other activities as will facilitate the free flow of trade, on or before 28-2-1968. At least 7 days before that date, the affidavits must be made available to counsel for the petitioners in these cases and they will file replies before the hearing date which we fix as 28-2-68.

24. The only remaining question, by no means the easiest one, remaining for decision, apart from the violation of Art. 301 of the Constitution, the decision on which we have deferred, due to lack of material, is the point raised by counsel on behalf of the petitioners that the Act if it imposes a tax on the passengers and on the owners of the goods is incomplete and ineffective and ought not to be allowed to be enforced as against the operators in so far as there is no provision made in the statute and/or under the Rules framed under the statute obliging the passengers or the owners of the goods to pay the tax imposed by the Act to the operator or for that matter enabling the operator to collect the tax imposed from the passengers or the owner of the goods. And the lack of such a provision is a lack of a law in regard to the collection of tax and is therefore violative of Art. 265 of the Constitution.

Article 265 injuncts the levy and collection of tax without the authority of law. It is said the term 'levy' will comprehend the charge as well as the means by which the amount of the tax is to be computed, and the collection thereafter of the tax so computed will also have to be provided by law. It is said that the provisions in the Act to which we have referred only provide for the levy of tax. It is contended that there is no law at all regarding the collection and without such a law this Act can have no effect and any insistence of payments by the petitioners of the tax due is an insistence without the backing of law. In answer to this contention counsel for the State has urged that provision has been made though not expressly by sections in the Act by the necessary intendment thereof, that the passengers and the owners of the goods should pay the amount of the tax to the operators, and that factually there has been an enhancement of the fares payable by the passengers as well as the owners of the goods or at least those who booked the goods for transport by directions being issued under Section 43 of the Motor Vehicles Act, and by the issuance of a notification by the State Transport Authority under Section 44(3) of the same Act.

Factual details regarding the enhancement in the fares are furnished in the counter affidavit in paragraphs 11, 12 and 13 in O P No 535 of 1967 and on the basis of those averments it is urged that there has been a 20% increase in the fare charged before the Act was brought into operation from the time the Act as well as the new fare came into effect, namely on 1.7.1963. It is therefore said these are not cases where any impost has been made on the petitioners without the petitioners having recourse to the passengers and goods and therefore there has been nothing illegal and it is even urged that a provision for recovery from the passengers in the manner in which it has been done is justifiable because for that procedure, the authority of law is the impost made by the Act on the passengers and goods. In other words the argument is that if the Act has imposed an obligation on the passenger and the owner of the goods that the tax under that Act should be paid by them appropriate provision can be made by the State even by relying on laws other than the Act, namely the Motor Vehicles Act and if that has been done, this Court should not interfere. A passage from Corpus Juris Secundum (Vol. 82, Section 73 at p 131) which has been quoted by Chief Justice Dixit in the judgment in AIR 1962 Madh Pra 108 has been relied on by counsel on behalf of the State. This passage is in these terms.—

'A statute imposing a tax must provide workable means of ascertaining the amount of tax to be paid. But it is not necessary to make specific provisions as to such matters concerning the enforcement of the tax as may be properly provided by reference to other laws

25 Here it is urged that the Act has provided not only workable means of ascertaining the amount of tax to be paid but has clearly specified the quantum of the tax and provision has been made and has been properly made by reference to the Motor Vehicles Act. In fact in the decision of the Madhya Pradesh High Court AIR 1962 Madh Pra 108 wherein this passage has been quoted their Lordships adopted the method of giving a direction that the State Government should give directions under the Motor Vehicles Act to enable the operators or owners of the vehicles to collect the tax imposed by the impugned Act and that it could be collected as part of the fare. So the fare was directed to be raised by resort to the provisions in the Motor Vehicles Act so as to include the tax as well. Before we refer to these passages in the judgment which follow the earlier pronouncement of the Court on the same subject it is necessary to advert to certain aspects of the matter

26 As we read the Motor Vehicles Act, it is not a law for the purpose of enabling the collection of any tax imposed by any other statute. This is a regulatory measure in relation to the matters provided in that statute. Provision has been made for the State to give directions to the State Transport Authority. That provision in so far as it pertains to directions relating to fares and freights is contained in Section 43 wherein subsection (1) states with reference to what matters the directions enumerated under that section can be given. The matters are the advantages offered to the public, trade and industry by the development of motor transport, the desirability of co-ordinating road and rail transport, the desirability of preventing the deterioration of the road system and the desirability of preventing uneconomic competition among motor vehicles. And by notification in the official Gazette it is provided that the State Government may issue directions to the State Transport Authority inter alia, regarding the fixing of fares and freights for stage carriages, contract carriages and public carriers.

Section 44 (3) states that a State Transport Authority shall give effect to any directions issued under Section 43 and subject to such directions and save as otherwise provided by or under the Act shall exercise and discharge all the functions stated in that section. By virtue of Section 59 it is provided that any prohibition or restriction imposed and any

maximum or minimum fares or freights fixed by notification made under Section 43 shall be a condition of a permit. Section 60 provides that any violation of any condition of the permit may entail suspension or cancellation of the permit. These provisions as we understand them are made purely for the purpose of the Motor Vehicles Act. We are not for a moment suggesting that any tax the incidence of which is purely on an operator need not be taken into account or is not a relevant factor in the issuance of directions relating to fares under Section 43 by the State or in the fixation by the State Transport Authority of fares, subject to those directions, under Section 44 (3). But if the tax is not on the operator and is an impost on the passenger or on the owner of the goods as we have held that it is under the Act, we do not think it is a relevant consideration at all in the matter of giving directions under Section 44 (3) or in the matter of fixation of the fares under Section 44 (3) by the State Transport Authority.

Apart from this we also consider that when a taxing statute has imposed a tax on a particular class of persons that statute or at least the rules framed under the statute must itself provide for the payment and the collection of the tax from such persons as are made liable by the impost. We say so because the amount of the tax payable by the person who has been taxed must be the precise amount imposed and it must be possible to discern in every case, this has been claimed from that person. The amount claimed must be neither more than the tax imposed nor less. If more is claimed from the passenger or the owner of the goods there will be no authority of law for it. And if only less is claimed the operators will have to make up the difference for which also there is no authority of law. So it must be ensured that the precise amount alone is collected from the passenger and the owner of the goods. This cannot be achieved by the method said to have been adopted viz., fixation of enhanced fare under the Motor Vehicles Act.

For instance with all the materials placed before us we are unable to say whether the entire liability imposed by the tax on the passenger and the owner of the goods has been recovered from them or whether more has been recovered. For notwithstanding the fact that there has been an increase of 20 per cent in the fare that was obtaining before the Act was brought into operation on 1-7-1963 we are unable to say what fraction of 20% is to provide for increased operational expenses which must have increased since the previous fixation of fare, and which fraction is to provide for the tax. This we think therefore is a very unsatisfactory way of making provision for

the collection of a tax imposed by a statute. We are no doubt aware that the Madhya Pradesh High Court in AIR 1962 Madh Pra 108 took a different view. Perhaps this was for the reason that the charging section in the statute considered therein had itself provided for the fare 'inclusive of tax'. The relevant part of the section (Section 3 of Madhya Pradesh Motor Vehicles (Taxation of Passengers) Act, 1959), is in these terms:—

"there shall be levied and paid to the State Government a tax. at a rate equivalent to ten percent, of the fare (inclusive of tax) payable to the operator of a stage carriage."

Their Lordships came to the conclusion that the passenger has to pay the fare and the tax and that it will be a proper method to make provision by directions under Section 43 and by fixation under Section 44 (3) of the Motor Vehicles Act. They relied on a passage from an earlier judgment to the following effect:—

"The contention that under Section 43 the maximum fares that could be charged had already been fixed and unless these were revised as provided in that section the operator could not be permitted to charge a higher fare, proceeds on a misreading of the section which, as amended, permits the State Government to issue directions to the State Transport Authority from time to time regarding the fixing of fares for stage carriages etc. The Regional Transport Authority, therefore, can refix the fare table and so amend the permits as to permit the operators to charge amended fares inclusive of the passenger tax, which they were not liable to collect from the passengers as agents of the State".

After quoting the above passage, their Lordships observed that:

"Until the fare tables are revised there is no liability on the operator to collect the tax from the passengers so long as the fare table is not revised for enabling the operator to recover the tax amount from the passengers as extra fare, no liability of any kind under the Act can be fastened upon the operator."

27. For the above reasons all the writ petitions were allowed and the respondents were prohibited from enforcing the provisions of the Act as against the petitioners unless and until the fare tables in respect of their stage carriages were revised under Section 43 of the Motor Vehicles Act.

28. The Madras High Court in dealing with a similar matter arising out of a proviso to the charging section of the Act that was considered in AIR 1954 Mad 569 which proviso inhibited the operators from collecting the tax from the passengers in cases where they had already been charging the maximum fare fixed under

the Motor Vehicles Act, ruled that the proviso can have no effect so far as the petitioners before the Court were concerned. The proviso is in these terms:-

"Provided that the fare charged by an operator inclusive of the tax leviable under this section, shall not exceed the maximum fare prescribed by the Government under the Motor Vehicles Act, 1939 and in force at the commencement of this Act."

29 The Madhya Pradesh High Court (AIR 1962 Madh Pra 108) ruled that no liability can be fastened upon the operator until the fare tables are revised under the Motor Vehicles Act. The Madras High Court (AIR 1954 Mad 569) on the other hand, said that the inhibition in the proviso will not be applied to the petitioners before the Court. In other words, the petitioners, the operators, were permitted to collect the tax from the passengers and the owner of the goods.

The State Government here seems to have adopted the procedure indicated in the Madhya Pradesh High Court decision. We have already stated our reasons for holding that this is not a proper or satisfactory method. We are not now in a position to say that the liability imposed by the Act has not been absorbed by the increase in fare that has been introduced as a result of the enhancement in fare effected from 1-7-1963. But we are equally unable to say that it has been so absorbed. This is what results from the adoption of a method such as the one that has been resorted to in this case.

30 So we think that a direction must be issued that provision must be made for the collection of the tax from the passenger as tax specifying the quantum calculated and computed on the basis of the provision in the Act. This will of course be payable to the operator who has been made liable to pay the tax to the State. It is not for us to suggest the manner in which this should be done. Perhaps this can be achieved by amending the statute by making specific provisions in the Act. It can even be done perhaps by framing Rules under S 20(g) which we have already read. Rules made under similar statutes had been relied on by courts as early as in the case of AIR 1952 Pat 359 (SB) for the purpose of construing the purpose of the Act. As we said, it is for the State Legislature and/or the State Government to take such steps as are necessary to provide the machinery. We direct that this should be done as expeditiously as possible.

31. It is not possible to dispose of these writ applications without determining the questions raised about violation of Article 301. So we adjourn the

hearing of the case to the 28th of this month.

32. By our order dated 2-2-1963, we directed that the State should file additional affidavits giving details of the amount collected by way of tax under the impugned Act and the amount, if any, spent for the purpose of maintaining or making roads or such other activities as would facilitate the free flow of trade. An affidavit sworn by the Deputy Secretary to Government P W D on the 20th February 1963 has been filed by the State on 22-2-1963 in O P No 535 of 1967. It is stated therein that prior to the passing of the impugned Act, the tax levied under the Travancore-Cochin Motor Vehicles Taxation Act in the Travancore-Cochin area, and the Madras Motor Vehicles Taxation Act, and the Madras Motor Vehicles (Tax on Passengers and Goods) Act in the Malabar area, was the only source of direct revenue to be expended "for opening new roads, and for maintaining the existing ones in proper condition, by improving the road surfaces by concreting, black-topping, metalling etc. and for paying contributions to local bodies for the proper upkeep of the roads within their control". It is claimed that the Government have been expending far beyond the revenue collected by it under the above Acts for the last five years and Annexure-D has been filed in support of this claim. It is further said that "in order to provide increasing trade and commerce facilities, by making and maintaining roads in good condition, the State had to augment the sources of its revenue". It is suggested that the impugned Act was made in 1963 for that purpose.

With reference to Annexure D to the affidavit already referred to it is averred that "though in the last three years the taxes collected under the two Acts together have slightly exceeded the actual amounts spent for maintaining the existing roads and making new ones and also bridges etc. the fact remains that all along amounts corresponding to the bulk of the tax, if not the entire tax, collected under the two Acts, has (have?) been spent for providing increasing facilities for trade, commerce and intercourse.

Reference has been made in the affidavit to Annexure A which, it is said, gives a correct account of the amounts collected by the State under the Kerala Motor Vehicles Taxation Act and the impugned Act for the five years from 1962-63. The amounts alleged to have been expended for construction and maintenance of roads and bridges including the schemes assisted by the Government of India are furnished in Annexure B. Administration expenses under the Motor Vehicles Taxation Acts and expenses towards payment to local bodies are de-

tailed in Annexure C. On the basis of these, it is claimed that "the revenue raised by the new impost under the impugned Act, does in fact, serve a vital public purpose viz., the opening of new roads and bridges, and the maintenance of the old ones in proper condition thereby securing and increasing the free flow of trade, commerce and intercourse within the State and between the States". It is therefore submitted "that the tax levied under the impugned Act is within the scope of Article 304 (b), of the Constitution of India as the levy imposes only reasonable restrictions on the freedom of trade, commerce or intercourse with or within the State as are required in the public interest."

33. From Annexure D it is seen that amounts in excess of those collected under the Motor Vehicles Taxation Act, which is seen from Annexure A have been expended for the purposes detailed in Annexures B and C. The amount so in excess was over 3 crores in the year 1962-63, over 1½ crores in the year 1963-64, nearly a crore in the year 1964-65 and 34 lakhs and odd and 40 lakhs and odd for the years 1965-66 and 1966-67. The expenditure incurred exceeded the total collections according to Annexure D for the years 1962-63 and 1963-64, but was less than 41 and odd lakhs in the year 1964-65, a crore and 8 lakhs and odd in the year 1965-66 and 61 lakhs and odd for 1966-67.

34. A reply affidavit has been filed by the petitioner in O. P. No. 930 of 1967 to the State's supplementary affidavit dated 20-2-1968. Briefly stated, two contentions have been raised in this reply. The first of these relate to the figures furnished in Annexures A to D of the supplementary counter affidavit. It is said that large sums received from the Central Government towards centrally sponsored schemes; viz., (1) roads of inter-State or economic importance and (2) west coast roads, have not been included in Annexure A, though full expenditure pertaining to them have been detailed in Annexure B. It is also pointed out that though an item of expenditure such as 'for inspection of motor vehicles' for the year 1962-63 amounting to Rs. 2,28,500/- has been claimed in Annexure C, the corresponding receipts under the same head, Head XI (a), which it is said was 42 lakhs and odd rupees has not been included in the receipts in Annexure A or Annexure D.

35. The second contention raised is that the expenditure actually incurred by the State in relation to the items detailed in Annexures B and C can be met exclusively from the collections under the Motor Vehicles Act and the collections under the Motor Vehicles Taxation Act if credit is also given to the subsidies to

the State Government from the Central Government. So it is urged that it was quite unnecessary to have imposed the tax under the impugned Act as the actual expenditure incurred by the State could have been easily met from the other resources. The impost under the impugned Act is therefore an unreasonable restriction and does not serve any public interest.

36. In support of the contentions relating to the mistakes in the Annexures to the supplementary counter affidavits which we have referred to, reliance has been placed on the Second Five Year Plan Kerala, Review of the Progress of Schemes, issued by the Planning Department page 49, wherein reference has been made to the two centrally sponsored schemes (1) roads of inter-State or economic importance and (2) west coast roads, as well as to the Third Five Year Plan, Policy and Programme, also issued by the Planning Department, Government of Kerala page 144 where again there is a reference to roads of inter-State or economic importance and (2) west coast roads, which are described as falling under the centrally sponsored scheme. Reference was also made to the Administration Report of the Public Works Department for the year 1960-61 page 30, wherein is seen Statement No. 1-C, 'Statement of receipts under Revenue', during 1960-61, and it was urged that large sums, over 80 lakhs of rupees have been received by the State as subventions from Government of India. It is urged that similar if not substantially higher amounts must have been received from the Central Government during the subsequent years as well and that these have not been included in Annexure A or Annexure D, to the supplementary affidavit.

Reference was also made to the Administration Report of the Motor Vehicles Department for the year 1962-63 and it was pointed out under the Head XI (a), (Receipt under Motor Vehicles Act), 42 lakhs and odd rupees have been received by the State for the year 1962-63 and that such income has not also been included in any of the statements annexed to the supplementary counter-affidavit. (See Statement No. XIII at page 90 of the Report) Further from Statement No. XIV (also at the same page of the Report) it was pointed out that the expenses in connection with the inspection of the Motor Vehicles fall under the Head XI (a) and that it is referable to the receipts under the same head and has therefore been wrongly included in Annexure C to the State's supplementary affidavit as the income from that source has not been taken into account. It is submitted that though figures for the year 1962-63 alone have been made avail-

able to the Court, similar must be the position in the subsequent years as well.

It is therefore vehemently contended that the tax under the impugned Act is unnecessary for meeting the expenses. The tax imposed by the impugned Act, it is urged, is not only not compensatory but the restrictions resulting from the imposition of the tax are not reasonable and are not in the public interest.

37 The question is whether in the circumstances disclosed it can be said that the provisions of Article 304 (b) of the Constitution have been satisfied. It is necessary to read certain pages from the decision of the Supreme Court in answering this question. We must refer to the passages in paragraphs 38 and 39 of the judgment of Justice Gajendragadkar in AIR 1964 SC 925

'(38) On the other hand, Mr Setalvad strongly urges that the tax constitutes a reasonable restriction in the public interest, because it purports to raise revenue for public purposes. As we have already seen, tax laws have to stand the scrutiny of Art 19. That being so as soon as the validity of a tax law is challenged under Article 19 the State would be entitled to rely on the fact that the revenue raised by the tax law serves public purpose and that is its basic justification for being treated as a reasonable restriction on the individual's fundamental right under Article 19 (1) (g). It would, therefore, follow that the consideration on which Mr Setalvad relies is not irrelevant, though its significance and importance cannot be over-rated. In this context it may however, be legitimate to bear in mind that the revenue is required by the State to raise money in order to carry on the function of Government and to sustain the manifold welfare activities undertaken by it. Similarly, the fact that the President has given previous sanction to the introduction of the Bill may conceivably be relevant because the Constitution seems to contemplate that the sanction of the President would indicate that the Central Government had applied its mind to the problem and had come to the conclusion that the proposed tax is reasonable and in the public interest. But we must hasten to add that the significance of this consideration cannot also be exaggerated.

(39) Mr Setalvad urges that evidence in the case shows that the State has levied the tax on the goods carried because it wants to utilise the income for the purpose of keeping the roads in order and to meet the huge expenses incurred in maintaining the waterways in the State. In the affidavit filed on behalf of the respondents details have been given about the expenditure incurred by the State on roads and waterways from year to year, and the revenue received by it

from the carriage tax during the same period. The affidavit points out that tea and the jute are the main products of the State of Assam and in order to have a regular and easy flow of trade, the State has to maintain the roads. The trade in these commodities through waterways is cheaper and, therefore, the State has also to incur large sums on maintaining the waterways. The statement filed in the affidavit clearly shows that every year the expenditure incurred is very much more than the revenue received from carriage tax. It may perhaps be that since the ton-mileage method has not been adopted in imposing the tax, the State may not be able to claim that the tax is compensatory in character. Usually, compensatory character may be claimed for a tax of this kind, provided the extent of the service rendered by the State by raising the tax is shown and it is also proved that the recovery of the tax has some relation to the rendering of the said service. That is why Mr Setalvad has not argued that the tax in question is compensatory in character. He, however, suggests that under Article 304 (b) it would be open to him to sustain the restriction imposed by the tax on the ground that the tax is levied not merely to raise general revenue for the State which itself is a public purpose, but that the tax is raised and utilised for keeping the waterways and the roads in good condition in the State. In our opinion, there is considerable force in these contentions.

We must also refer to the observations of Justice Sarkar in paragraph 69 of His Lordship's Judgment in the same case

"(69) Now let me look at the question from another point of view. To start with it would not be wrong to say that since a tax is collected in public interest and for public good the burden imposed by it on trade would prima facie be reasonable in the public interest. There is no reason to think that the burden imposed by this Act is erroneous (so one-sided?) that it is such as would crush the trade by putting a weight on it which it could not carry. Furthermore it has been established on the affidavit that the Government spends on roads and facilities on waterways much more than what is collected in the shape of tax on the goods carried. That also is a consideration which goes to establish the reasonableness of the levy. The petitioner has not been able to put before us anything which would destroy the effects of these considerations. The fact that the Act imposes the tax with retrospective effect cannot by itself also make the restriction unreasonable. For the reasons earlier mentioned, it may still be reasonable."

38. The consideration that weighed with their Lordships, namely, that the burden imposed by a tax on a trade would prima facie be reasonable and in the public interest because it is intended for raising money "in order to carry on the function of government and to sustain the manifold welfare activities undertaken by it" holds good in this case as well. The fact of Presidential sanction for the Act has also to be given its due weight and importance.

We have held that the tax imposed by the impugned Act is on the passengers, collectible from the operators, who could, and should reimburse themselves from the passengers. And there is therefore no question of the tax imposed casting such burden as would crush the industry or drive it out of existence.

39. The only factor which is absent is the fact that it has not been established before us that amounts in excess of, or even equal to, what has been collected under the impugned Act as well as the Kerala Motor Vehicles Taxation Act have been expended on the various activities which are intended for the reconstruction or opening of new roads and bridges and for maintaining and improving roads and in order to provide facilities for increased flow of trade, commerce or intercourse. The question is whether such proof is necessary in relation to the working of each year or a small group of years before it can be said that the requirements of Article 304 (b) have been satisfied. In answering this question, we think that it must be borne in mind that it would be not only inadvisable but dangerous to view the position with reference to the working of the statute for a short period. In this case the impugned Act has been in force throughout the year only for the three years 1964-1965 and 1965-1966 and 1966-1967.

During these years even according to the statement furnished in Annexure D to the supplementary counter affidavit the receipts have been in excess of the expenditure. But it is significant that the expenditure for these years have been considerably less than the expenditure for the two previous years 1962-63 and 1963-64. In fact if the total amount expended for the year 1962-63 which is over rupees 5 crores and 80 lakhs has been expended in the three years 1964-65, 1965-66 and 1966-1967, there would have been no surplus income for the years 1964-65 and 1966-1967 and only negligible excess for the year 1965-1966. Even for the year 1966-1967 only much less than what was spent for 1962-1963 has been expended. We have not got before us the figures for 1967-1968 which will of course be complete only after the year is over.

40. But there is one factor which is not only puzzling but disturbing. The specific reason, if any, for spending progressively lesser amounts in later years when there has been progressive increase in the income has not been explained.

On the whole the picture that we get from the materials before us is not a satisfactory one. But we think it would be unwise to jump to the conclusion that the revenue derived from the collection of the taxes under the impugned Act is unnecessary for the development of facilities for improvement of communications which in turn would result in augmenting the trade, commerce or intercourse. It may be that much more than what is collected will be expended in coming years or has already been expended this year. The fact that there has been substantial fall in the expenditure during the years 1964-65 to 1966-67 may well be due to the fact that there has been strain and stresses which necessitated the adoption of a policy to curtail expenditure for this purpose, so as to augment the resources for other inevitable and unavoidable expenditure which were urgently required in the public interest. Such things may, and necessarily often do, occur in the administration of the affairs of a State and result from policy decisions taken by the Government who are the best judges of the situation and who have to decide on the allocation of revenue.

41. In these circumstances we do not think, that we would be justified in saying on the basis of the working for three years only that the tax imposed under the impugned Act has saddled as unreasonable restriction and such restriction is not in the public interest. We do not think that it can be disputed and we think it is common place knowledge, that roadways in this State, and for that matter, in the whole of India, have to make great strides in order to keep up with the facilities available in this regard in other countries. It is also conceivable that large amounts will have to be expended, perhaps much greater than the revenue received under the impugned Act and the Kerala Motor Vehicles Taxation Act, for this purpose now, and in the immediate future, and may be it will be so expended by the State. We are unable therefore to say at this stage that the restriction imposed by the tax is not reasonable and is against public interest. We therefore dismiss these writ applications but subject to the direction that we have issued in paragraph 30 of our judgment. There will be no order as to costs in these petitions.

SSG/D.V.C.

Petitions dismissed.

AIR 1969 KERALA 146 (V 56 C 33)

T C RAGHAVAN, J

M A Thomas, Petitioner v P. J. Abraham and another, Respondents

Criminal Revn. Petn No 380 of 1967 and Original Petn. No 563 of 1968, D/- 11-6-1968

Prevention of Food Adulteration Act (1954), Ss. 13, 7, 16 — Sale of adulterated tea — Report of Public Analyst and certificate of Director — Value of — Binding nature on Courts.

What is relevant as evidence In both the report of the Public Analyst and the certificate of the Director of Central Food Laboratory are only the facts stated therein in other words, the data relating to the analysis, and not the opinion of the Analyst or the Director Thus whether the certificate is reliable and good evidence and whether it discloses adulteration are questions to be decided by the Court On these questions the certificate is not final and conclusive excepting that, if the Court decides to act on the certificate it has to accept the data found by the Director as a result of his test as final and conclusive and must then decide whether the sample is adulterated. On the last question whether there is adulteration on the basis of the data supplied by the Director even other evidence may be allowed and the proviso to subsection (5) of Section 13 is not a bar to this 1967 Ker LT 1095 & AIR 1964 All 349 & AIR 1962 Guj 44, Rel on.

(Paras 7, 9)

Where the charge against the accused was that he sold tea adulterated with added coal tar dye but the certificate of the Director disclosed that no coal tar dye was present in the sample It could not be said that the tea sold by the accused was adulterated. (Paras 11, 12)

Cases Referred: Chronological Paras

(1967) 1967 Ker LT 1095=1LR (1968)

2 Ker 687 P K Ali v Food Inspector Tellicherry

(1964) AIR 1964 All 349 (V 51)=

1964 (2) Cri LJ 125 Nagar Mahapalika Kanpur v Ram Niwas

(1962) AIR 1962 Guj 44 (V 49)=

1962 (1) Cri LJ 417 Mohanlal Chhaganlal Mithaiwala v Vipanchandra R Gandhi

7, 9

K. Chandrasekharan and T Chandrasekhara Menon, for Petitioner; Advocate-General and State Prosecutor, for Respondents (Nos 1 and 2 respectively). (in Cri R. P No 380 of 1967) K S Sebastian, A G Augustine and V C James, for Petitioner (in O P. No 563 of 1968)

ORDER.— The petitioner, the owner of a tea factory, has been convicted under

Sections 7 (1) and 16 (1) (a) of the Prevention of Food Adulteration Act and sentenced to rigorous imprisonment for 9 months and a fine of Rs 1,000/- by the Sub-Divisional Magistrate, and the conviction and sentence have been confirmed in appeal by the Sessions Judge The charge against the petitioner was that he sold tea adulterated by adding prohibited coal-tar dye.

2. The Food Inspector visited the tea factory on 28th January 1967 and purchased 375 grams of tea dust from a stock stored and exposed for sale The sample was divided into three parts and packed and sealed in three clean dry bottles one bottle was handed over to the petitioner, another was sent to the Public Analyst the same day and the third was retained with the Food Inspector The report of the Public Analyst (Ex. P6) appears to have been signed on 7th May, 1967, and the prosecution was started on 4th July, 1967 The prosecution witnesses were examined on 15th July; and thereafter, the petitioner applied for having his sample tested by the Central Food Laboratory On 18th July, the sample was sent to the Central Food Laboratory, and Ex. C1 dated 10th August, 1967, is the certificate issued by the Director of the Central Food Laboratory Several contentions have been raised and have also been considered by the Lower Courts. Before me the main question argued relates to the validity, effect, etc., of the certificate of the Director of the Central Food Laboratory.

3. The standard that tea has to satisfy is prescribed by A.14 in Appendix B of the Prevention of Food Adulteration Rules A.14 is as follows

"Tea means tea derived exclusively from the leaves, buds and tender stems of plants of the Camellia genus and tea species. It shall conform to the following specifications:

- | | |
|--|---|
| (a) Total ash determined on tea dried to constant weight at 100°C. | 5.0 to 8.0 per cent |
| (b) Total ash soluble in boiling distilled water | Not less than 40.0 per cent of total ash. |
| (c) Ash insoluble in BCl | Not more than 1.0 per cent. |
| (d) Extract obtained by boiling dry tea (dried at constant weight at 100°C) with 100 parts of distilled water for one hour under reflux. | Not less than 85 per cent. |

- (e) Alkalinity of soluble ash. Not less than 1.8 per cent. and not more than 2 per cent. expressed as K₂O.
- (f) Crude fibre. Not more than 15 per cent.

It shall not contain any added colouring matter."

Ex. P6, the report of the Food Analyst, discloses:

"Microscopic examination: The sample consists of tea only.

Total ash determined on tea dried to the constant weight at 100°C. 8.0 per cent.

Alkalinity of soluble ash. 2.0 per cent as K₂O

Water soluble ash. 61.6 per cent of the total ash.

Ash insoluble in HCl. 0.2 per cent.

Crude fibre. 11.2 per cent.

Aqueous extract obtained by boiling dry sample (dried to constant weight at 100°C) with hundred parts of distilled water for one hour under reflux. 85.5 per cent.

A non-permitted orange coal-tar dye. Present.

and (I) am of the opinion that the said sample does not conform to the standards prescribed for tea under the Prevention of Food Adulteration Rules, 1955, and is therefore adulterated. I am further of opinion that the sample contains coal-tar dye. The addition of coal-tar dye to tea is prohibited as per clause A.14 Appendix B of Prevention of Food Adulteration Rules, 1955."

The relevant portion of the certificate issued by the Director of the Central Food Laboratory (Ex. C1) shows:

"Total ash (on dry weight basis). 8.7 per cent.

Ash soluble in boiling distilled water. 82.9 per cent. of total ash.

Ash insoluble in HCl. 1.7 per cent.

Alkalinity of soluble ash. 1.15 per cent. as K₂O.

Hot water extract (on dry weight basis). 81.8 per cent.

Crude fibre. 18.4 per cent.

Added colouring matter. Absent.

Microscopic examination. Structures other than tea are absent.

Opinion: The sample of tea is adulterated."

I have quoted the above extracts in extenso as I feel that, for a proper appreciation of the discussion hereinafter, the extracts are essential.

4. For the purpose of comparison of the aforesaid three extracts, I shall treat clauses (a) to (f) in A.14 as one part and the portion relating to the colouring matter as another part. Now, comparing A.14 and Ex. P6, what appears is that all the requirements of the first part of A.14 are satisfied by the data given in Ex. P6 relating to that part. On the second part, Ex. P6 says that non-permitted orange coal-tar dye is present. Again, the result of microscopic examination is that the sample contains tea only. In the opinion portion of Ex. P6, the Public Analyst says that "the sample does not conform to the standards prescribed for tea under the Prevention of Food Adulteration Rules, 1955, and is therefore adulterated". This obviously relates to the first part in A.14; and this opinion of the Public Analyst appears to be wrong, because, as I have already pointed out, all the requirements of the first part of A.14 have been satisfied by the data relating to the same in Ex. P6. The Public Analyst then says that "the sample contains coal-tar dye; the addition of coal-tar dye to tea is prohibited as per clause A.14 Appendix B of the Prevention of Food Adulteration Rules, 1955". Here the Public Analyst is right.

5. Now, I shall compare Ex. C1 with A.14. Ex. C1 shows that on microscopic examination, no structures other than those of tea are present; it also discloses that crude fibre, one of the requirements in the first part of A.14, is less than 15 per cent. The sample however does not satisfy the standards prescribed by cls. (a) to (e) in the first part of A.14. On the second part relating to the addition of colouring matter, Ex. C1 says that there is no added colouring matter. (It may be remembered at this stage that the charge against the petitioner was that he sold tea adulterated by the addition of prohibited coal-tar dye).

6. Under Section 11 of the Act, the sample taken has to be divided into three parts: one part has to be sent to the Public Analyst, another has to be kept with the Food Inspector and the third has to be given to the vendor. The prosecution is based on the result of the report of the Public Analyst. During trial, both the Food Inspector and the accused person (the vendor) are given the right to have the samples with them sent to the Central Food Laboratory for test and a certificate from its Director (vide Section 13 (2)). When a certificate is obtained from the Director of the Central

Food Laboratory, the certificate supercedes the report of the Public Analyst (vide Section 13 (3)) Sub-section (5) of Section 13 then prescribes:

"Any document purporting to be a report signed by a Public Analyst, unless it has been superseded under sub-sec. (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act."

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein"

7. Under sub-section (5), both the report of the Public Analyst and the certificate signed by the Director of the Central Food Laboratory may be used as evidence of the facts stated therein; and under the proviso to the sub-section, any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein. From the wording of this sub-section, it is clear that what is relevant as evidence in both the report and the certificate are only the facts stated therein, in other words the data relating to the analysis, and not the opinion of the Analyst or the Director. This is clear from the wording of the sub-section itself, and I do not think there is any need for any decision in support thereof. At any rate, *P. K. Ali v. Food Inspector, Tellicherry*, 1967 Ker LT 1095, *Nagar Mahapalika Kanpur v. Ram Niwas*, AIR 1964 All 349, *Mohanlal Chhaganlal Mithalwala v. Vipanchandra R. Gandhi*, AIR 1962 Guj 44 and similar decisions may be referred to.

8. The language of sub-section (5) in relation to the proviso thereto may now be considered. Both the report and the certificate may be used as evidence this is what the sub-section says. But, when we come to the proviso, it says that the facts contained in the certificate of the Director shall be final and conclusive evidence. I may also reiterate that under sub-section (3) the certificate supersedes the report.

9. In my opinion, the questions that arise when a report or a certificate comes up for consideration are whether it may be admitted in evidence and whether it is reliable. What sub-section (5) does is to make the certificate and the report admissible in evidence: it does not make them reliable evidence. In other words, they are by themselves evidence, and the Analyst or the Director need not be examined

before the report or the certificate is admitted in evidence. What the proviso to the sub-section does further is to make the data or the facts found on analysis or test by the Director to be final in my opinion, finality and conclusiveness are enjoined on the certificate of the Director to obviate the necessity of the examination of the Director as a witness and also to prevent the protraction of the proceeding by asking for a further or a better test or analysis. The Public Analyst may be called as a witness, and the court or the parties are not precluded from calling him. On the other hand, the Director of the Central Food Laboratory cannot be called as a witness. If the right to call him as a witness is also given, the proceeding will naturally be protracted. Thus, the purpose of enjoining finality on the report of the Director is only to achieve these ends.

Whether the certificate is reliable and good evidence and whether it discloses adulteration are questions to be decided by the Court. On these questions the certificate is not final and conclusive, excepting that, if the court decides to act on the certificate, it has to accept the data found by the Director as a result of his test as final and conclusive, and must then decide whether the sample is adulterated. On the last question, whether there is adulteration on the basis of the data supplied by the Director, even other evidence may be allowed vide, AIR 1962 Guj 44, and the proviso to sub-section (5) of Section 13 does not appear to be a bar to this.

10. In this case, both the Lower Courts have held that the report of the Public Analyst has been superseded, and since the certificate of the Director discloses facts which show adulteration, the petitioner is liable to be convicted.

11. Both the Public Analyst and the Director of the Central Food Laboratory are experts, and they use scientific methods to analyse, test and find out the constituents of the samples sent to them. In this case, the analysis by one discloses that the sample contained coal-tar dye; the analysis by the other discloses that the sample did not contain coal-tar dye. The analysis by the former discloses that the constituents mentioned in the first part of A.14 were all satisfied, the analysis by the latter discloses that the constituents or their percentages do not correspond to the standards prescribed by clauses (a) to (e) of the first part of A.14. Microscopic examination by both shows that the samples contained only tea. In view of these, I find it difficult to treat the certificate (Ex. C1) as reliable evidence regarding the facts or the data found by analysis by the Director. It is

pointed out by the counsel of the Food Inspector that since the certificate has superseded the report, the latter can no more be looked into even for ascertaining whether the certificate is reliable.

Even accepting this, what the certificate shows is that nothing was found added in the sample (the sample was tea only and it did not contain added coal-tar dye); and that the percentages of total ash and of ash insoluble in hydro-chloric acid were a little higher than the standards prescribed and the percentages of alkalinity of soluble ash, of total ash soluble in boiling distilled water and of hot water extract (on dry weight basis) were lower than the prescribed standards. Adulteration under the Prevention of Food Adulteration Act may be by the addition of baser or cheaper ingredients, by the addition of prohibited colouring matter, by the addition of prohibited preservatives, by not keeping the prescribed standards, by not keeping proper sanitary conditions, etc. In this case, it may be remembered that the charge against the petitioner is that he sold tea adulterated with added coal-tar dye; and that the certificate of the Director discloses that no coal-tar dye was present in the sample. The test by the Director took place about six months and a half after the samples were taken; and there is no knowing whether there was any possibility of the ash content and its alkalinity changing by lapse of time.

12. In view of all the aforesaid facts and circumstances, I feel it is quite unsafe to hold that the tea sold by the petitioner was adulterated.

13. The revision petition is allowed; the conviction and sentence are set aside; and the petitioner is acquitted.

14. In view of the acquittal of the petitioner, the writ petition is not pressed; and the same is dismissed without costs.

MOVJ/D.V.C. Revision petition allowed.

AIR 1969 KERALA 149 (V 56 C 34)

P. T. RAMAN NAYAR, J.

Mery Metilda and another, Appellants v. Kunjiran Kunju Kathija Ummal and others, Respondents.

Second Appeal No. 1511 of 1964, D/-29-5-1968, appeal from Sub-Court, Quilon in A. S. No. 129 of 1963.

Civil P. C. (1908), S. 52 — Principle of 'substantial representation' — Requisite for application of.

The first requisite for the application of the principle of substantial representation is that the omission to bring all the heirs on the party array was a bona fide error due to want of information,

despite diligent enquiry regarding the existence of the omitted heirs. (Para 7)

In a case where there was a return of the summons issued to one of the defendants to the mortgage suit with the endorsement that he was dead, it should have put the plaintiff therein, on notice of such death and therefore it cannot be said that his proceeding with the suit as if the dead defendant was alive, was bona fide. (Para 7)

Therefore the mortgage decree as against the legal representatives of the deceased defendant who were not parties to the suit is invalid. For the rest of the co-owners of the mortgaged property who were parties to the suit, the decree and the execution sale would be valid and binding. AIR 1954 Trav-Co 60 (FB), Dist. (Para 8)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 792 (V 53)=

(1966) 1 SCR 937, Mohd. Sulaiman v. Mohd. Ismail

(1954) AIR 1954 Trav-Co 60 (V 41)=

1953 Ker LT 706 (FB), Kamakshi

Amma v. Gangadharan Pillai 3, 4

S. Narayanan Potti, N. K. Varkey and Savithri Sankar, for Appellants; S. Easwara Iyer, R. Srinivasan Potti, L. Gopalakrishnan Potti and C. S. Rajan, for Respondents (Nos. 1, 2, 6 and 13).

JUDGMENT:— In the year 1110 M. E. (1934-35 A. D.) one Kochana, the predecessor of the present plaintiffs, mortgaged the property now in suit and other property to Peter, the predecessor of the present defendants. Kochana died two years later leaving as his heirs his two widows and 11 children. One of these children, Mohammed by name, died, according to the plaintiffs on 13-3-1946, and that case is no longer disputed by the defendants. Shortly thereafter, on 4-3-1947, the mortgagee, Peter, brought O. S. No. 681 of 1122 for the recovery of the money due under the mortgage by sale of the mortgaged property. He was then apparently unaware of Mohammed's death, and he brought the suit against the two widows and 11 children of the mortgagor, Kochana (and certain alienees of the mortgaged property) as if Mohammed was still alive. Ex. P-1, the summons issued to Mohammed was returned with the endorsement that Mohammed was dead. Yet, no steps were taken to bring his legal representatives on record. Among his heirs, his mother, brothers and sisters were already party defendants, but his widow and daughter, the present plaintiffs 3 and 4 — the defendants no longer dispute that they are his widow and daughter — were not, and, by some mistake, Mohammed, who was named as the 3rd defendant in the plaint, was declared ex parte and the suit proceeded with as if he was alive. The remaining heirs of Kochana suffer-

ed the suit to proceed ex parte and the decree for sale was passed in the mortgagee Peter's favour on 1-4-1949. In execution of that decree, the property now in suit (two pieces of land each four cents in extent) was brought to sale and bought by Peter himself. The sale was confirmed on 2-2-1951 and Peter obtained delivery on 23-6-1951 under the delivery kychit, Ext D2. Peter died in 1954 leaving his widow and son, the present defendants, as his heirs.

2. The present suit was brought in July 1956 by the heirs of Kochana and of his son, Mohammed, all of whom (or whose predecessors) with the exception of plaintiffs 3 and 4, the widow and daughter of Mohammed, were party defendants in the former suit. The plaintiffs alleged that the summonses and notices in the mortgage suit and the execution proceedings therein were not really served on the parties thereto and that false returns of service were made. According to them, the decree and the proceedings in execution were vitiated by fraud, of which they became aware only shortly before the suit, and Peter a Court purchase conveyed no title to him. They further alleged that Peter did not actually obtain delivery the so-called delivery under Ext. D2 being a sham transaction, and that the 3rd plaintiff was in actual possession of the property presumably on behalf of all of them. On these averments, they asked for a decree setting aside the mortgage decree and the execution proceedings pursuant thereto, and giving them a declaration of their title to and possession of the property and an injunction to protect that possession. In the event of it being found that they were not in possession, they asked for recovery of possession with mesne profits.

3. The plaintiffs case of fraud, with regard to the service of summons and notice in the mortgage suit and the execution proceedings therein, found favour with neither Court but, the Lower Appellate Court took the view that, in proceeding with the mortgage suit against Mohammed ex parte as if he was alive, Peter the plaintiff therein, was guilty of fraud, fraud not merely against the heirs of Mohammed but against all the defendants in the mortgage suit, even those who had been duly served with summons. The first Court was not satisfied that plaintiffs 3 and 4 were, as they claimed to be, the widow and daughter of Mohammed. In this view which meant, that all the heirs of the mortgagor Kochana and his son, Mohammed were party defendants in the mortgage suit and had been duly served with summons, it dismissed the present suit. The Lower Appellate Court, however found that plaintiffs 3 and 4 were the widow and daughter of Mohammed, and that finding, as I

have already observed, is no longer disputed. It agreed with the trial Court that Peter actually took possession of the property on 22-6-1951 under Ext. D2 and that he and after him, his heirs were in possession. But, in the view it took that the decree and execution proceedings in the mortgage suit were completely vitiated by fraud, it gave the plaintiffs a decree for possession. In so doing it placed reliance on the Full Bench decision of this Court in *Kamakshi Amma v Gangadharan Pillai*, 1953 Ker LT 706= (AIR 1954 Trav-Co 60) (FB). And it did not even consider the plea of limitation raised by the defendants — after the actual delivery to Peter on 23-6-1951 (which it found) the plaintiffs could scarcely have been unaware of the alleged fraud.

4. Kochana was a Muslim, and, when a Muslim dies, his heirs take his property in severalty as tenants-in-common. The heirs of Kochana had several, though undivided, shares in the property and it is rather difficult to understand how assuming that the decree against one of them was void in that it was obtained against a man who was dead even at the time the suit was instituted, or because it was obtained by fraud, the decree is bad as against the rest. The decision relied upon by the Court below namely, 1953 Ker LT 706= (AIR 1954 Trav-Co 60) (FB) has no application whatsoever for, that decision dealt with a case where a decree had been obtained in respect of property belonging to a Nayar tarwad otherwise than in accordance with Section 31 of the Nayar Act. And all that was held, in the very terms of the statute, was that the decree was not binding on the tarwad. The decision can have no bearing on a case like the present where a decree obtained against several tenants-in-common is bad as against one of them. That can in no way affect its validity so far as the others are concerned. The decree if it is bad at all, can be bad only as against Mohammed a separate 7/72 share of the mortgaged property.

5. It is urged on behalf of the appellant defendants that although Mohammed, one of the 13 heirs of the mortgagor, Kochana, was dead when the mortgage suit was brought, the remaining 12 being party defendants duly served with summons, the decree can be supported in entirety on the theory of substantial representation, the heirs who were actually parties to the suit substantially representing the entire estate of the mortgagor, Kochana, including the interest of the heirs who were not parties. For the respondent plaintiffs it is contended that the theory of substantial representation can be invoked only when a defendant dies pending suit and the suit is proceeded

with some but not all his legal representatives on the party array. It has no application when a suit is brought for the recovery of money due from a person who is dead from out of his assets in the hands of his legal representatives, for, in such a suit, the decree can only be for recovery from the hands of the legal representatives who are parties to the suit and not from the hands of those who are not parties thereto. Moreover, unlike a suit for recovery of a simple money debt, a suit brought to enforce a mortgage executed by a person who is dead is not a suit against his estate. It is a suit brought against the present owners of the mortgaged property to enforce the transfer effected by the mortgage, in other words, to enforce the right to bring the property to sale for recovery of the debt, and it makes no difference whether the present owners got the property by transfer inter vivos or by succession. In either case, the suit is against the property in the hands of the present owners. They are sued in their own right and in no sense as the representatives of the old mortgagor. It would be different if a mortgagor defendant dies pending suit. For, there, by the fiction that an adjudication relates back to the date of the institution of the suit it is as if the dead man were still alive in the shape of his legal representatives, and the theory of substantial representation comes into play in case only some but not all his legal representatives are brought on record.

6. I confess that I was at first blush favourably impressed by this argument advanced on behalf of the defendants, but I think the decision in Mohd. Sulaiman v. Mohd. Ismail, AIR 1966 SC 792 provides a complete answer to it. There, one of the three original mortgagors was dead when the suit was brought. The suit was brought against the two mortgagors who were alive and some, but not all, the heirs of the deceased mortgagor. The Supreme Court, invoking the principle of substantial representation, upheld the mortgage decree and the sale pursuant thereto, in the subsequent suit brought by the heirs who had been omitted. That, as I have said, is a complete answer.

7. Nevertheless, it seems to me that the present defendants are not entitled to the benefit of the principle of substantial representation, for, as the Supreme Court decision just referred to recognises, the first requisite for the application of that principle is that the omission to bring all the heirs on the party array was a bona fide error due to want of information, despite diligent inquiry, regarding the existence of the omitted heirs. In the present case, as we have already seen, there was a return of the summons issued to Mohammed in

mortgage suit with the endorsement that he was dead. This, surely, should have put Peter, the plaintiff therein, on notice of Mohammed's death, and, therefore, it can scarcely be said that his proceeding with the suit as if Mohammed were alive was bona fide.

8. This being so, the mortgage decree cannot be supported as against such of the owners of the mortgaged property as were not parties to the mortgage suit. It follows that the mortgage decree and the sale pursuant thereto are not binding on plaintiffs 3 and 4 who were co-owners of the mortgaged property but were not parties to the mortgage suit. For the rest, the decree and the execution sale are clearly valid and binding.

9. In the result, I allow this appeal by the defendants in part. Plaintiffs 3 and 4 will have a declaration of title to a 105/1728 share (which, it is agreed by both sides, is their due share) of the property in suit. (The plea of limitation taken at the trial has not been pressed before me, possibly because the defendants, as the purchasers of the shares of all the co-owners except plaintiffs 3 and 4, are co-owners with those plaintiffs). That is the only relief that the plaintiff can be given in this suit. For the rest, their suit is dismissed and they will pay the costs of the defendants here as well as in the Courts below.

DGB/D.V.C.

Order accordingly.

AIR 1969 KERALA 151 (V 56 C 35)

T. C. RAGHAVAN, J.

State of Kerala, Petitioner v. C. K. Assainar, Respondent.

Criminal Revn. Petn. No. 157 of 1968, D/- 2-7-1968, appeal From Munsif Magistrate's Court, Pattambi in C. M. P. No. 39 of 1968.

(A) Criminal P. C. (1898), Ss. 5 (1) and (2) and 523 — Expression "otherwise dealt with" in S. 5 — Includes provisions for disposal of property under Chapter 43 of the Code — Seizure of goods by Police for contravention of Kerala Rice (Regulation of Movement) Order (1966) — Offender produced before Magistrate and goods retained for production before Collector — Magistrate cannot direct production of goods before him under S. 523 in view of Clause 6 of Order (as amended on 22-2-1968). (Para 4)

(B) Essential Commodities Act (1955), (as amended by Act 25 of 1966), Ss. 6A to 6D — Kerala Rice (Regulation of Movement) Order (1966) (after its amendment on 22-2-1968), Clause 6 — Interpretation of Clause 6 of Order read with S. 6 of Act.

KL/LL/F354/68

The Magistrate before whom an accused is brought for contravention of the provisions of the Order, has no power to call upon the Collector to produce the commodity seized by the Officers of the Civil Supplies Department, Revenue Department etc., and produced before the Collector (Para 5)

In view of the provisions of Ss 6A to 6D in the Act, the Collector's retention of the commodity seized and produced before him is only subject to the result of the prosecution before the Magistrate; and if the Magistrate after trial of the case comes to the conclusion that the commodity seized from the accused person should be returned to him and pass such an order, the Collector has to return it in specie, if possible and its price, if the return of the commodity is not possible, with reasonable interest as specified in Section 6C of the Act. This provision is sufficient safeguard for the rights of an accused person who is brought before a Magistrate for an offence of contravening any of the provisions of the Kerala Rice (Regulation of Movement) Order. Of course, in a case where the commodity is not produced before the Collector, the Magistrate may dispose of it. (Para 5)

(C) Essential Commodities Act (1955) (as amended by Act 25 of 1966), Ss 7 and 6C (2) — Magistrate has the power to pass an order of forfeiture even in a case where he acquits the accused person — The seized commodity is to be returned or its price paid by collector only if no order of forfeiture is passed by Magistrate. I.L.R. (1968) 2 Ker 474, Rel. on.

(Para 5)

Cases Referred Chronological Paras
(1968) Cr. R P No 123 of 1968,
D/- 27-5-1968=I.L.R. (1968) 2 Ker
474 Ramaswamy Gounder v State
of Kerala 5

State Prosecutor, for Petitioner; V
Nagappan Nair, for Respondent

ORDER.— The respondent, the accused in a crime before Perintalmanna Police Station, applied before the Munsif-Magistrate Pattambi for an order directing the Collector to produce before Court the rice seized from him. The Taluk Supply Officer filed objections claiming that the Collector was not bound to produce the rice before the Munsif-Magistrate. The Munsif-Magistrate overruled the objection and passed an order directing the Collector to produce the rice. The State of Kerala has filed the revision petition against that order.

2. A lorry belonging to the respondent carrying 100 bags of rice capsized on 3rd March, 1968, at about 5 p.m. The police reached the scene and seized the rice and the lorry. The respondent and the lorry were produced before the Munsif-Magistrate the next day; and the 100 bags of

rice were retained by the police to be produced before the Collector. The respondent was also charged under Section 279 of the Penal Code. The grounds on which the Munsif-Magistrate directed the Collector to produce the rice before him were that the case came within Section 523 of the Code of Criminal Procedure, and that under Section 6A of the Essential Commodities Act, the Collector had the right to have the rice produced before him only if he had the power to confiscate it. The Munsif-Magistrate held that since the case was now before him, the rice had to be produced before him.

3. The Interpretation put upon Section 5 (2) of the Code of Criminal Procedure by the Munsif-Magistrate does not appear to be correct. The Munsif-Magistrate seems to think that under sub-section (2) of Section 5 a special enactment can regulate only the manner or place of investigating, inquiring into, trying, or otherwise dealing with an offence in his opinion, this will not include making provision for the disposal of the property involved in the offence. The Munsif-Magistrate says that 'trying' is only alternative with 'otherwise dealing with'. This is obviously incorrect. Under Section 5 (1) of the Code of Criminal Procedure, all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions of the Code. The expression 'otherwise dealt with' occurring in this sub-section evidently includes disposal of property under Chapter XLIII of the Code. The same expression, 'otherwise dealing with', occurs in sub-section (2) as well, and that expression can only have the same meaning as in sub-section (1). Therefore, if a special statute makes provision for the disposal of the property involved in an offence under that statute such provision must displace the relevant provisions of the Code. The Criminal Procedure Code is a general code laying down the procedure in criminal cases generally; and if by a special statute an offence is created and provision is also made for the disposal of the property involved in such offence, there cannot be any objection for that provision being applied to the property involved in that offence. Therefore the view of the Munsif-Magistrate that Section 523 of the Code applies can hold good only if there are no provisions for disposal of property in the Essential Commodities Act and the Kerala Rice (Regulation of Movement) Order.

4. The Munsif-Magistrate has then considered Section 6A of the Essential Commodities Act and clause 6 of the Kerala Rice (Regulation of Movement) Order. Under the Act orders can be passed by State Governments and the Kerala State passed the Kerala Rice

(Regulation of Movement) Order of 1966. Clause 6 of that Order empowered certain officers of the Revenue Department, the Civil Supplies Department, etc. to seize paddy and rice, in respect of which there was reason to believe that any provision of the Order had been or was being or was about to be contravened. In such cases the said officers were also empowered to seize the packages, coverings or receptacles in which such rice was found or the animals, vehicles, vessels or other conveyances used in carrying such rice. They were further empowered to take or to authorise the taking of all measures necessary for securing the production of the rice seized along with the packages, etc. "in a Court and for their safe custody pending such production". This was the original clause 6 in the Kerala Rice (Regulation of Movement) Order as passed in 1966. This has been amended on 22nd February, 1968; and a new clause 6 has been substituted.

Under the new clause 6 (1) (c) also the officers are empowered to seize the stock of rice, in respect of which they have reason to believe that any provision of the Order has been or is being or is about to be contravened, along with the packages, coverings, etc. Sub-clause (c) further provides that the officers should thereafter take all measures for securing the production of the rice seized along with the packages, coverings, receptacles, etc. before "the appropriate Court and for their safe custody pending such production". An Explanation is added to this sub-clause which states that "appropriate Court" shall mean such Court as is specified in or under the Essential Commodities Act, in which proceedings would lie for contravention of the provisions of the Order, and shall also include the Collector of the District referred to in Section 6A of the Essential Commodities Act. Thus, the amended clause 6 has constituted the Collector also an appropriate Court; and the officer seizing the rice on the belief that a provision of the Order has been contravened, may produce the rice seized before either of the appropriate Court, viz., the Court in which proceedings would lie and the District Collector. This amended clause does not appear to have been brought to the notice of the Munsif-Magistrate; and for that reason, his order also does not lay down the correct position.

5. It is then urged by the Counsel of the respondent that even after the amendment the Munsif-Magistrate has the power to direct the Collector to produce the rice before him. On the other hand, the Public Prosecutor argues that once the commodity seized can be produced before the Collector who is an appropriate Court and the Collector himself wants it to be produced before him,

the Munsif-Magistrate, who is also an appropriate Court, need not direct the Collector to produce the rice before him. The new clause 6 of the Kerala Rice (Regulation of Movement) Order was most probably enacted to meet a case like this. The rice, if produced before the Collector, will undoubtedly be better preserved and better disposed of. In such a case, why should the Munsif-Magistrate have a superior or a supervening authority to call upon the Collector to produce the rice before him? Again, Sections 6A to 6D of the Essential Commodities Act make elaborate provisions regarding confiscation by the Collector. Section 6A authorises the Collector to confiscate any essential commodity seized: Section 6B lays down the procedure before confiscation, like issue of show cause notice, etc.; and Section 6C (1) provides for appeals against orders of confiscation before a judicial authority constituted by the State Government. Sub-section (2) of Section 6C then provides that where an order of confiscation is modified or annulled by the Appellate Judicial Authority, or where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made under Section 6A the person is acquitted, and in either case where it is not possible for any reason to return the essential commodity seized, the person from whom the seizure was made shall be paid the price therefor as if the essential commodity had been sold to the Government, with reasonable interest calculated from the day of seizure. Provision is also made in the same sub-section for the manner in which the price of the essential commodity has to be fixed.

Lastly, Section 6D provides that the confiscation by the Collector is no bar for the infliction of any other punishment to which the person is liable under the Act. These provisions make it clear that the Collector has power to confiscate the essential commodity seized, whether there is a prosecution before a Magistrate or not; that, if there is a prosecution and it ends in acquittal, the Government will return the commodity seized; that, if for any reason the commodity cannot be returned in specie, its price with reasonable interest will be paid to the person from whom it was seized; that an order of confiscation by the Collector is appealable to a judicial authority constituted by the State Government; and that, if the Appellate Authority modifies or annuls the order of confiscation, then also the essential commodity will be returned or its price with reasonable interest will be paid to the person from whom the seizure was made. In view of these provisions in the Act, the Collector's retention of the commodity seized and produced before him is only subject to

the result of the prosecution before the Magistrate, and if the Magistrate after trial of the case comes to the conclusion that the commodity seized from the accused person should be returned to him and pass such an order, the Collector has to return it in specie, if possible, and its price if the return of the commodity is not possible with reasonable interest as specified in Section 6C of the Essential Commodities Act. This provision is sufficient safeguard for the rights of an accused person who is brought before a Magistrate for an offence of contravening any of the provisions of the Kerala Rice (Regulation of Movement) Order. I do not think it is necessary that the Magistrate should have the power to call upon the Collector to produce the commodity seized by the officers of the Civil Supplies Department, Revenue Department, etc. and produced before the Collector. Of course, in a case where the commodity is not produced before the Collector, the Magistrate may dispose of it.

I may also point out that under Section 7 of the Essential Commodities Act, the Magistrate has the power to pass an order of forfeiture even in a case where he acquits the accused person vide *Ramaswamy Gundur v State of Kerala*, Cri. R. P No 123 of 1966 (Ker), and only if no order of forfeiture is passed by the Magistrate, the Collector need return the commodity or pay its price. I feel that this is the best and the most harmonious interpretation of Section 6 of the Kerala Rice (Regulation of Movement) Order with Section 6A of the Essential Commodities Act.

6. In this view, the revision petition is allowed, and the order of the Munsif-Magistrate is set aside.

CWM/D V C. Revision allowed.

AIR 1969 KERALA 154 (V 56 C 36)
FULL BENCH

M. MADHAVAN NAIR, T. S. KRISHNAMOORTHY IYER & K. SADASIVAN, JJ

K. C. Pazhanimala and others, Appellants v State of Kerala and others, Respondents.

Writ Appeals Nos. 260 & 261 of 1967 and 1, 22 to 26, 28, 34, 38, 47, 48 and 52 to 60 of 1968, D/- 26-7-1968, from order of Gopalan Nambiyar, J in O P No 3510/67 and W A. Nos. 3855, 3521, 3962, 3761, 3685, 3923, 3397, 4101, 4073, 3721, 3722, 3597, 4079, 3556, 4060, 3856, 4289, 4602, 3887 and 4209 of 1967.

(A) Constitution of India, Art. 226 — Kerala Paddy (Restriction on Milling)

KL/LL/F374/66

Order 1967 — Writ petition, by rice mills owners carrying on hulling of paddy, challenging validity of Order 1967 — Maintainability — "Person aggrieved" — Meaning of.

The High Court has got very wide powers under Article 226 of the Constitution to issue directions and writs of the nature mentioned therein not only for the enforcement of fundamental rights but also for any other purpose. The petitioner approaching the Court should be one who has a personal or individual right in the subject matter of the petition and any person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject matter thereof. Case law discussed. (Para 6)

The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy body who is interfering in things which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. The meaning given to the words "person aggrieved" has to be applied to the expression person prejudicially affected. (1961) 2 All ER 504, Foll. (Para 6)

Therefore the rice mills owners in the State carrying on the hulling of paddy in the rice mills established by them in accordance with the provisions of Central Act 21 of 1956 directly affected by the provisions of clauses 3, 6 and 7 of the Kerala Paddy (Restriction on Milling) Order, 1967 are persons who are aggrieved because of the enforcement of the impugned Order, 1967 and therefore have sufficient interest to challenge the impugned Order. (Para 6)

(B) Essential Commodities Act (1955), Ss. 3 (6) and 5 (b) — Kerala Paddy (Restriction on Milling) Order, 1967 — Order passed by State Government under delegated powers — Order not laid before both Houses of Parliament, at any time, after it was made — Effect — Violation of S. 3 (6) does not render the order invalid — But it cannot be said that S. 3 (6) is not applicable to an order passed by any authority in exercise of power under S. 5 (b) of the Act. AIR 1969 Ker 38, (FB), Foll. (Para 7)

(C) Constitution of India, Art. 226 — Writ petition challenging validity of Kerala Paddy (Restriction on Milling) Order, 1967 — Pleadings — Court is not restricted to pleadings of State — Fact that a particular object is stated in counter affidavit will compel the High Court to examine validity of impugned Order only in that background. AIR 1961 SC 954, Foll. (Para 8)

(D) Constitution of India, Arts. 245 and 246, Sch. 7, List I, Item 52 and List 3, Item 33 — Kerala Paddy (Restriction on Milling) Order 1967. Pre. — Rice Milling Industry (Regulation) Act (21 of 1958) — Order issued by State Government as delegate of Central Government — Order whether a piece of colourable legislation — Whether any conflict between Parliament and State Legislature — Essential Commodities Act (1955), S. 5.

The Kerala Paddy (Restriction on Milling) Order, 1967 issued by the State Government as a delegate of the Central Government empowered by S. 5 of the Essential Commodities Act, 1955 is an Act of the Central Government and therefore no question of any conflict between Parliament and State Legislature can arise. In passing the impugned order the State Government did not purport to act as a delegate of the State Legislature or in its own executive powers. It was made by the State Government in exercise of its power to make subordinate legislation on behalf of the Central Government. In passing the impugned order the State Government did not exceed its authority. Case law discussed. (Paras 9, 10)

Further, the impugned order is not a piece of colourable legislation. The doctrine against colourable legislation is in essence a question of the power of legislature to enact the law in question. The impugned order was passed by the State Government as a delegate of the Central Government and in passing it the State Government had not exceeded its authority. (Paras 8, 11)

It cannot be said that the purpose of the impugned order is the same as the object of the Central Act viz., the Rice Milling Industry (Regulation) Act (21 of 1958) and the former is therefore invalid. The Essential Commodities Act, 1955 is relatable to Entry 33, in List III of the Constitution while Act (21 of 1958) which is entirely for a different purpose is under the legislative power in Item 52, in List I of the Constitution. Since the impugned order is issued under the Essential Commodities Act, 1955 and its object is as indicated in its preamble it would be inappropriate to hold that the object of the impugned order is the same as that of Act (21 of 1958) even though it indirectly interferes with the working of the rice mills established under Central Act (21 of 1958). The object of the impugned Order falls within the object of the Essential Commodities Act, 1955 and it is not intended to control in any way the working of the rice mills. It is intended to prevent hoarding and black marketing in paddy and rice by regulating the conversion of paddy into rice through the process of milling. Case law discussed.

(Para 10)

(E) Essential Commodities Act (1955), S. 3 (2) (a) and (d) — Kerala Paddy (Restriction on Milling) Order (1967), Pre. — Object — Order falling only under S. 3 (2)(a) and not S. 3 (2)(d) of the Act — No prior concurrence of Central Government — Order held invalid.

The preamble of the Kerala Paddy (Restriction on Milling) Order, 1967 only shows that it was for maintaining and increasing the supplies of rice and paddy and for securing their equitable distribution and availability at fair prices — rice is an essential commodity. Conversion of paddy into rice through the rice mills is production or manufacture of rice. The term production can only mean making goods available for human wants. The essence of manufacture is the change of one object to another for the purpose of making it marketable. In market rice is a different commodity from paddy and therefore when there is a conversion of paddy into rice through rice mills there is either production of rice or manufacture of rice from paddy. The object of the impugned order is therefore to control the same for the purpose of making paddy and rice available to the community at fair prices. The impugned order therefore falls under Section 3 (2) (a) of the Essential Commodities Act. The expression in S. 3 (2) (d) is not use and consumption but use or consumption. The expression use is a word of very wide significance. If the impugned order is to regulate the use of paddy then the order comes under Section 3 (2) (d) of the Essential Commodities Act. The object of the regulation whether it is under Section 3 (2) (a) or 3 (2) (d) is to all intents and purposes the same. What is sought to be prevented by the impugned order is the production or manufacture of rice from paddy through mills. The use of paddy for the purpose of converting into rice is not sought to be prevented by the impugned order. There is no restriction or regulation imposed in the matter of converting paddy into rice by handpounding. But the regulation by the impugned order is the production or manufacture of rice by milling paddy. This is more in the nature of manufacturing rice from paddy by the process of milling. In such circumstances this can more appropriately come only under S. 3 (2) (a) and not S. 3 (2) (d) of the Act. (Para 19)

As the Impugned order falls under S. 3 (2) (a) of the Act, prior concurrence of the Central Government is necessary. The order G. S. R. 1111, D/- 24-7-1967 issued by the Under-Secretary to the Central Government does not satisfy the requirement of prior concurrence and hence the impugned order is invalid. (Para 19)

Cases Referred: Chronological Paras
 (1969) AIR 1969 Ker 38 (V 56)=
 1968 Ker LT 390 (FB), State of
 Kerala v. Annama
 (1966) AIR 1966 SC 416 (V 53)=
 (1966) 1 SCR 523, Jaora Sugar
 Mills (P) Ltd. v. State of Madhya
 Pradesh
 (1966) AIR 1966 SC 828 (V 53)=
 (1966) 2 SCR 172, G. Venkates-
 wara Rao v. Govt. of Andhra
 Pradesh
 (1966) AIR 1966 Raj 105 (V 53)=
 ILR (1965) 15 Raj 684, Bankidass
 v. State of Rajasthan
 (1964) 1964-1 All ER 779=(1964)
 2 QB 362, Maurice v. London
 County Council
 (1963) AIR 1963 SC 507 (V 50)=
 (1962) 2 SCR 711, State of Punjab
 v. Suraj Parkash
 (1962) AIR 1962 SC 1044 (V 49)=
 (1963) 1 SCJ 106, Calcutta Gas
 Co., (Proprietary) Ltd. v. State of
 West Bengal
 (1961) AIR 1961 SC 954 (V 48)=
 (1961) 2 SCA 523, Burrakur Coal
 Co., Ltd. v. Union of India
 (1961) 1961-2 All ER 504=1961 AC
 617, Attorney-General of The
 Gambia v. Njie
 (1960) 1960 Ker LJ 1319, Muthu-
 swami Kounden v. State of Kerala
 (1953) AIR 1953 SC 375 (V 40)=
 1954 SCR 1, Gajapati Narayan
 Deo v. State of Orissa
 (1952) AIR 1952 SC 12 (V 39)=
 1952 SCR 28, State of Orissa v.
 Madan Gopal
 (1951) AIR 1951 SC 41 (V 38)=
 1950 SCR 869, Charanjit Lal
 Chowdhuri v. Union of India

In No. 260/67

S. Easwara Iyer, for Appellants; Advoca-
 te-General (for Nos. 1 to 3) and C. San-
 karan Nair (for No. 4), for Respondents.

In No. 261/67

K. R. Kurup, for Appellant; Advocate-
 General, for Respondents (Nos. 1 to 3).

In No. 1/68

K. Velayudhan Nair, N. R. K. Nair, K.
 J. Joseph and T. K. M. Unnikrishnan, for Appellants; Advocate-General, for Respondents (Nos. 1 & 2).

In No. 22/68

G. Viswanatha Iyer, for Appellants; Advocate-General, for Respondents (Nos. 1 to 3).

In No. 23/68

G. Viswanatha Iyer, for Appellants; Advocate-General, for Respondents (Nos. 1 to 3).

In No. 24/68

E. P. Poullose, for Appellants; Advocate-General, for Respondents (Nos. 1 to 3).

In No. 25/68

G. Viswanatha Iyer, for Appellants; Advocate-General (for Nos. 1 to 5) and

C. Sankaran Nair (for No. 6), for Respondents.

In No. 26/68

K. Chandrasekharan, T. Chandrasekhara Menon, K. Vijayan and N. N. Sugunapalan, for Appellants; Advocate-General (for Nos. 1 to 3) and C. Sankaran Nair (for No. 4), for Respondents.

In No. 28/68

K. R. Kurup, for Appellant; Advocate-General, for Respondents (Nos. 1 to 3).

In No. 34/68

K. S. Sebastian, for Appellants; Advocate-General, for Respondent.

In No. 38/68

T. C. Karunakaran, P. K. Shamsuddin, V. M. Kurien, P. J. Mathew, A. I. Mohammed Basheer and K. K. Gangadharan, for Appellants; Advocate-General, for Respondents (Nos. 1 to 3).

In No. 47/68

S. Easwara Iyer, L. Gopalakrishnan Potti and E. Subramoney, for Appellants; Advocate-General, (for Nos. 1 to 3) and C. Sankaran Nair (for No. 4), for Respondents.

In No. 48/68

S. Easwara Iyer, L. Gopalakrishnan Potti and E. Subramoney, for Appellants; Advocate-General (for Nos. 1 to 3) and C. Sankaran Nair (for No. 4), for Respondents.

In No. 52/68

K. Kuttikrishna Menon and A. P. Chandrasekharan, for Appellants; Advocate-General, for Respondents (Nos. 1 to 3).

In No. 53/68

T. C. Karunakaran, P. K. Shamsuddin and P. J. Mathew, for Appellants; Advocate-General, for Respondents (Nos. 1 to 3).

In No. 54/68

K. Chandrasekharan and T. Chandrasekhara Menon, for Appellants; Advocate-General (for Nos. 1 to 3) and C. Sankaran Nair (for No. 4), for Respondents.

In No. 55/68

S. Easwara Iyer, L. Gopalakrishnan Potti, C. S. Rajan and E. Subramoney, for Appellants; Advocate-General (for Nos. 1 to 3) and C. Sankaran Nair, (for No. 4), for Respondents.

In No. 56/68

K. R. Kurup, for Appellants; Advocate-General, for Respondents (Nos. 1 to 7).

In No. 57/68

K. George Varghese, Thomas V. Jacob and P. C. Joseph, for Appellants; Advocate-General (for Nos. 1 to 3) and C. Sankaran Nair (for No. 4), for Respondents.

In No. 58/68

K. George Varghese, Thomas V. Jacob and P. C. Joseph, for Appellants; Advocate-General (for Nos. 1 to 3) and C. Sankaran Nair (for No. 4), for Respondents.

In No. 59/68

T. L. Viswanatha Iyer, for Appellants;
Advocate-General, for Respondents (Nos. 1 to 3).

In No. 60/68

T. L. Vishwanatha Iyer, for Appellants;
Advocate-General (for Nos. 1 to 3), for Respondents.

KRISHNAMOORTHY IYER, J.:— These appeals directed against the decision of Gopalan Nambiyar, J. involve a common point of law which relates to the validity of the Kerala Paddy (Restriction on Milling) Order, 1967. The learned Judge upheld the validity of the Order overruling the several objections raised by the appellants.

2. The Kerala Paddy (Restriction on Milling) Order, 1967 has been issued by the Government of Kerala in exercise of the powers conferred by sub-section (1) read with clauses (d), (i) and (j) of sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (Central Act 10 of 1955). The said provisions read:

"3. Power to control production, supply, distribution, etc. of essential commodities:—

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the Defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide—

- (a)
- (b)
- (c)
- (d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity;
- (e)
- (f)
- (g)
- (h)
- (i) for requiring persons engaged in the production, supply or distribution of, or trade and commerce in any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto, as may be specified in the order;
- (j) for any incidental and supplementary matters, including in particular the entering and search of premises, vehicles, vessels and aircraft, and the seizure by a person authorised to make such search

of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is about to be committed, and of any books of accounts and documents which in his opinion would be useful for, or relevant to, any proceedings under this Act and the return of such books of accounts and documents to the person from whom they were seized after copies thereof or extracts therefrom as certified by that person in the manner specified in the order have been taken."

Section 5 of the Essential Commodities Act, 1955, which deals with the delegation of powers to make orders under Section 3 by the Central Government reads:

"5. Delegation of powers. — The Central Government may, by notified order, direct that the power to make orders under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction be exercisable also by —

- (a) such officer or authority subordinate to the Central Government; or
- (b) such Government or such officer or authority subordinate to a State Government, as may be specified in the direction."

3. The Order G. S. R. 1111 dated 24th July, 1967, issued by the Central Government under Section 5 of the Essential Commodities Act, 1955 and amended by the Central Government by G. S. R. 284 dated 9-2-1968 is reproduced below:

"Delegation of Powers by the Central Government.

ORDER

New Delhi, the 24th July, 1967.

G. S. R. 1111. — In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), and in supersession of the Order of the Government of India in the Ministry of Food, Agriculture, Community Development and Co-operation (Department of Food) No. G. S. R. 906, dated the 9th June, 1966 (as subsequently amended), the Central Government hereby directs that the powers conferred on it by sub-section (1) of Section 5 of the said Act to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii), and (j) of sub-section (2) thereof shall, in relation to foodstuffs be exercisable also by a State Government subject to the conditions—

(1) that such powers shall be exercised by a State Government subject to such directions, if any, as may be issued by the Central Government in this behalf;

(2) that before making an order relating to any matter specified in the said clauses (a), (c) or (f), or in regard to distribution or disposal of foodstuffs to places outside the State or in regard to regulation of transport of any foodstuff, under the said clause (d), the State Gov-

ernment shall also obtain the prior concurrence of the Central Government, and

(3) that in making an order relating to any of the matters specified in the said clause (j) the State Government shall authorise only an officer of Government.

The Kerala Paddy (Restriction on Milling) Order 1967 was issued by the Government of Kerala on 20th September 1967 in view of the delegation of power made by the Central Government under G S R. 1111. As already stated G S R. 1111 quoted above contains also the amendments incorporated by G S R. 284 dated 9-2-1968 and since those amendments have no direct impact in considering the validity of the Kerala Paddy (Restriction on Milling) Order 1967 it is not necessary to reproduce G S R. 1111 before its amendment by G S R. 284. Though the Kerala Paddy (Restriction on Milling) Order 1967 is purported to have been issued by the Government of Kerala in exercise of the powers conferred by Sec. 3 sub-sec. (1) read with sub-sec. (2) (d) (i) and (j) of the Essential Commodities Act, 1955 before us it was sought to be sustained only under Section 3 (2) (d) of the Essential Commodities Act, 1955 and it was freely conceded by the learned Advocate-General that Section 3 (1) read with S 3 (2) (i) and (j) will not help to promulgate the Kerala Paddy (Restriction on Milling) Order, 1967.

4. The appellants before us are owners of rice mills in the State. Before the learned Single Judge one of the original petitions was by a person who applied for permission to mill his paddy and whose application was returned. The order returning the application was set aside by the Single Judge on the ground that the said order is arbitrary and against the terms of the impugned order and the original petition was allowed. The said order has become final.

5. On behalf of the respondents a contention was raised that the appellants are not persons aggrieved by the provisions of the Kerala Paddy (Restriction on Milling) Order, 1967 and are therefore not competent to maintain the petitions under Article 226 of the Constitution and the appeals have to be dismissed on that ground. The ground in the form in which it was argued before us was not raised before the learned Single Judge. The locus standi of the appellants to maintain the petitions should to a very large extent depend upon the provisions of the impugned order and the reliefs sought for by the petitioners. In most of these petitions the prayer is for the issue of a writ of certiorari or any other appropriate writ declaring the Kerala Paddy (Restriction on Milling) Order 1967, invalid, inoperative and null and void. There is a prayer in all the petitions for the issue of a writ of manda-

mus compelling respondents 1 to 3 not to insist upon the production of permit for hulling paddy in the mills owned by the appellants.

6. The submission of the learned Counsel appearing for the appellants was that clauses 3, 6 and 7 of the impugned Order directly affect the mill owners from carrying on the hulling of paddy in the rice mills established by them in accordance with the provisions of Central Act 21 of 1958 they are persons aggrieved and have locus standi to maintain the petitions under Article 226 of the Constitution. We are of the view that the appellants are directly affected by the provisions of clauses 3, 6 and 7 of the impugned Order and have therefore sufficient interest to challenge the impugned Order. It has now been held by the decisions of the Supreme Court that the High Court has got very wide powers under Article 226 of the Constitution to issue directions and writs of the nature mentioned therein not only for the enforcement of fundamental rights but also for any other purpose. It is also clear from those decisions that the petitioner approaching the Court should be one who has a personal or individual right in the subject matter of the petition (and?) that any person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject matter thereof. Their Lordships of the Supreme Court observed in *Calcutta Gas Co. (Proprietary) Ltd. v State of West Bengal*, AIR 1952 SC 1044 at p 1047

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. In *State of Orissa v Madan Gopal*, 1952 SCR 28=AIR 1952 SC 12 this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the Court under Article 226 of the Constitution. In *Charanjit Lal Chowdhuri v Union of India*, 1950 SCR 869=AIR 1951 SC 41 it has been held by this Court that the legal right that can be enforced under Article 32 must ordinarily be in the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. We do not see any reason why a different principle should apply in the

case of a petitioner under Article 226 of the Constitution. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified. The question, therefore, is whether in the present case the petitioner has a legal right and whether it has been infringed by the contesting respondents."

The same principle is expressed in the decisions in *State of Punjab v. Suraj Parkash*, AIR 1963 SC 507 and *G. Venkateswara Rao v. Government of Andhra Pradesh*, AIR 1966 SC 828. In the latter case their Lordships of the Supreme Court observed at page 833:

"This Court held in the decision cited (AIR 1962 SC 1044 at p. 1047) (supra) that 'ordinarily' the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest; it can also relate to an interest of a trustee. That apart, in exceptional cases as the expression 'ordinarily' indicates, a person who has been prejudicially affected by an Act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof."

In this connection arguments were advanced at the Bar as to the meaning of the expression "person aggrieved". Their Lordships of the Privy Council had to consider the scope of the words "person aggrieved" in *Attorney-General of the Gambia v. N'Jie*, 1961-2 All ER 504 at p. 511 and they observed:

"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy-body who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

The Court of Appeal in *Maurice v. London County Council* 1964-1 All ER 779 at p. 782 quoted with approval the observations of the Privy Council made in 1961-2 All ER 504. In our view the meaning given to the words 'person aggrieved' has to be applied to the expression 'person prejudicially affected'. We have therefore no doubt to hold that the several appellants are persons who are aggrieved because of the enforcement of the impugned order. The objection of the maintainability of the petitions filed under Article 226 of the Constitution has only to be overruled.

7. Now we shall deal with the contentions raised by the appellants. The first contention was based on Section 3, sub-section (6) of the Essential Commodities Act, 1955, reading thus:—

"Every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made."

The submission on behalf of the appellants was that the impugned order was not laid before both Houses of Parliament after it was made at any time and therefore the order cannot take effect. The learned Single Judge disposed of that contention in favour of the respondents thus:—

"The learned Advocate-General contended that the laying before Parliament is ordained by clause (6) of Section 3 only in respect of an order covered by clause (a) of Section 5 of the Act, and not one covered by clause (b) thereof. On the language, juxtaposition, and co-relation of the sections I am in agreement with this contention. The consequence of requiring Central Government's Orders made under Section 3 being laid before Parliament, but not those made under delegated powers by the State Government, may be anomalous. But the remedy is not by judicial legislation (vide the publication by the Indian Law Institute: Administrative Process under the Essential Commodities Act p. 89). There is also authority in this Court which is binding on me that laying before Parliament, ordained by a statutory provision, without providing any default for disobedience, and without even any limitation of time, within which it is to be done, is only directory and not mandatory. (vide 1960 Ker LJ 1319). The impugned order was promulgated on 20th September, 1967 and it cannot be said that there has been an infraction of Section 3 (6) of the Act, in not laying it before Parliament so far."

We agree with the conclusion reached by the learned Single Judge that on account of the failure to conform to the provisions of Section 3, sub-section (6) of the Essential Commodities Act, 1955 the impugned order is not invalid. But we do not agree with the reasoning of the learned Judge that Section 3, sub-section (6) is inapplicable to the case of an order made by the State Government or any other authority under delegated powers. The legal effect of the failure to conform to the provisions of Section 3 (6) of the Essential Commodities Act, 1955 was considered by a Full Bench of this Court, in *State of Kerala v. Annam*, 1968 Ker LT 390=(AIR 1969 Ker 38) (FB), where Madhavan Nair, J., speaking for the Court observed:

"It is obvious that, by its expression, the sub-section does not make the laying before the Parliament a condition precedent to the validity of the Order nor does it annul the Order if it is not laid before the Parliament within a specified time. A law once brought to force normally continues in force till it is determined by a statutory provision therefor. To interpret the expression in the sub-section 'as soon as may be' to mean 'within a reasonable time' as counsel would have it, would make the duration of the law uncertain and therefore cannot be accepted."

We are therefore of the view that the violation of Section 3 (6) of the Act does not render the impugned order invalid, though we disagree with the view taken by the learned Judge that Section 3 (6) is not applicable to an order passed by any authority in exercise of the power under Section 5 (b) of the Act.

8. The next submission on behalf of the appellants was that the impugned Order is a piece of colourable legislation. The handle for such a contention is furnished by the reason given in paragraph 3 of the counter-affidavit filed by the State for the impugned order. Paragraph 3 of the counter-affidavit filed in O P. 3510 of 1967 which has given rise to Writ Appeal No 260 of 1967 is in these terms:

"The Government have been getting complaints about hoarding and black-marketing activities on the part of Rice Mills. The provisions for controlling Rice Mills under the Rice-Milling Industry (Regulation) Act, 1958 (Central Act 21 of 1958) were found to be inadequate for the purpose of preventing hoarding and black-marketing activities on the part of Rice Mills. It was felt by the Government that in the interests of the general public and to ensure availability of rice to the public at reasonable prices and to prevent hoarding and black-marketing stricter control was necessary over Rice Mills."

Because of the above passage it was argued that the object of the order in dispute is to control the rice mills and since for the said purpose Central Act 21 of 1958 has been enacted, the impugned order really encroaches the field occupied by the Central Act. But the learned Advocate-General submitted that the purpose of the impugned order is not the control of the rice mills but to ensure a fair distribution of rice and paddy by preventing hoarding and black marketing of rice and paddy. The fact that a particular object is stated in the counter-affidavit will not compel us to examine the validity of the impugned order only in that background. In *Burrakur Coal Co Ltd v Union of India*, AIR 1961 SC 954

at p. 963 it was pointed out by their Lordships of the Supreme Court that.

"While considering the validity of the law the Court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained."

If the impugned order is considered to be a measure to prevent boarding and profiteering in paddy and rice as was pointed out by the learned Advocate-General and for maintaining and increasing the supplies of rice and paddy and for securing their equitable distribution and availability at fair prices as is indicated by the preamble of the impugned order we do not find any reason to hold that the impugned order is in any way invalid merely because of the reason given by the State in their pleadings. The plea that the impugned order is a piece of colourable legislation is misconceived. The doctrine against colourable legislation is in essence a question of the power of legislature to enact the law in question. In explaining the doctrine their Lordships of the Supreme Court observed in *Gajapati Narayan Deo v State of Orissa*, AIR 1953 SC 375 at p 379:

"The doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power."

9. In *Jaora Sugar Mills (P) Ltd. v State of Madhya Pradesh*, AIR 1966 SC 416 at p 421 their Lordships of the Supreme Court followed the decision in AIR 1953 SC 375 and observed.

"The challenge to the validity of a Statute on the ground that it is a colourable piece of legislation is often made under a misconception as to what colourable legislation really means. As observed by Mukherjee, J., in 1954 SCR 1 at p 11" (AIR 1953 SC 375 at p 379)

"the idea conveyed by the expression 'colourable legislation' is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise."

Thus observation succinctly and effectively brings out the true character of the contention that any legislation is colourable legislation. Where a challenge is

whether the petitioner was bound by the agreement made by the representative union and it is sufficient to say that the employer believed that the petitioner was bound and was liable to work in accordance with that agreement. What is material is that the dismissal of the petitioner was not by reason of the circumstance that he obtained an award or took proceedings under the Act against the employer. We are satisfied that the finding given by the Industrial Court that the employer did not commit any contravention of section 83 is not in any way erroneous.

7. The petition fails and is dismissed with costs. Counsel's fee Rs. 50/-. The outstanding amount of security deposit shall be refunded to the petitioner.
DVT/D.V.C. Petition dismissed.

AIR 1969 MADHYA PRADESH 65
(V 56 C 22)

P. V. DIXIT, C. J.
AND G. P. SINGH, J.

Jagat Singh Choudhury, Petitioner v. M. P. Electricity Board and others, Respondents.

Misc. Petn. No. 90 of 1967, D/- 24-9-1968.

(A) M. P. Industrial Relations Act (27 of 1960), Ss. 31 (3), 61 (1) (A) (a), 61 (2) — Labour Court, powers of — Domestic enquiry not in conformity with standing orders — Enquiry into charges can be made by Labour Court itself — Domestic enquiry not held in compliance with prescribed regulation — Same principle applicable — (Civil Services (Classification, Control and Appeal) Rules, R. 55).

If the procedure of enquiry is governed by standing orders and an employee is dismissed without an enquiry, or on the basis of a defective enquiry, the Labour Court in an application made by the employee for reinstatement will itself have jurisdiction to enquire into the charges before ordering reinstatement. This position does not change when the mode of enquiry is governed by a regulation. The standing orders constitute the statutory terms of employment and similar is the effect when conditions of service of employees are prescribed by regulations made by the employer under statutory powers. That being so, the Labour Court will have that power when the domestic enquiry does not conform to a regulation which prescribes the mode of enquiry. AIR 1963 SC 439 at p. 441, Rel. on. (Para 4)

There are two reasons why a Labour Court is recognised to possess the power of enquiring into the charges. Firstly, an enquiry by the Labour Court itself is more advantageous to the employee, for

he gets the benefit of a verdict of the Court on the merits and is not left to another domestic enquiry by the employer which if properly carried is conclusive on merits; secondly, the Labour Court by itself enquiring into the charges gets the opportunity of finally adjudicating the dispute and of doing justice between the parties thereby finally removing the cause of industrial strife. AIR 1965 SC 1803, Rel. on. (Para 4)

These considerations will also be applicable when the termination of services of an employee is challenged before a Labour Court under section 31 (3) of the Madhya Pradesh Industrial Relations Act (27 of 1960) on the ground that the domestic enquiry held by the employer did not conform to the requirements of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules which the employer had made applicable to his employees in the form of a statutory regulation. (Para 4)

The power conferred on Labour Court under sections 61 (1) (A) (a) and 61 (2) is to decide the dispute and all questions of fact relevant to the dispute. When the dispute under section 31 (3) is concerning termination of employment on certain charges, the existence and merits of the charges are relevant questions of fact within the meaning of section 61 (2) and the Labour Court has power to decide these questions whether the conditions of service be regulated by standing orders or by statutory regulations. (Para 4)

(B) Constitution of India, Art. 226 — New point — Point not raised before relevant authority — Cannot be allowed to be raised. (Para 2)

(C) M. P. Industrial Relations Act (27 of 1960), S. 66 — Revisional jurisdiction — Exercise of — Discretionary — Defect in Labour Court's order — Industrial Court not bound to set it aside.

In the exercise of its revisional jurisdiction under Section 66 the Industrial Court is not bound to set aside the order of the Labour Court whenever any defect is pointed out. In revision it can pass such order "as it thinks fit". It is open to the Industrial Court to uphold the order of the Labour Court on the ground that the two charges held to be proved are sufficiently serious to sustain the termination of employment of the employee notwithstanding the fact that the two other charges also held to be proved do not amount to misconduct. (Para 5)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1803 (V 52) =
(1965) 3 SCR 588, Workmen of the
Motipur Sugar Factory Private
Ltd. v. Motipur Sugar Factory
Private Ltd.

(1963) AIR 1963 SC 439 (V 50) =
 1962 Supp (2) SCR 697 Bagalkot
 Cement Co v R. K. Pathan 4
 Gulab Gupta, for Petitioner; B. L. Seth,
 for Respondent No 1

SINGH, J. The petitioner was employed as a Supervisor by the Madhya Pradesh Electricity Board. As a result of an enquiry held against him on certain charges, his services were terminated on 18th June, 1964. The petitioner after usual approach notice filed an application before the Labour Court, Ujjain under section 31 of the Madhya Pradesh Industrial Relations Act, 1960 for reinstatement with back wages. The Labour Court came to the conclusion that the domestic enquiry was defective. The Court then itself enquired into the merits of the charges after giving both parties opportunity to lead evidence. It was finally held that four of the six charges were proved against the petitioner and the order of termination of his services was proper. The petitioner then went up in revision before the Industrial Court, Indore, which was dismissed on 14th December 1966. The petitioner has now come up under Articles 226 and 227 of the Constitution and prays that the order of the Industrial Court and the Labour Court be quashed and the Electricity Board be directed to reinstate the petitioner with full back wages and other benefits.

2 The first point raised by the learned counsel for the petitioner is that he was not given adequate opportunity to examine certain witnesses before the Labour Court. This point was not argued by the petitioner before the Industrial Court. The petitioner therefore, cannot be allowed to urge this point under Article 226.

3. It was next contended that the Board by a notification issued in October, 1963 had applied the Civil Services (Classification, Control and Appeal) Rules as a regulation applicable to the employees of the Board that because of this notification Rule 55 of the Civil Services (Classification, Control and Appeal) Rules applied to the petitioner that as the domestic enquiry held by the Board was not in accordance with Rule 55 it was wholly invalid and that as the matter was not governed by standing orders but by Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, the Labour Court had no jurisdiction to enquire into the merits of the charges and after it was found that the enquiry was defective, the petitioner ought to have been reinstated.

4. This is also a point which the petitioner did not argue before the Industrial Court. In that court it was never

contended that the petitioner was governed by Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, and therefore, the Labour Court could not itself enquire into the charges. The only point argued in this connection before the Industrial Court was that, as the standing orders did not apply to the petitioner, the termination of employment should have been set aside without any further enquiry. The finding of the Industrial Court on that point was that if the standing orders did not apply, the petitioner was governed by ordinary law of master and servant and his services could be terminated for any act of dishonesty in the performance of his duties. As the petitioner did not argue the applicability of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules before the Industrial Court, he is not entitled to urge that point before us. Even otherwise we are not at all impressed by the argument. We will assume in favour of the petitioner that Rule 55 of the Civil Services (Classification, Control and Appeal) Rules applied to him as a regulation made by the Electricity Board and the enquiry held against him did not comply with the requirements of that rule. The question on this assumption is whether the Labour Court could itself, on an application for reinstatement made by the petitioner enquire into the charges and after holding the charges proved disallow the relief of reinstatement.

It is not disputed by the learned counsel for the petitioner that if the procedure of enquiry be governed by standing orders and an employee be dismissed without an enquiry or on the basis of a defective enquiry the Labour Court in an application made by the employee for reinstatement will have jurisdiction to enquire into the charges. According to the learned counsel this will not be the position when the mode of enquiry is governed by a regulation and not by standing orders. In our opinion, there is no room for any such distinction. The standing orders constitute the statutory terms of employment, Bagalkot Cement Co v R. K. Pathan, AIR 1963 SC 439 at p 441, and similar is the effect when conditions of service of employees are prescribed by regulations made by the employer under statutory powers. If in cases where the domestic enquiry is not in conformity with the standing orders, the Labour Court can itself enquire into the charges before ordering reinstatement of the employee, there is no reason why it should not have that power when the domestic enquiry does not conform to a regulation which prescribes the mode of enquiry. There are two reasons why a Labour Court is recognised to possess the power of enquiring

into the charges. Firstly, an enquiry by the Labour Court itself is more advantageous to the employee, for he gets the benefit of a verdict of the Court on the merits and is not left to another domestic enquiry by the employer which if properly carried is conclusive on merits; secondly, the Labour Court by itself enquiring into the charges gets the opportunity of finally adjudicating the dispute and of doing justice between the parties thereby finally removing the cause of industrial strife.

In *Workmen of the Motipur Sugar Factory Private Ltd. v. Motipur Sugar Factory Private Ltd.*, AIR 1965 SC 1803 a case under Section 10 of the Industrial Disputes Act, the Supreme Court adverted to this matter and it was observed as follows:

"If it is held that in cases where the employer dismisses his employee without holding an enquiry, the dismissal must be set aside by the Industrial Tribunal only on that ground, it would inevitably mean that the employer will immediately proceed to hold the enquiry and pass an order dismissing the employee once again. In that case, another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in the meantime. This course would mean delay and on the second occasion it will entitle the employer to claim the benefit of the domestic enquiry. On the other hand, if in such cases the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having the merits of his case being considered by the tribunal for itself and that clearly would be to the benefit of the employee. That is why this Court has consistently held that if the domestic enquiry is irregular, invalid or improper, the tribunal may give an opportunity to the employer to prove his case and in doing so, the tribunal tries the merits itself. This view is consistent with the approach which industrial adjudication generally adopts with a view to do justice between the parties without relying too much on technical considerations and with the object of avoiding delay in the disposal of industrial disputes".

These considerations will also be applicable when the termination of services of an employee is challenged before a Labour Court under section 31 (3) of the Madhya Pradesh Industrial Relations Act on the ground that the domestic enquiry held by the employer did not conform to the requirements of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules which the employer had made applicable to his employees in the form of a statutory regulation. The power of the Labour Court as conferred

by sections 61 (1) (A) (a) and 61 (2) are as follows:

"S. 61 (1) In addition to powers conferred under other provisions of this Act, a Labour Court shall have power to—

(A) decide —

(a) disputes regarding which application has been made to it under sub-section (3) of section 31 of the Act;

x	x	x
x	x	x
x	x	x

(2) For the purposes of deciding a dispute under paragraphs (A). . . of sub-section (1) it shall be lawful for the Labour Court to determine questions of fact relevant to the dispute."

The power thus conferred is to decide the dispute and all questions of fact relevant to the dispute. When the dispute under section 31 (3) is concerning termination of employment on certain charges, the existence and merits of the charges are relevant questions of fact within the meaning of section 61 (2) and the Labour Court has power to decide these questions whether the conditions of service be regulated by standing orders or by statutory regulations. In our opinion the Labour Court in the instant case had jurisdiction to enquire into the merits of the charges.

5. Lastly it was pointed out that the Labour Court upheld the order of termination on proof of four charges out of which according to the finding of the Industrial Court, two charges did not amount to misconduct. It was argued that the Industrial Court should not have upheld the order of the Labour Court on a finding that the two charges which were held by it to amount to misconduct were in themselves sufficient for terminating the petitioner's employment. The four charges which the Labour Court found proved against the petitioner are as follows:

(i) Giving connections without estimated charges;

(ii) Giving connections without agreement;

(iii) Shifting connections without taking shifting charges according to rules; and

(iv) Misappropriating the property of the Board.

It will be seen from them that the third charge and the fourth one which related to the misappropriation of the property of the Board were serious charges and it could be very well said that they themselves were sufficient for passing an order terminating the petitioner's services. The petitioner's contention that it was not open for the Industrial Court to uphold the order of termination on these two charges alone is not correct. In the exercise of its revisional jurisdiction under section 66 of the Madhya Pradesh Indus-

trial Relations Act, the Industrial Court is not bound to set aside the order of the Labour Court whenever any defect is pointed out. In revision it can pass such order "as it thinks fit". It was thus open to the Industrial Court to uphold the order of the Labour Court on the ground that the two charges held to be proved were sufficiently serious to sustain the termination of employment of the petitioner notwithstanding the fact that the two other charges also held to be proved did not amount to misconduct.

6 This petition fails and is dismissed. Counsel's fee Rs. 75/- The outstanding amount of security shall be refunded to the petitioner.

YPB/D.V.C.

Petition dismissed.

AIR 1969 MADHYA PRADESH 63 (V 56 C 23)

P V DIXIT C. J
AND G P SINGH, J

New Precision (India) Pvt. Ltd. Dewas,
Applicant v Commissioner of Income-tax,
Madhya Pradesh, Nagpur, Opposite Party.

Misc. Civil Case No 343 of 1966, D/-
17-9-1968

Income Tax Act (1961), S 37—Assessee Company engaged in manufacture of castings and parts of diesel engines — Company agreeing to pay certain sum to engineer of certain concern in consideration of his leaving service and joining assessee as director — Amount so paid is capital expenditure—Claim for deduction under S 37 not maintainable.

Where a company engaged in the manufacturing of certain parts of diesel engine agreed with the engineer of a certain concern to pay him certain amount in consideration of his leaving that concern and joining the assessee-company as a director the amount so paid to the engineer is a capital expenditure in respect of which the assessee cannot claim any deduction under Section 37 of the Income Tax Act 1961.

There can be no doubt that the payment which the assessee made to the engineer for procuring exclusively for its benefit his services, experience and technical knowledge for the manufacture of castings was an expenditure wholly and exclusively for the purpose of the business of the assessee-company. But an expenditure for the purpose of business may be of a capital nature and if it is of that nature then it cannot be claimed as deduction under section 37 of the Act. The question whether the amount expended by the assessee was in the nature of capital expenditure or a revenue

disbursement has to be decided on the facts of the case and a variety of circumstances, such as, the nature of expenditure, whether the payment was made once and for all or was a recurring expenditure and whether the asset acquired was a source of permanent income or exhausted itself either during the year of acquisition or within a short period thereafter, AIR 1962 SC 680, Foll.

(Para 4)

The expression "once and for all" denotes an expenditure which is made once and for all for procuring an enduring benefit to the business as distinguished from a recurring expenditure in the nature of operational expenses. When the words 'permanent' or 'enduring' are used in this connection it is not meant that the advantage which will be obtained will last for ever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole e.g. enlargement of the good-will of company, permanent improvement in the material or immaterial assets of the concern. The word "asset" is not confined to 'something material', the asset or advantage may be of an impalpable or incalculable nature.

(Para 5)

If these principles are applied, the answer seems clear that the payment to the engineer by the assessee was a capital expenditure. The expenditure was incurred by the assessee once and for all for procuring the benefit and use of his service technical knowledge and experience. It was not any recurring expenditure in the nature of "operational expenses" With that expenditure the assessee acquired an asset in the shape of his technical knowledge and practical experience for the purpose of manufacturing castings and certain parts of diesel engines. The benefit of the services, technical knowledge and experience of the said engineer, was an advantage or asset for the enduring benefit of the assessee's business. So long as the assessee retains the services of that engineer for its exclusive productive and manufacturing purposes and express its value in its products, it is a fixed capital of the assessee (1939) 7 ITR 101 (CA) and AIR 1968 SC 1131, Distinguished AIR 1955 SC 89, Followed.

(Para 6)

Cases Referred Chronological Paras

(1968) AIR 1968 SC 1131 (V 55) =

(1968) 69 ITR 692, Commr of

I. T v Ciba of India Ltd.

7, 8

(1962) AIR 1962 SC 680 (V 49) =

(1962) 44 ITR 689 Abdul Kayoom

v C I T Madras

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(1960) AIR 1960 SC 1034 (V 47) =

(1960) 40 ITR 67, Pingle Industries,

Ahmedabad v Commr of

I. T. Hyderabad

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- (1955) AIR 1955 SC 89 (V 42) =
 (1955) 27 ITR 34, Assam Bengal
 Cement Co. Ltd. v. Commr. of
 I. T. West Bengal 4, 5
 (1947) AIR 1947 Lah 162 (V 34)=
 (1947) 15 ITR 185 (FB), Benarasi-
 das Jagannath, In re 5
 (1939) 1939-7 ITR 101=21 Tax Cas
 528 (CA), British Sugar Manu-
 facturers Ltd. v. Harris (Inspector
 of Taxes) 7
 (1938) 61 CLR 337, Sun News-
 papers Ltd. and Associated News-
 papers Ltd. v. Federal Commr. of
 Taxation 5
 (1927) 13 Tax Cas 1=(1927) SC 705,
 Commr. of Inland Revenue v.
 Granite City Steamship Co. 5
 (1926) 10 Tax Cas 155=(1925) 1 KB
 421, Atherton v. British Insulated
 and Helsby Cables Ltd. 5
 (1887) 1887-2 Tax Cas 239=4 TLR
 51, City of London Contract Cor-
 poration v. Styles 5

K. A. Chitaley with V. S. Dabir, for
 Applicant; M. Adhikari, for Opposite
 Party.

DIXIT, C. J.: In this reference under
 section 256 (1) of the Income-tax Act,
 1961, (hereinafter called the Act), at the
 instance of the assessee M/s New Precision
 (India) Private Ltd., Dewas, the
 question which the Income-tax Appellate
 Tribunal has referred to us for decision is:

"Whether on the facts and in the cir-
 cumstances of the case, the sum of Rupees
 40,100/- paid to Shri B. V. Mahabale is
 expenditure allowable u/s 37 of the
 Income-tax Act, 1961?"

'2. The material facts are that the
 assessee-company was incorporated on
 22nd July 1960. The share holding of the
 company, as on 30th June 1961, was
 thus—

- (i) 260 shares held by Shri and Smt.
 Desai,
- (ii) 240 shares held by Shri Gaikwad,
- (iii) 50 shares held by Shri B. V.
 Mahabale, and
- (iv) 100 shares held by Smt. Kusuma-
 wati Mahabale wife of Shri B. V. Maha-
 bale.

The company was engaged in the manu-
 facture of certain parts of diesel engines.
 Prior to the incorporation of the asses-
 see-company, there was a firm consisting
 of Shri Desai and Shri Gaikwad doing
 the business of manufacturing certain
 parts of diesel engines. This firm used to
 purchase castings from M/s Mysore Kir-
 loskar Ltd. As there was some difficulty
 in getting timely supply of castings from
 M/s Mysore Kirloskar Ltd., the assessee-
 company started its own foundry to make
 the castings. Shri B. V. Mahabale was
 first in the service of M/s Mysore Kir-
 loskar Ltd. as an engineer. He agreed to

leave the service of M/s Mysore Kirloskar Ltd. and join the assessee-company as a Director, on the condition of the company paying him Rs. 40,000/- being the amount which he would be required to pay to M/s Mysore Kirloskar Ltd., as liquidated damages, before the expiry of the period of his contract with that concern. This condition was accepted by the assessee-firm, and on 12th and 23rd December 1960 payments totalling Rs. 40,100/- were made directly by the assessee-firm to M/s Mysore Kirloskar Ltd. After this payment, Shri B. V. Mahabale left the service of M/s Mysore Kirloskar Ltd. and joined the assessee-company on 1st March 1961 on a monthly remuneration of Rs. 3,000/-.

3. In the assessment proceedings for the assessment year 1962-63, for which the relevant previous year ended on 30th June 1961, the assessee sought to deduct Rs. 40,100/- on the ground that this was an expenditure not of a capital nature but wholly and exclusively laid out for the purposes of business under S. 37 of the Act. This claim was disallowed by the Income-tax Officer and, on appeals, by the Appellate Assistant Commissioner and the Tribunal.

4. There can be no doubt that the payment of Rs. 40,100/-, which the assessee made to M/s Mysore Kirloskar Ltd. for procuring exclusively for its benefit the services, experience and technical knowledge of Shri Mahabale for the manufacture of castings, that is to say, for the purpose of setting the profit-earning machinery in motion, was an expenditure wholly and exclusively for the purpose of the business of the assessee-company. But an expenditure for the purpose of business may be of a capital nature; and if it is of that nature, then it cannot be claimed as deduction under section 37 of the Act. The question, therefore, is whether the amount of Rs. 40,100/- expended by the assessee was in the nature of capital expenditure or a revenue disbursement. Whenever such a question arises in any case, it has to be decided on the facts of the case and a variety of circumstances, such as the nature of expenditure, whether the payment was made once and for all or was a recurring expenditure and whether the asset acquired was a source of permanent income or exhausted itself either during the year of acquisition or within a short period thereafter. As observed by Hidayatullah J. (as he then was) in the majority judgment of the Supreme Court in *Abdul Kayoom v. C. I. T.*, (1962) 44 ITR 689: (AIR 1962 SC 680):

"What is attributable to capital and what to revenue has led to a long string of cases here and in the English Courts. The decisions of this court reported in

Assam Bengal Cement Co. Ltd. v Commissioner of Income-tax, (1955) 27 ITR 34 (AIR 1955 SC 89) and Pingle Industries case, (1960) 40 ITR 67 (AIR 1960 SC 1034) have considered all the leading cases, and have also indicated the tests, which are usually applied in such cases. It is not necessary for us to cover the same ground again. Further none of the tests is either exhaustive or universal.

Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) (The nature of the Judicial Process, P 20) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive. What is decisive is the nature of the business, the nature of the expenditure, the nature of the right acquired, and their relation inter se and this is the only key to resolve the issue in the light of the general principles which are followed in such cases."

5 In (1955) 27 ITR 34 (AIR 1955 SC 89) the principles laid down by a Full Bench of the Lahore High Court in Benarsidas Jagannath, In re, (1947) 15 ITR 185 (AIR 1947 Lah 162) (FB) which must be borne in mind for deciding whether the expenditure is "revenue" or "capital expenditure, were approved by the Supreme Court. The Lahore High Court formulated the principles in the following words—

1 Outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment; vide Lord Sands in Commissioners of Inland Revenue v Granite City Steamship Company (1927) 13 Tax Cas 1 at p 14. In City of London Contract Corporation v Styles, (1887) 2 Tax Cas 239 at p 243 Bowen, L. J., observed as to the capital expenditure as follows:

"You do not use it "for the purpose of" your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern

2. Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade; vide Viscount Cave, L. C. in Atherton v British Insulated and Helsby Cables Ltd. (1926) 10 Tax Cas 155. If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be

regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether. Thus, if labour saving machinery was acquired, the cost of such acquisition cannot be deducted out of the profits by claiming that it relieves the annual labour bill, the business, has acquired a new asset, that is, machinery

The expressions "enduring benefit" or "of a permanent character" were introduced to make it clear that the asset or the right acquired must have enough durability to justify its being treated as a capital asset.

3. Whether for the purpose of the expenditure, any capital was withdrawn, or in other words, whether the object of incurring the expenditure was to employ what was taken in as capital of the business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or a part of its circulating capital. Fixed capital is what the owner turns to profit by keeping it in his own possession. Circulating or floating capital is what he makes profit of by parting with it or letting it change masters. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital, on the other hand, is not involved directly in that process and remains unaffected by it.

Bhagwati J., delivering the judgment of the Supreme Court in (1955) 27 ITR 34 (AIR 1955 SC 89) (supra) said that the expression once and for all used by Viscount Cave, L. C. in (1926) 10 Tax Cas 155 is used to denote an expenditure which is made once and for all for procuring an enduring benefit to the business as distinguished from a recurring expenditure in the nature of operational expenses. He also quoted with approval the following observations of Latham C. J. in *Sur Newspapers Ltd. and Associated Newspapers Ltd. v Federal Commissioner of Taxation*, (1938) 61 CLR 337 at p. 355—

"When the words 'permanent' or 'enduring' are used in this connection it is not meant that the advantage which will be obtained will last for ever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole" e.g. — enlargement of the good will company" — "permanent improvement in the material or immaterial assets of the concern". It must be noted that the word "asset" as Lord Atkinson pointed out in *Athertons case*, (1926) 10 Tax Cas 155 (supra) is not confined to "something material" the asset or advantage may be of an

impalpable or incalculable nature: See (1955) 27 ITR 34 : (AIR 1955 SC 89) (supra). These are the principles which have to be applied in order to determine here whether the expenditure of Rupees 40,100/- incurred by the assessee-company was capital expenditure or revenue expenditure.

6. If these principles are applied to the facts of this case, the answer seems clear that the payment of Rs. 40,100/- by the assessee was a capital expenditure. The expenditure was incurred by the assessee once and for all for procuring the benefit and use of Shri Mahabale's service, technical knowledge and experience. It was not any recurring expenditure in the nature of "operational expenses". With that expenditure the assessee acquired an asset in the shape of Shri Mahabale's technical knowledge and practical experience for the purpose of manufacturing castings and certain parts of diesel engines. The expenditure was not incurred for the purpose of earning profits in the conduct of the assessee's business. The asset, which the assessee acquired, no doubt cannot be compared with factory or office buildings, plant or machinery. The technical knowledge and practical experience of Shri Mahabale was an intangible ambience pervading the production and manufacturing organisation of the assessee.

The benefit of the services, technical knowledge and experience of Shri Mahabale, which the assessee acquired exclusively after paying Rs. 40,100/- to M/s Mysore Kirloskar Ltd. was an advantage or asset for the enduring benefit of the assessee's business. So long as the assessee retains the services of Shri Mahabale, for its exclusive productive and manufacturing purposes and express its value in its products, it is, one may say, a fixed capital of the assessee. The assessee acquired a source of knowledge and experience helpful in the manufacture of the castings and certain parts of diesel engines; and thus by making a payment of Rs. 40,100/- secured an enduring advantage and an asset, which is a capital asset of its business. In our judgment, on the application of the tests laid down by the Supreme Court to the facts of this case, there can be no doubt that the expenditure of Rs. 40,100/-, which the assessee incurred, was with a view to procuring an asset or advantage for the enduring benefit of its business.

7. The question, which we are required to answer, is not directly covered by any authority. Shri Chitale, learned counsel appearing for the assessee, however, referred us to the decisions in British Sugar Manufacturers Ltd. v. Harris (Inspector of Taxes), (1939) 7 ITR 101

(CA) and C. I. T. v. Ciba of India Ltd. (1968) 69 ITR 692 : (AIR 1968 SC 1131) as authorities supporting to some extent the view that the expenditure incurred by the assessee was a revenue expenditure which the assessee-company was entitled to deduct under section 37 of the Act. In our opinion, the cases cited by the learned counsel for the assessee are not of much assistance and are clearly distinguishable.

In (1939) 7 ITR 101 (CA) (supra), a company engaged in the manufacturing business agreed with two other companies to pay them a stated percentage of its "net profits" in consideration of their giving to the company the full benefit of their technical and financial knowledge and experience, and giving to the company and its directors, advice to the best of their ability respectively on all questions of or relating to manufacture and finance and disposal of the company's products. Greene, M. R., presiding over the Court of Appeal, held that the payment made by the assessee-company to the other two companies of a certain percentage of its net profits was a sum which the assessee was entitled to deduct as being "money wholly and exclusively laid out or expended for the purposes of trade". He took the view that the agreement between the assessee-company and the other two companies was an agreement for remuneration by way of a commission representing a percentage of 'profits' for services to be rendered to the company. He said "in other words, it is nothing more or less than a very common type of agreement under which officers of companies are remunerated by a commission on 'profits', which after all is simply a share of 'profits', provided that the word 'profits' is construed in the right sense".

In the payment made by the assessee here to M/s Mysore Kirloskar Ltd., there is no element of any remuneration at all. The payment was a price paid to M/s Mysore Kirloskar Ltd. once and for all by the assessee for securing for its exclusive benefit the services, technical knowledge and experience of Shri Mahabale.

8. In the other case, namely, (1968) 69 ITR 692 : (AIR 1968 SC 1131) (supra), the assessee-company was an Indian subsidiary of Ciba Ltd. of Basle, a Swiss company engaged in the development, manufacture and sale of medical and pharmaceutical preparations. By an agreement concluded between the assessee and the Swiss company, the latter undertook to deliver to the assessee all processes, formulae, scientific data, working rules and prescriptions pertaining to the manufacture or processing of pro-

ducts discovered and developed in the Swiss company's laboratories and to communicate the results of its research work, and also granted to the assessee full and sole right and licence under the patent listed in the agreement to make use, exercise and vend the inventions specified therein in India. In consideration of the right to receive scientific and technical assistance, the assessee agreed to make contributions of 5 p.c., 3 p.c. and 2 p.c. respectively of the net sale price of the products sold by the assessee towards (i) technical consultancy and technical service rendered and research work done, (ii) cost of raw material used for experimental work, and (iii) royalties on trade marks used by the assessee.

The Supreme Court held that the contribution made by the assessee to the Swiss firm towards technical consultancy and technical services rendered, cost of raw materials used for experimental work, and the royalties was allowable as a business expenditure under S 10 (2) (xv) of the Indian Income-tax Act, 1922. This case is also clearly distinguishable. As pointed out by the Supreme Court, the assessee Ciba of India Ltd. did not under the agreement become entitled exclusively, even for the period of the agreement, to the patents and trade marks of the Swiss company; it had merely access to the technical knowledge and experience in the pharmaceutical field which the Swiss company commanded, by making that technical knowledge available the Swiss company did not part with any asset of its business, nor did the assessee acquire any asset or advantage of an enduring nature for the benefit of its business. Here, the assessee obtained the services of Shri Mahabale exclusively for its own benefit; it was not as if the assessee allowed Shri Mahabale to continue in the service of M/s Mysore Kirloskar Ltd. and then entered into an agreement with M/s Mysore Kirloskar Ltd. for being allowed to draw for the purpose of carrying on its business as manufacture of certain parts of diesel engines, upon the technical knowledge and experience of Shri Mahabale in consideration of some periodical payment to M/s Mysore Kirloskar Ltd. M/s Mysore Kirloskar Ltd. parted with an asset, namely, the services, experience and technical knowledge of Shri Mahabale and the assessee company acquired it.

9. For all these reasons, our answer to the question placed before us for decision is that the sum of Rs. 40,100/- paid to Shri B V Mahabale was a capital expenditure in respect of which the assessee could not claim any deduction under section 37 of the Act. The asses-

see shall pay costs of this reference. Counsel's fee is fixed at Rs. 200/-.

GDR/D.V.C.

Reference answered accordingly.

AIR 1969 MADHYA PRADESH 72
(V 56 C 24)

P. V. DIXIT C J

AND G P. SINGH, J.

Commissioner of Income Tax, M. P. and Nagpur, Applicant v Champalal Sukhrum, Opposite Party.

Misc. Civil Case No. 231 of 1967 D/- 24-9-1968

(A) Income-tax Act (1922), S. 28 (1) — Income-tax Act (1961), S. 271 (1) (c) — Penalty proceedings under S. 271 (1) (c) Income-tax Act 1961, for defaults referred to in S. 28 (1) of Income-tax Act, 1922 in respect of assessment year ending 31-3-1962 — Proceedings could be validly initiated under S. 271 of 1961 Act.

An assessee is liable to penalty under S. 271 (1) of the 1961 Act for default referred to in S. 28 (1) of the 1922 Act in respect of any assessment for the year ending 31-3-62 or any earlier year, which is completed on or after 1-4-1962. Penalty proceedings could validly be initiated under S. 271 of the 1961 Act (1967) 64 ITR 285 (MP), Foll.

(Para 6)

(B) Income-tax Act (1922), S. 28 (1) — Income-tax Act (1961), S. 271 (1) — Penalty proceedings for concealment of income—Question of fact—To be determined on circumstances of case—Nature of such proceedings.

The question whether an assessee has concealed particulars of his income or whether he has committed an offence in this connection is a question of fact to be determined on the circumstances of the case. The Income-tax Officer must himself expressly find in penalty proceedings that the explanation given by the assessee was false before imposing a penalty for concealment of income. Such proceedings are penal proceedings and should not be treated as proceedings for imposition of additional tax. AIR 1968 Madh Pra 103, Foll.

(Paras 7 and 8)

Cases Referred Chronological Paras

(1968) AIR 1968 Madh Pra 103

(V 55) = 1968-67 ITR 337=1967

MPLJ 827, Commr of Income Tax

v Punjabhai Shah

(1967) 1967-64 ITR 285=1966 MPLJ

1118, Kishan Lal v. Commr of

Income Tax

P S Khirwadkar, for Applicant, R. K.

Tankha, for Opposite Party

KL/KL/F71/68

DIXIT, C. J.: In this reference under section 66 (1) of the Indian Income-tax Act, 1922, at the instance of the Commissioner of Income-tax, the Income-tax Appellate Tribunal has referred the following two questions to this Court for decision—

"1. Whether in respect of the assessment for 1961-62 made under the provisions of the Indian Income-tax Act, 1922, penalty proceedings could be validly initiated and concluded under section 271 read with section 274 of the Income-tax Act, 1961?

2. If the answer to question No. 1 is in the affirmative, whether on the facts and in the circumstances of the case, the assessee had concealed the particulars of his income or given inaccurate particulars thereof within the meaning of S. 271 (1) (c) so as to justify the imposition of penalty?

2. The material facts are that the assessee is an individual carrying on money lending business. In the assessment proceedings for the assessment year 1961-62 the Income-tax Officer added two sums, namely, Rs. 3,800/- and Rupees 15,000/- as assessee's income from undisclosed sources. The first amount represented credits of Rs. 2000/- on 14th August 1960 and Rs. 1800/- on 25th September 1960 in the account of one Harikishan Sitaram. The Income-tax Officer did not accept the statement of Harikishan Sitaram that these amounts were genuine advances to him by the assessee. He concluded that the deposits totalling Rs. 3,800/- were the assessee's own secreted profits. The assessee claimed that the amount of Rs. 15,000/- was received by him from his separated brother Murlidhar on 10th June 1960. It was stated that in 1958 the assessee and Murlidhar decided to start motor transport business jointly and for this purpose Rs. 15,000/- were credited to the joint account of the assessee's minor son and Murlidhar's minor son. Later on, the assessee decided not to take part in the business and, therefore, the joint account of the minor sons was closed by transferring the amount of Rs. 15000/- to the debit of the minor son of Murlidhar alone. The Income-tax Officer did not accept the statement of the assessee that the amount of Rs. 15000/- was owed by Murlidhar to the assessee. He treated the sum of Rs. 15000/- credited on 10th June 1960 as the assessee's own income for the material year from undisclosed sources. The assessment for the material year was completed under section 23 (3) of the Indian Income-tax Act, 1922, on 17th July 1963.

3. In the course of assessment proceedings, the Income-tax Officer issued a notice to the assessee to show cause why a penalty under section 271 (1) (c)

of the Income-tax Act, 1961, should not be imposed on him for concealing the particulars of his income represented by the amount of Rs. 18,800/- added as income from undisclosed sources. These proceedings were subsequently taken up by the Inspecting Assistant Commissioner as competent authority to levy penalty under the Income-tax Act, 1961, and ultimately a penalty of Rs. 7,500/- was levied.

4. The assessee then preferred an appeal before the Tribunal against the quantum of assessment as well as the penalty levied. The Tribunal upheld the addition of Rs. 3,800/- and Rs. 15,000/- as the assessee's income from undisclosed sources. It, however, set aside the order of the Inspecting Assistant Commissioner imposing the penalty taking the view that as the assessment for the year 1961-62 was completed under section 23 (3) of the Indian Income-tax Act, 1922, no penalty could be imposed under section 271 (1) of the Income-tax Act, 1961, and, further, that the addition of certain unexplained cash credits by itself did not justify the levy of penalty for concealment of income.

5. The answer to the first question is obvious from the provisions of S. 297 (2) (g) of the Income-tax Act, 1961. That provision says that notwithstanding the repeal of the Indian Income-tax Act, 1922, any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st March 1962, or any earlier year, which is completed on or after the 1st April 1962, may be initiated and such penalty may be imposed under this Act. Here, the assessment was for the year 1961-62. The assessment was completed on 17th July 1963, that is after 1st April 1962, when the 1961 Act came into force. Therefore, clause (g) of section 297 (2) was plainly attracted for the initiation of proceedings for the imposition and the levy of penalty under the Act of 1961. The reasoning given by the Tribunal that as section 271 (1) of the 1961 Act uses the expression "in the course of any proceedings under this Act" and as the assessment proceedings in this case were under the 1922 Act, therefore, S. 271 could not be invoked for levy of penalty is altogether fallacious. Under clause (g) of section 297 (2) the initiation of proceedings for imposition of penalty and the levy of penalty under the Act of 1961 is not with reference to the fact whether the assessment was made under the 1961 Act or the 1922 Act. That apart, in this case the return having been filed on 19th October 1961, that is, before the commencement of the 1961 Act, the assessment under the 1922 Act was by virtue of the provisions of section 297 (2) (a) of the Act of 1961. The proceed-

ings for assessment under the Act of 1922 were the proceedings under the 1961 Act itself.

6 The matter is really concluded by the decision of a Division Bench of this Court in *Kishanlal v. C. I. T.*, 1967-64 ITR 285 (MP). In that case, it has been held that an assessee is liable to penalty under section 271 (1) of the 1961 Act for defaults referred to in section 28 (1) of the 1922 Act in respect of any assessment for the year ending on 31st March 1962 or any earlier year which is completed on or after 1st April 1962. All that has been said in the case of *Kishanlal*, 1967-64 ITR 285 (MP) (supra) applies here with greater force, and it must be held that in the present case penalty proceedings could validly be initiated under section 271 of the 1961 Act.

7 The other question placed before us for decision is really a question of fact. In *C. I. T. v. Punjabhai Shah*, 1968-67 ITR 337 = 1967 MPLJ 827 (AIR 1968 Madh Pra 103) it has been held by a Division Bench of this Court that the question whether an assessee has concealed particulars of his income or whether he has committed an offence in this connection is a question of fact to be determined on the circumstances of the case. In that case, it has also been observed—

"Now, a penalty under section 28 (1) (c) of the 1922 Act or section 271 (1) (c) of the 1961 Act can be imposed on an assessee only if the authority mentioned in those provisions is satisfied that the assessee has concealed the particulars of his income. The penalty proceedings, being in their very nature penal proceedings, the degree or quantum of proof for finding an assessee guilty is that of a criminal prosecution. The assessment proceedings and penalty proceedings are different in their nature. The findings given in assessment proceedings are no doubt relevant and admissible in penalty proceedings. But they do not operate as *res judicata* so as to preclude the production of other evidence in penalty proceedings to show that the assessee concealed his income or to rebut this charge. Again, the bare fact that the explanation offered by the assessee in the assessment proceedings was rejected and it was held in those proceedings that he had concealed his income or that the explanation was unsatisfactory by itself cannot be made the basis of the conclusion that he has been guilty of deliberately concealing the particulars of his income. No doubt, if the assessee's explanation is found to be deliberately false, then it is possible to infer that he concealed his income. But the authority competent to impose a penalty must expressly find that the assessee's explanation is false."

The Income-tax Officer must himself expressly find in penalty proceedings that the explanation given by the assessee was false before imposing a penalty for concealment of income. In the present case, the Inspecting Assistant Commissioner no doubt held that the assessee had deliberately furnished inaccurate particulars of his income. But his approach to the matter of imposition of penalty was vitiated by the fact that he treated the penal proceedings as proceedings for imposition of additional tax and observed that the quantum of evidence required for levy of penalty would be the same as required for the purpose of inclusion of an additional amount in the total income of the assessee for the purpose of assessment. The Tribunal, however, rightly treated the penalty proceedings as penal proceedings. But it did not expressly find that the assessee had deliberately concealed particulars of his income. The Tribunal took the view that the bare fact that the assessee's explanation was not satisfactory or that it was false did not justify the imposition of penalty when there was no conclusive proof about the concealment of particulars of income. The finding reached by the Tribunal that the assessee did not conceal particulars of his income is a finding on a question of fact. As the second question is a question of fact, we refuse to answer it.

8. For these reasons, our answer to the first question is in the affirmative. We decline to answer the second question as it is a question of fact. The assessee shall have costs of this reference. Counsel's fee is fixed at Rs. 100/-.
DGB/D.V.C. Reference answered accordingly.

AIR 1969 MADHYA PRADESH 74
(V 56 C 25)

SHIV DAYAL

AND S P BHARGAVA, JJ

Gwalior Sugar Co. Ltd. Dabra, Appellant v. Shyam Saran Gupta and Co., Kanpur, Respondent.

Letter Patent Appeal No 12 of 1967, D/- 18-9-1968, from judgment of Pandey J in Company Petn. No 7 of 1955 D/- 28-7-1967

(A) Companies Act (1956), Ss. 439 and 243 — Companies (Court) Rules (1959), R. 99 and Form No 48 — Expression "Other persons" in Form 48 — Whether restricted to those enumerated in S. 439.

Section 439 of the Companies Act enacts that an application to the Court for winding up of a Company shall be by a petition. Those who can present such petition are enumerated. A cre-

KL/KL/572/68

ditor falls under clause (b) and a contributory under clause (c). If the intention of the words "other persons" in Form No. 48 was to limit it to the other persons specified in S. 439, then the words "Other persons" were bound to be qualified by the expression "specified in S. 439 (1)". In the absence of those words, the expression "Other persons" cannot be limited to Company, the Registrar and the person authorised by the Central Government in that behalf, in a case falling under S. 243. (Para 6)

(B) Companies Act (1956), S. 439 — Companies (Court) Rules (1959) R. 99, Form No. 48 — Words "Other persons" in Form 48 — Construction — Rule of ejusdem generis — When applies.

It is the first principle of construction of statutes that the words should be given their plain and natural meaning. Ejusdem generis rule is founded upon the idea, that if the legislature intended the general words to be used in the unrestricted sense, the particular classes would not have been mentioned. But when the language of the statute is plain and there is no uncertainty, the rule has no application. It is essential for its application that the specified words before the general words must constitute a category or genus. It is neither easy nor advisable to lay down any general rule for arriving at the intention of the legislature where a line of limitation must precisely be fixed. If on a wider examination of the scope of the enactment it can be seen that the general words, although they follow the particular words, should be construed generally, effect must be given to the intention of the framers as gathered from the larger survey. Thus it is quite clear that every person whose interests are likely to be affected adversely or favourably is entitled to oppose or support a petition for winding up of a Company under section 439 of the Companies Act. Such person is within the expression "any other person" in Form 48, read with R. 99 of the Companies (Court) Rules, when a creditor by petition prays for winding up of a company and that Company is the managing agent of another company and the former is surety of the latter for huge loans and advances made by Banks, that other Company has the right to intervene and oppose the winding up petition. Case law discussed. AIR 1922 PC 112 and AIR 1934 PC 213 Dist.

(Paras 7, 8, 9, 10 and 12)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 245 (V 53) =
1966-1 SCR 304, Bhanu Pratap
Singh v. Asstt. Custodian, EP
Bahraich

(1965) AIR 1965 SC 1167 (V 52) =
(1965) 2 SCR 192, Hamdard Dawa-
khana (Wakf) v. Union of India

(1964) AIR 1964 SC 1882 (V 51) =
1964-8 SCR 50, Jagdish Chandra
v. Kajaria Traders (Ind) Ltd. 8
(1960) AIR 1960 SC 1080 (V 47) =
1960-3 SCR 887, K. K. Kochuni
v. States of Madras and Kerala 8
(1959) 1959-1 QB 204 = 1958-3 All
ER 344, Rands v. Oldroyd 10
(1957) AIR 1957 SC 521 (V 44) =
1957 SCJ 557, Lilawati Bai v.
Bombay State 9
(1956) 1956-2 All ER 254 = 1956-3
WLR 21, Culley v. Harrison 9
(1955) AIR 1955 SC 810 (V 42) = 1955-2
SCR 367, State of Bombay v. Ali
Gulshan 8
(1934) AIR 1934 PC 213 (V 21) =
ILR 56 All 634, Bisheshwar v.
Parath Nath 13
(1922) AIR 1922 PC 112 (V 9) =
ILR 3 Lah 127, Chajju Ram v.
Neki 13
(1890) 1890-15 AC 506 = 60 LJ QB
89, Cox v. Hakes 10
(1889) 22 QBD 744 = 58 LJQB 443,
Nutton v. Wilson 10
(1859) 28 LJ MC 213 = 2 E & E 77,
R. v. Edmundson 10

K. K. Dubey Govt. Advocate, for Ap-
pellant; J. S. Verma, for Respondent.

SHIV DAYAL, J.: This appeal under Letters Patent of this Court, is from the order dated 28 July 1967 passed by Pandey, J., in Company Petition No. 7 of 1965, whereby the appellant's application for leave to intervene was rejected.

2. Shyamsaran Gupta (respondent) made an application for winding up of the company, named "Sir J. P. Shrivastava and Sons (M.B.) Private Ltd., Dabra", (hereinafter called the "Debtor-company"), on the ground that the company is unable to pay its debts within the meaning of section 433 (e) of the Companies Act, 1956. Under clause (f) of that section, a company may also be wound up, if the Court is of opinion that it is just and equitable that the company should be wound up. When the petition for winding up was advertised under Rule 99 of the Companies (Court) Rules, 1959, the Gwalior Sugar Co. Ltd., Dabra (hereinafter called the "intervener") applied for leave to intervene, as it desired to oppose the petition. Its application was rejected on the ground that the intervener is neither a creditor, nor a contributory, nor does it come within the expression "other person desirous of supporting or opposing the making of an order on the said petition", within Form No. 48 contained in the said Rules.

3. The appellant contended before us, as before the learned single Judge, that the debtor-company is the Managing Agent. It has a large number of fully paid up shares in the intervening company; that the debtor company has

guaranteed payment of loan which the intervening company borrows from time to time from certain banks, and that the winding up of the debtor-company would enormously affect the working of the intervening company. Thus the intervening company has substantial interest in opposing the petition for winding up.

4 There is no dispute that the only provision which enables the supporting or opposing a petition for winding up is contained in Rule 99 of the Companies (Court) Rules 1959, read with Form No 48.

That Rule reads thus:

Advertisement of petition. Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by Rule 24 of these Rules. The advertisement shall be in Form No 48."

Rule 24 is a general Rule for advertisement of petition.

5 The relevant portion of Form No 48 is in these words:

"Any creditor, contributory or other person desirous of supporting or opposing the making of an order on the said petition should send to the petitioner or his advocate notice of his intention." The appellant's contention is that the words "other person" in the above expression are omnibus. They are comprehensive enough to include any person whoever he may be.

6 Learned counsel for the respondent, on the other hand, urges that the words "other person" must be restricted to those enumerated in section 439 of the Companies Act. In our opinion, this contention is untenable. Section 439 provides for an application for winding up. It enacts that an application to the Court for winding up of a company shall be by a petition. Those who can present such petition are enumerated. A creditor falls under clause (b) and a contributory under clause (c). If the intention of the words "other person" in Form No 48 was to limit it to the other persons specified in section 439 then the words "other person" were bound to be qualified by the expression specified in section 439 (1). In the absence of those words, the expression "other person" cannot be limited to company, the Registrar and the person authorised by the Central Government in that behalf, in a case falling under section 243.

7 We shall now consider whether the words "other person" must be read *ejusdem generis*. The *ejusdem generis* rule or the rule *noscitur a sociis*, is really a question of the assumed intention of the statute. Where there are general words following particular and specific words, the general words must be confined to

things of the same kind as those specified (See *Craies on Statute Law*, 6th Edition page 179, and *Maxwell on Interpretation of Statutes* 11th Edition, page 326). It is stated in *Crawford on Statutory Construction* (Page 326)

"If several words are connected by a copulative conjunction, a presumption arises that they are of the same class, unless, of course, a contrary intention is indicated. On the other hand, the maxim '*noscitur a sociis*' is not to be applied where the meaning of the word or phrase is clear and unambiguous. Nor is it to be used so as to render general words useless. Like all other principles of construction, it is to be used only as an instrumentality for determining the intent of the legislature where it is in doubt."

Ejusdem generis rule is founded upon the idea that if the legislature intended the general words to be used in the unrestricted sense, the particular classes would not have been mentioned. But when the language of the statute is plain, there is no uncertainty, the rule has no application.

8 For the application of the *ejusdem generis* rule, it is essential that the specified words before the general words must constitute a category or genus. Mr Justice Hidayatullah (as his Lordship then was), speaking for the court in *Jaydush Chandra v. Kajaria Traders (Ind) Ltd.*, AIR 1964 SC 1882 laid down thus:

"It follows, therefore, that interpretation *ejusdem generis* or *noscitur a sociis* need not always be made when words showing particular classes are followed by general words. Before the general words can be so interpreted there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted." So also in *Bhanu Pratap Singh v. Asstt. Custodian E. P. Bahraich*, AIR 1966 SC 245 Mr Justice Shah, while interpreting the expression "any other person" in section 10 (2) (n) of the Administration of Evacuee Property Act, 1950, observed thus:

"The rule of interpretation *ejusdem generis* applies where a general word follows particular and specific words of the same nature as itself, it has no application where there is no genus or category indicated by the Legislature. The words used in Clause (n) empowering the Custodian to pay to 'any other person', any sums of money out of the funds in his possession are not restricted to persons who are members of the family of the evacuee; they include other persons as well who are entitled to receive money from the evacuee."

In *State of Bombay v. Ali Gulshan* AIR 1955 SC 810 their Lordships held that

the words "any other purpose" in section 6 (4) (a) of the Bombay Land Requisition Act (No. 23 of 1948) should not be read ejusdem generis with 'the purpose of the State'. In *K. K. Kochuni v. States of Madras and Kerala* AIR 1960 SC 1080 it was observed that it is not an inviolable rule of Law, but is only permissible inference in the absence of an indication to the contrary and their Lordships laid down as follows:

"It appears to us that the word 'otherwise' in the context only means 'whatsoever may be the origin of the receipt of maintenance'. . . It is most likely that a word of the widest amplitude was used to cover even acts of charity and bounty . . ." (Page 1103).

In *Hamdard Dawakhana (Wakf) v. Union of India*, AIR 1965 SC 1167, Gajendra-gadkar, C. J., said:

"The suggestion that this clause should be read ejusdem generis with the previous category of beverages cannot obviously be accepted, because an examination of the said beverages will disclose the fact that there is no genus by reference to which the rule of ejusdem generis can be properly invoked. Besides, the context of the clause clearly suggests that it is intended to take in all beverages other than those earlier specified, provided they contain fruit juices or fruit pulp."

In our opinion, in the present case also, there is no genus.

9. It is the first of the principles of construction of statutes that the words should be given their plain and natural meaning. It was observed in *Lilawati Bai v. Bombay State*, AIR 1957 SC 521 (529) that where the context and the object and mischief of the enactment do not require restricted meaning to be attached to words of general import, the Court must give those words their plain and ordinary meaning. In *Culley v. Harrison*, (1956) 2 All ER 254, the expression under consideration was "any house, room or other place which shall be opened or used for public entertainment. . . shall be deemed a disorderly house". The Queen's Bench Division did not accept the argument that 'place' should be construed ejusdem generis with the words preceding it. It was held that the intention of the Parliament, while employing the word 'place' was deliberate in order to give it a wider meaning than the words "house" or "room".

10. The restricted meaning is rejected when there are adequate grounds to show that it has not been employed in the limited order of ideas to which the preceding words belong. Sometimes it happens that the words used in a statute are so general that they must

receive some limitation. It is neither easy nor advisable to lay down any general rule for arriving at the intention of the legislature where a line of limitation must precisely be fixed. Sometimes Courts are influenced by the history, the mischief or the intention of the statute. In *Nutton v. Wilson*, (1889) 22 QBD 744 (748), Lindley, M. R., observed:

"We must look at the object to be attained" See also *Cox v. Hakes*, 1890-15 AC 506, per Lord Halsbury. It may be the requirement of the general object of the Act that the final generic word should not be restricted in meaning by the preceding words. In *R. v. Edmundson*, (1859) 28 LJ MC 213 in the expression "in any dwelling house, out-house, yard, garden, or other place", a warehouse which was a mile and a half from the dwelling house, was held to be included in the expression "other place", although apparently a warehouse would not be considered as ejusdem generis with a dwelling house, coupled with its enumerated dependencies. If on a wider examination of the scope of the enactment it can be seen that the general words, although they follow the particular words, should be construed generally, effect must be given to the intention of the framers as gathered from the larger survey. See *Rands v. Oldroyd* 1959-1 QB 204, where the words "any other matter" were construed.

11. Where a winding up petition is advertised, any person, whose interests are likely to be affected adversely by winding up order, would naturally desire to oppose the petition. And, likewise, any person whose interests are likely to be affected favourably would desire to support it. The framers of the Rule specified creditors and contributories as those who would usually be interested in supporting or opposing the petition, but there may be others whose interests are likely to be affected by a winding up order. Therefore, they employed the general words "other persons" to enable all those who can satisfy the Court that their interests are likely to be affected one way or the other by a winding up order, to support or oppose the petition.

12. It is elementary that a person, if he so chooses, has the right to enter appearance in and oppose a proceeding the result of which may be prejudicial to his interests. On a general survey of the Companies Act, 1956, and the Companies (Court) Rules, 1959, we do not find any intention to the contrary. We would, therefore, give effect to the elementary principle of justice in the construction of the general words. It is quite clear to us that every person whose interests are likely to be affected adversely or favourably is entitled to oppose or support a petition for winding up of a com-

pany under section 439 of the Companies Act, 1956. Such person is within the expression any other person in Form No 48 read with Rule 99 of the Companies (Court) Rules, 1959. When a creditor by petition prays for winding up of a company and that company is the Managing Agent of another company and the former is surety of the latter for huge loans and advances made by Banks, that other company has the right to intervene and oppose the winding up petition.

13. The Privy Council cases in Chajju Ram v. Neki, AIR 1922 PC 112 and Bisheshwar v. Parath Nath AIR 1934 PC 213, relied on by Shri Verma, are clearly distinguishable.

14. In the present case, the averments of the appellant-company are that the debtor-company is the Managing Agent of the appellant-company and on the guarantee furnished by it, loans of several lacs are advanced by the Banks to the appellant-company. If the debtor-company is ordered to be wound up it is patent enough that the interests of the appellant-company will be adversely affected. As to this, the learned Single Judge has merely observed that although the appellant-company may be required to find another guarantor that does not entitle it to intervene in these proceedings initiated by a creditor. The reason stated is that in such a proceeding the only question is whether a sum of money is due to that creditor and was not paid on demand as provided by section 434 of the Companies Act. In our opinion, the intervener cannot be shut out. It should be allowed to protect its interests. It can show that the debt claimed by the petitioning-creditor was not due or that a demand was not made or for any other reason, the winding up order should not be made.

15. The appeal is allowed. The order of the learned Single Judge dated 28 July 1967 is set aside. The appellant-company shall be allowed to intervene, as prayed by it. There shall be no order for costs.

DGB/DVC,

Appeal allowed.

AIR 1969 MADHYA PRADESH 78
(V 56 C 26)

T. C. SHRIVASTAVA
AND G. P. SINGH, JJ.

Smt. Sugandhi widow of Dammulal and others, Petitioners v. Collector Raipur and others, Respondents.

Misc. Petn. No. 539 of 1966 D/- 18-3-1968.

(A) Land Acquisition Act (1894) Sections 11, 12, 18 and 2 (d) — Land Acquisition

EL/AM/C166/68

sition Mannal Executive Instruction No. 80 — Declaration of award under S 12 by Additional Collector who was empowered to discharge functions of Collector — Approval by Collector in compliance with Instruction No. 80 does not amount to award being made by Collector — Additional Collector not incompetent to decide reference under S 18, M. P. Adaptation of Laws Order (1956) (Para 3)

(B) Land Acquisition Act (1894) S 18 — Section is mandatory — Application for reference by interested person — Refusal to make reference on ground that applicant should file suit is illegal. AIR 1966 SC 1538 at p 1541, Rel. on M P No 254 of 1963, D/- 22-12-1965 (M.P.), Disting (Para 4)

(C) Constitution of India, Art. 226 — Land Acquisition Act (1894), S 18 (3) (as inserted by S 3 of C. P. and Berar Act 7 of 1949) — Refusal by Collector to make reference — Applicant's failure to avail of remedy under S 18 (3) — Writ not barred.

The rule that an aggrieved person should exhaust all statutory remedies before he claims interference under Article 226 is not a rigid rule of law but merely a matter of discretion of High Court. (Para 5)

An order passed by the Collector under section 18 refusing to make reference is revisable by High Court under Section 18 (3). But this alternative remedy is not a remedy of right and does not ordinarily bar interference under Article 226. CA Nos. 1362 and 1363 of 1967 D/- 16-2-1968 (SC) and MP No 345 of 1964 dated 28-1-1965 (MP) and AIR 1963 SC 13 Rel. on.

(Para 5)

(D) Land Acquisition Act (1894) Sections 18 (3) (b) 9 and 12 — Application for seeking reference under section 18 by interested person — Absence of prior service of notices under Ss 9 and 12 to him — Eligibility for seeking reference not affected.

Section 18 does not provide that a reference can be claimed only by a person who has been served with notices under Sections 9 and 12. Any person interested who has not accepted the award has a statutory right, if he applies within limitation to require the Collector to refer his objections to the Court. The definition under Section 3 (b) of the expression "person interested" also does not require that a person to come within the definition must be one who is noticed under Sections 9 and 12. The fact of notice may affect the question of limitation within which an application for reference should be made under Section 18, but it has nothing to do with the eligibility of a person for making the application. AIR 1963 Pat 201 and AIR 1963 SC 1604 Rel. on. (Para 6)

(E) Land Acquisition Act (1894), Sections 18, 31 and 13 — Application under S. 18 by interested person — Not barred only because compensation is already paid to rival claimant.

The disability arising under S. 31, from acceptance of the compensation is limited to the person who receives compensation without protests. Other persons interested, who dispute the award and who apply within limitation under section 13 cannot be shut out in having their objection investigated by a Civil Court on the ground that the compensation amount was paid to a rival claimant before the application under Section 18 is made. (Para 7)

(F) Land Acquisition Act (1894), Section 18—Application under, by interested person — Not barred by his filing civil suit questioning entire acquisition proceedings.

The question whether the entire acquisition is invalid is wholly outside the scope of section 18 and a reference under that section is limited to quantum and apportionment of compensation. The question raised in the civil suit about validity of acquisition proceedings is not triable in the reference and conversely questions raised in reference under section 18 are not triable in the civil suit. Person, who challenges the entire acquisition proceedings in the civil suit has also a statutory right to claim the determination of his objection as to the quantum of compensation and apportionment, by a reference under section 18 on the footing that acquisition proceedings are valid. Right conferred under section 18 is not lost, simply because the person is also seeking by a suit, nullification of the entire acquisition proceedings.

(Para 8)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 13 (V 55) =
1968-1 SCR 82, Collector of Customs, Cochin v. A. S. Bava 5
(1968) CA Nos. 1362 and 1363 of 1967 D/- 16-2-1968 = 1968 SC (Notes) 104, Collector of Central Excise and Land Customs Shillong v. Sanawarmal Purohit 5
(1966) AIR 1966 SC 1538 (V 53) = (1966) 3 SCR 141; Kajari Lal v. Union of India 4
(1965) MP No. 345 of 1964 D/- 28-1-1965 = 1965 MPLJ (Notes) 131, Bharat Lal v. Land Acquisition Officer Mahasamund 5
(1965) MP No. 254 of 1963 D/- 22-12-1965 = 1966 MPLJ 417, Smt. Sugandhi v. Collector, Raipur 4
(1963) AIR 1963 SC 1604 (V 50) = 1964-1 SCR 971, State of Punjab v. Mt. Qaisar Jehan Begum 6
(1963) AIR 1963 Pat 201 (V 50) = 1963 BLJR 254, Shivdev Singh v. State of Bihar 5

J. V. Jakatdar, for Petitioners; K. K. Dube, (for No. 1) and G. C. Koshal, (for Nos. 4 and 5), for Respondents.

SINGH, J.: This petition under Articles 226 and 227 of the Constitution arises on the following facts. In Revenue Case No. 13-A/82 of 1961-62 certain area out of plot No. 2/11 of Madhopara, Raipur was acquired for the purposes of the Telegraph Department under the Land Acquisition Act, 1894. On 13th May, 1963 an award of Rs. 55,135.60 P. as compensation was published by the Additional Collector, Raipur and on 12th June, 1963, the entire amount was paid to one Birdhichand Jain who received the same on behalf of his wife Smt. Radhabai who claimed to be the sole owner of the land. One Dammulal, who also claimed exclusive ownership of the acquired area, applied to the Collector on 26th July, 1963 that although he alone was entitled to the land, there was wilful and mala fide omission on the part of the authorities to give him notices of the acquisition proceedings under Sections 9 (3) and 12 (2) of the Act and, therefore, the entire proceedings were null and void. Dammulal also filed a petition under Article 226 of the Constitution in the High Court, being M. P. No. 254 of 1963, praying that the entire acquisition proceedings be quashed.

This petition was dismissed on 22nd December, 1965 mainly on the ground that the allegation of wilful omission to issue notices could more properly be investigated in a civil suit. Without prejudice to his right to challenge the validity of the entire acquisition proceedings, Dammulal had also applied on 7th November, 1963 to the Collector, Raipur for a reference under section 18 of the Act. In this application he claimed to be the sole owner of the acquired land and, therefore, alone entitled to the whole of the compensation; further, he disputed the quantum of compensation and claimed that instead of Rs. 55,135-60 P., the proper compensation of the land should be fixed at Rs. 1,65,406-80 P. This application under Section 18 of the Act was dismissed by the Additional Collector (also called Land Acquisition Officer) on 30th March 1966 on the sole ground that the appropriate remedy for the applicant was to file a suit as pointed out by the High Court in M. P. No. 254 of 1963. Dammulal died in the meantime and the petitioners, who are his heirs and legal representatives, have filed this petition under Articles 226 and 227 of the Constitution for having the order rejecting the application under Section 18 quashed by this Court.

2. The first contention raised on behalf of the petitioners is that the Addi-

tional Collector, who dismissed the application under Section 18 was not appointed by the State Government to perform the functions of a Collector under the Land Acquisition Act and, therefore, he could not act as a Collector and dismiss the application. The jurisdiction to act under Section 18 is conferred on the Collector which expression is defined by Section 2 (d) to mean the Collector of a district and to include "a Deputy Commissioner and any officer specially appointed by the appropriate Government to perform the functions of a Collector" The question for consideration is whether the Additional Collector is an officer specially appointed under Section 2 (d) to perform the functions of a Collector. In the Mahakoshal region of the State, under the revenue laws previously in force the Revenue Officers now styled as Collectors and Additional Collectors were known as Deputy Commissioners and Additional Deputy Commissioners. By Revenue Department Notification No 5103-4622-XII of 22nd September, 1950 the Government of the then State of Madhya Pradesh appointed all the Additional Deputy Commissioners to perform the functions of a Collector under the Land Acquisition Act.

After the re-organisation and formation of the new State in 1956 uniformity in nomenclature of revenue officers was achieved by Para 4 A of the Madhya Pradesh Adaptation of Laws Order, 1956, (as amended in 1957) made under section 120 of the States Reorganisation Act, 1956 which reads as under

"Whenever an expression mentioned in column (1) of the table hereunder printed occurs in any law in force in the Mahakoshal region immediately before the appointed day, then there shall be substituted therefor the expression set opposite to it in column (2) of the said table, and there shall also be made in any sentence in which the expression occurs such consequential amendments as the rules of grammar may require."

TABLE

(1)	(2)
"Deputy Commissioner ..	Collector.
Additional Deputy Commissioner ...	Additional Collector.
Assistant Commissioner ...	Assistant Collector
Extra-Assistant Commissioner	. Deputy Collector "

By virtue of the aforesaid provision the expressions Deputy Commissioner and Additional Deputy Commissioner in "any law in force" in Mahakoshal region were replaced by the expressions Collector and

Additional Collector. In the adaptation order, as provided in Para 2 (d), the word law has the same meaning as in Section 2 (b) of the States Reorganisation Act, 1956 which defines "Law" as follows.

"Law" includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having the force of law in whole or any part of the territory of India".

By reading this definition in Para 4-A of the Adaptation Order, the alteration of the designation of the revenue officers directed by that Para is to be made not only in enactments but also in orders and notifications having the force of law. It has already been noticed that by notification No 5103-4622-XII of 22nd September, 1950 all Additional Deputy Commissioners in the Mahakoshal region were appointed to discharge the functions of a Collector under the Land Acquisition Act. This notification was issued under Section 2 (d) of that Act and has the force of law and is a 'law in force' within the meaning of that expression as it occurs in Para 4-A of the Adaptation Order. After the Adaptation Order, the notification will therefore be read to mean that all Additional Collectors in the Mahakoshal region were authorised to discharge the functions of a Collector under the Land Acquisition Act. By Section 3 of the Madhya Pradesh Extension of Laws Act, 1958 the Land Acquisition Act, 1894, as in force in the Mahakoshal region, was extended to all the other regions of the State. It is possible to hold that the notification empowering the Additional Collectors to perform the functions of a Collector as in force in the Mahakoshal region was a part and parcel of Section 2 (d) of the Land Acquisition Act and was extended to the whole of the State. Be that as it may, so far as the instant case, which arises from the Mahakoshal region, is concerned, there is no difficulty. Having regard to the notification of 1950 and Para 4-A of the Adaptation Order it must be held that the Additional Collector Raipur was empowered to discharge the functions of a Collector under the Land Acquisition Act and had jurisdiction to decide the application under section 18 of the Act.

3 Then it is contended that the award in the instant case was made by the Collector and, therefore the application for reference under Section 18 should have also been decided by him and not by the Additional Collector. This contention is factually wrong. On 22nd April, 1963 the Additional Collector made the award and as the compensation fixed exceeded Rs. 10,000/-, he submitted it to the Collector for approval. This procedure was required by the Executive Instruction

No. 80, which occurs at page 60 of the Land Acquisition Manual. The award was approved by the Collector on 11th May 1963. After the file was received back by the Additional Collector, he declared the award on 13th May, 1963 and directed issue of notices. Simply because the award after it was made by the Additional Collector, was sent to the Collector for obtaining his approval in pursuance of the Government instructions, it cannot be said that the award was made by the Collector. Having regard to Sections 11 and 12 of the Land Acquisition Act it must be held on the facts of this case that the award though approved by Collector was made by the Additional Collector who decided the application under Section 18 of the Act.

4. Next it is urged that the ground on which the application under Section 18 was dismissed was wholly extraneous to that provision. It has already been mentioned that the Additional Collector dismissed the application for reference on the sole ground that the proper remedy for the petitioners was to file a suit as held by the High Court in *Smt. Sugandhi v. Collector, Raipur*, MP No. 254 of 1963 D/- 22-12-1965 (MP). Reference by the Additional Collector to the order of the High Court in the earlier writ petition was really unfortunate. That petition had nothing to do with the right of the petitioners to claim a reference under Section 18 of the Act. In that petition the entire acquisition proceedings were challenged as invalid and void on the ground that notices of the proceedings were wilfully suppressed and in that connection it was said by this Court that as the petition raised questions of fact the proper remedy was to file a civil suit. Section 18 provides a statutory remedy to a person interested who has not accepted the award and if an application be made within limitation requiring a reference, the Collector has no choice and is bound to make the reference. The Section is mandatory; *Kajari Lal v. Union of India*, AIR 1966 SC 1538 at p. 1541 Para 12. The Section gives no option to the Collector to refuse to make the reference on the ground that the person applying for reference should file a suit. It must, therefore, be held that the Additional Collector acted in excess of jurisdiction in refusing to make the reference on a wholly extraneous consideration not germane to Section 18.

5. But it is argued on behalf of the respondents that the Writ Petition should fail as the petitioners had an alternative remedy of revision which they failed to exercise. It is true that under the Madhya Pradesh Amendment of S. 18, any order passed by a Collector under that Section is revisable by the High

Court. But the provision of an alternative remedy does not take away the jurisdiction of the Court under Article 226 of the Constitution. As has so often been said and has quite recently been reaffirmed, the rule that an aggrieved person should exhaust all statutory remedies before he claims interference under Article 226 is not a rigid rule of law but merely a matter of discretion of the High Court; *Collector of Central Excise and Land Customs Shillong v. Sanawarmal Purohit* CA Nos. 1362 and 1363 of 1967 D/- 16-2-1968 = 1968 SC (Notes) 104.

In the instant case, the question whether the Additional Collector who passed the impugned order had the authority to function as Collector was itself doubtful and therefore the petitioners could not have been sure of the remedy of revision which is available against an order of Collector. The writ petition was filed within the period of limitation allowed for a revision application. The impugned order of the Additional Collector is patently in excess of jurisdiction. The remedy of revision, which the petitioners did not avail of, is not a remedy of right and does not ordinarily bar interference under Article 226; *Bharatlal v. Land Acquisition Officer, Mahasamund*, MP No 345 of 1964 D/- 28-1-1965 = 1965 MP LJ (Notes) 131; *Collector of Customs, Cochin v. A. S. Bava*, AIR 1968 SC 13 pp. 14, 15 Para 4. In the circumstances of this case, we are satisfied that it would not be a sound exercise of discretion to refuse interference simply because the petitioners did not adopt the alternative remedy of revision.

6. It is then argued that the petitioners were not noticed under Ss. 9 and 12 of the Land Acquisition Act and therefore they are not entitled to claim a reference under Section 18. There is no substance in this contention. Section 18 does not provide that a reference can be claimed only by a person who has been served with notices under Sections 9 and 12. Any person interested who has not accepted the award has a statutory right if he applies within limitation to require the Collector to refer his objections to the Court. The expression "person interested" is defined in Section 3 (b) of the Act to include all persons claiming an interest in compensation to be made on account of the acquisition of land under the Act. This definition also does not require that a person to come within the definition of "person interested" must be one who is noticed under Section 9 or Section 12. The fact of notice may affect the question of limitation within which an application for reference should be made under Section 18, but in our view it has nothing to do

with the eligibility of a person for making the application. In *Shivdev Singh v State of Bihar* AIR 1963 Pat 201 at p 206 it was held by a Bench of the Patna High Court that a person even if not served with a notice under Section 9 can apply for a reference under Section 18. Indeed, in *State of Punjab v Mt. Qasir Jehan Begum*, AIR 1963 SC 1604 where the question dealt with was one of limitation under Section 18 (2) reference was claimed and was allowed at the instance of a person who had not at all been given any notice of the acquisition proceedings. We, therefore, reject the argument that the petitioners were not entitled to apply for a reference as they were not noticed under Section 9 or Section 12 of the Act.

7 It is further argued for the respondents that as the petitioners made the application under Section 18 after the entire compensation amount determined by the award had been paid to Smt. Radhabai who was a rival claimant, they were not entitled to claim a reference to the Court. There is no merit in this argument. As enacted in Section 31, a person who receives the amount of compensation without protest disentitles himself for applying for a reference under Section 18. The reason is plain, for in such a case it would be said that the person taking payment without protest has accepted the award. But, the disability arising from acceptance of the compensation is limited to the person who receives the compensation. Other persons interested who dispute the award and who apply within limitation under Section 13 cannot be shut out in having their objection investigated by a Civil Court on the ground that the compensation amount was paid to a rival claimant before the application under S 18 was made. The petitioners were thus not debarred in claiming the reference simply because the compensation amount had been paid to Radhabai.

8. Lastly it is urged that the petitioners have already filed a civil suit for challenging the entire acquisition proceedings on the ground of wilful suppression of notices and this fact also disentitles them to claim a reference under Section 18. The question whether the entire acquisition is invalid is wholly outside the scope of Section 18 and a reference under that Section is limited to quantum and apportionment of compensation. The question raised in the civil suit will not be triable in the reference and conversely questions raised in the reference will not be triable in the Civil Suit. The petitioners who challenge the entire acquisition proceedings in the civil suit have also a statutory right to claim the determination of their objections as to the quantum of compensation and ap-

portionment by a reference under S 18 of the Act on the footing that acquisition proceedings are valid. In our view that right conferred by statute is not lost simply because the petitioners are seeking by a suit nullification of the entire acquisition proceedings.

9 In the result, this petition succeeds and is allowed. The order of the Additional Collector dated 30th March 1965, dismissing the application under S 18 is quashed and he is directed to determine that application according to law. The petitioners will have their costs of this petition from the respondents Nos 3 to 6 Counsel's fee Rs. 100/- if certified. CWM/D V C. Petition allowed.

AIR 1969 MADHYA PRADESH 12
(V 56 C 27)

P V DIXIT C J
AND R J BHAVE, J

Miss Mamie Bhagwandas Ahuja, Applicant v Controller of Estate Duty M. P. and Nagpur Opposite Party

Misc. Civil Case No. 20 of 1966 D/-
16-4 1968

(A) Estate Duty Act (1953) Ss. 17 (1) (2), 20 (1) — Estate Duty (Controlled Companies) Rules (1953) R. 11 (3) (b) and (9) (b) — Deceased managing Director getting remuneration but no dividend — Remuneration received by him in excess has to be treated as share benefit under R. 11 (9) (b) for purposes of R. 11 (3) — Value of shares has to be deducted in determining slice under S 17 (2)

The deceased was the managing director of a controlled company. For the shares in the company he did not get any share benefit in the form of dividend but received only non share benefit in the form of remuneration and other allowances. Treating certain portion of the remuneration as excessive the taxing authority determined the slice of the Company's assets passing on the death of the deceased under Section 17 of the Act corresponding to the excessive remuneration received by him. The taxing authority however did not deduct the value of the shares from the slice determined under Section 17 on the ground that R. 11 (3) of the rules had no application.

Held, that under Clause (b) of Rule 11 (3) read with Rule 11 (9) (b) the amount of the value of the shares had to be deducted from the amount of the slice determined under Section 17 of the Act. The excessive remuneration determined by the taxing authority though a non-share benefit, had to be treated for the purpose of sub-rule (3) of Rule 11 as a share benefit under Rule 11 (9) (b) as the deceased did not receive any share benefit in the form of dividend.

GL/L/L/C964/68

The excessive remuneration was by virtue of Rule 11 (9) (b), a share benefit and therefore sub-rule (3) of Rule 11 came into operation and for the purpose of sub-rule (3) the 'slice' corresponding to the excessive remuneration determined under section 17 had to be regarded as a "share benefits slice".

(Paras 13, 17)

(B) Estate Duty Act (1953), S. 17—Applicability of.

It will be seen from section 17 (1) of the Act that only three conditions are necessary to establish a prima facie claim for estate duty thereunder. The three conditions are: (i) the company must be one to which the section applies, that is, it must be a controlled company as explained in section 17 (4); (ii) the deceased must have made a transfer of property to the company; and (iii) benefits must have accrued to the deceased in the three years ending with his death. If these three conditions are fulfilled, the presumptive claim for estate duty extends to a fraction of the company's net assets at the death determined in accordance with sub-section (2) of section 17.

(Para 7)

(C) Estate Duty Act (1953), S. 17 — Estate Duty (Controlled Companies) Rules (1953). R. 11 — Purpose of the rule is to give relief from double charge of estate duty.

As is evident from the provisions contained in rule 11, that rule is designed to give relief from a double charge of estate duty. Rule 11 (3) permits reduction of the slice under section 17 in the manner stated in clauses (a) and (b) of that rule. If the "share benefits" accrued to the deceased, then, where the value of the shares equals or exceeds the "slice" of the company's assets corresponding to the "share benefits", there is no claim under section 17 on such "slice", though the "non-share benefits" accruing to him give rise to a claim on the "slice" corresponding to the "non-share benefits". This is what is provided by clause (a) of rule 11 (3) of the Rules. The other clause applies where the value of the shares is less than the slice of the Company's assets determined under S. 17; in such a case, the amount of the "slice" corresponding to the "share benefits" which is chargeable to estate duty under section 17, is reduced by the amount of the value of the shares or debentures.

(Para 11)

A. P. Sen, for Applicant; M. Adhikari and P. S. Khirwadker, for Opposite Party.

DIXIT, C. J.: This is a reference under section 64 (1) of the Estate Duty Act, 1953, (hereinafter called the Act), at the instance of the accountable person, Miss Mamie Ahuja. The question, which the Appellate Tribunal (Central Board of

Direct Taxes, New Delhi) has referred to this Court for decision, is—

"Whether on the facts and in the circumstances of the case, the value of the shares amounting to Rs. 1,00,000/- should have been deducted from the sum of Rs. 1,14,256/- in computing the value of the estate under rule 11 (3) of the Estate Duty (Controlled Companies) Rules, 1953?"

2. The material facts are that Shri Bhagwandas Ahuja, father of the accountable person Miss Mamie Ahuja, died on 6th January 1954. The assets of the deceased consisted, amongst others, of ten shares in Motors (India) Ltd. (hereinafter referred to as the Company) of the face value of Rs. 10,000/- each. The subscribed and paid up capital of the company, which was originally Rupees 1,50,000/- divided into fifteen shares of Rs. 10,000/- each, was subsequently increased to Rs. 3,00,000/-, by a further issue of fifteen shares of Rs. 10,000/- each. Bhagwandas used to get Rupees 12,000/- per annum as salary from the company. He did not receive any dividend in respect of the shares held by him; but as Managing Director of the company drew substantial sums by way of salary, entertainment and conveyance allowances, which in the last three accounting years before his death, aggregated to Rupees 60,000/-. The shares of the company were not quoted on the Stock Exchange.

3. The Assistant Controller of Estate Duty, Indore, valued the shares for Estate Duty purposes at Rs. 10,000/- each and included the value of the shares in the principal value of the estate left by the deceased. He further held that a slice of the company's assets should be deemed to pass on the death of the deceased as the company was admittedly a controlled company within the meaning of section 17 (4) of the Act and the necessary conditions for the application of section 17 (2) had been satisfied. The Assistant Controller held that, having regard to the nature of duties discharged by the deceased and the business of the company, the remuneration of Rupees 60,000/- drawn by him was excessive; of this remuneration he regarded Rupees 30,000/- as reasonable remuneration and the remaining Rs. 30,000/- as excessive remuneration. He, therefore, did not treat the reasonable remuneration of Rupees 30,000/- as a benefit accruing to the deceased from the company for the purposes of section 17 of the Act. He, therefore, determined the slice of the company's assets passing on the death of the deceased under section 17 of the Act corresponding to the excessive remuneration of Rs. 30,000/- received by the deceased. On this basis, he computed the value of the slice of the company's assets deemed to pass on the death of the

deceased under section 17 at Rupees 114,256/

4 In the assessment proceedings of estate duty the accountable person contended that, having regard to the provisions of rule 11 (3) (b) of the Estate Duty (Controlled Companies) Rules, 1953 (hereinafter called the Rules) as the total value of Rs. 100,000/- of the ten shares held by the deceased was less than the slice of the company's assets determined under section 17 the proportion of the company's assets chargeable under section 17 was Rs. 14,256/ (the proportion determined under section 17 less the value of the shares) and thus only an amount of Rs. 14,256/- could be further added for charging the duty. This contention was rejected by the Assistant Controller taking the view that the relief under rule 11 (3) (b) would be available only where a benefit accrued to the deceased by virtue of his share-holding and that the excessive remuneration of Rs. 30,000/- taken by the deceased could not be attributed to the shares held by him. The Assistant Controller therefore included the value of the slice at Rs. 114,256/- and the value of the shares, namely Rs. 100,000/- in the principal value of the assets, which he computed at Rs. 2,61,205/-

5 The accountable person then preferred an appeal before the Appellate Tribunal reiterating her contention in regard to the exclusion of the value of the shares from Rs. 114,256/- the proportion of the company's assets chargeable under Section 17 of the Act. The appellate Tribunal also negated the contention observing—

"In this Company's case the Assistant Controller has valued the shares of the Company on the basis of the assets, but the slice under Section 17 has been determined by treating one-half of the salary, entertainment allowance and conveyance allowance as a benefit and not for services. The benefit that accrued to him in the shape of excessive salary is not referable, in any way to the shares held by the deceased. The benefit allowed by sub-rule (3) of Rule 11 of Estate Duty (Controlled Companies) Rules cannot, therefore be allowed so far as the slice of the assets of this Company is concerned.

6 The material provision of the Act and the Rules which require consideration are Section 17 (1) (2) and (4) (1) of the Act, and Rules 5 (1) (a) and 11 (3) (8) and (9) of the Rules. Section 17 (1) (2) and (4) (1) of the Act are in the following terms:—

"17 (1) Where the deceased has made to a controlled company a transfer of any property (other than an interest to cease on his death or property which he transferred in a fiduciary capacity) and

any benefits accruing to the deceased from the company accrued to him in the three years ending with his death, the assets of the company shall be deemed for the purposes of estate duty to be included in the property passing on his death to an extent determined in accordance with sub-section (2)

(2) The extent to which the assets of the company are to be deemed to be included as aforesaid shall be the proportion ascertained by comparing the aggregate amount of the benefits accruing to the deceased from the company in the last three accounting years with the aggregate amount of the net income of the company for the said years

Provided that —

(a) where, in any of the said accounting years, the company sustained a loss, the amount of that loss shall be deducted in ascertaining the said aggregate net income of the company;

(4) (1) A controlled company is any company which at any relevant time, was or would, if these provisions had always been in force have been deemed to be under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested.

Rules 5 (1) (a) and 11 (3) (8) and (9) of the Rules are as under—

'5 (1) The following shall be treated as benefits accruing to the deceased from the company, that is to say—

(a) any income of the company and any periodical payment out of the resources or at the expense of the company which the deceased received for his own benefit whether directly or indirectly and any enjoyment in specie of land or other property of the company or of a right thereover which the deceased had for his own benefit whether directly or indirectly"

'11 Limitation on and prevention of duplication of, charge—

(3) where the following conditions are satisfied that is to say that any benefit accrued to the deceased from the company by virtue of any interest that he at any time had in shares in or debentures of the company or by virtue of a power having at any time been exercisable by him or with his consent in relation to shares in or debentures of the company, and apart from this sub-rule estate duty would be payable on the death both on the value of those shares or debentures by virtue of any provisions other than Section 17 of the Act, and on the proportion of the value of the company's assets that corresponds to the benefits that so

accrued to him by virtue of that Section then —

(a) if the value of the shares or debentures is equal to or greater than, the said proportion, or if the Controller is satisfied that the said proportion would not, if fully ascertained, be found to be substantially in excess of the value of the shares or debentures duty on the said proportion shall not be payable,

(b) in any other case, the amount on which duty is to be charged in respect of the said proportion shall be reduced by the amount of the value of the shares or debentures.

* * * * *

(8) So much of any income or periodical payment or enjoyment of a kind mentioned in Rule 5 as is shown to the satisfaction of the Controller to have represented or to have been such that it would if received have represented, reasonable remuneration to the deceased for any services rendered by him as the holder of an office under the company shall, notwithstanding anything in that rule, not be treated for the purposes of these rules as a benefit accruing to the deceased from the company; and any liability of the company in respect of the remuneration of any person as the holder of an office under the company shall be treated for the purposes of these rules as incurred for the purposes of the business of the company wholly and exclusively to the extent to which it is shown to the satisfaction of the Controller that the amount thereof was reasonable and to that extent only.

(9) For the purposes of sub-rule (3) where the benefits that accrued to the deceased from the company in the relevant accounting years included benefit that accrued to him otherwise than as mentioned in that sub-rule but the deceased had at any time an interest in, or a power was at any time exercisable in relation to, shares in or debentures of the company in respect of which estate duty would be payable on his death apart from anything in that sub-rule and by virtue of that interest or power benefits accrued to the deceased from the company in those years, or would so have accrued to him if any payments had been made by virtue of rights attached to those shares or debentures, then —

(a) if the first mentioned benefits consisted to any extent of payments made out of moneys which, if not so applied, could have been applied in increasing the last mentioned benefits, or as payments which would have constituted such benefits; or

(b) if the first mentioned benefits are brought into the computation made under sub-section (2) of Section 17 of the Act to the exclusion to any extent of the last mentioned benefits; the first mentioned

benefit shall to that extent be treated as if they had accrued to the deceased by virtue of his interest in or of the power exercisable in relation to the said shares or debentures."

7. It will be seen from Section 17 (1) of the Act that only three conditions are necessary to establish a prima facie claim for estate duty thereunder. The three conditions are: (i) the company must be one to which the section applies, that is, it must be a controlled company as explained in Section 17 (4); (ii) the deceased must have made a transfer of property to the company; and (iii) benefits must have accrued to the deceased in the three years ending with his death. If these three conditions are fulfilled, the presumptive claim for estate duty extends to a fraction of the company's net assets at the death determined in accordance with sub-section (2) of Section 17. In this case, *there is no dispute that the Motors (India) Ltd. in which the deceased held ten shares, was as controlled company and for acquiring those shares the deceased had made transfer of property to the company.*

8. In regard to the benefits accruing to the deceased from the controlled company, the material provisions are those contained in Rule 5 (1) (a) and rule 11 (8) of the Rules. Under Rule 5 (1) (a), any income of the company and any periodical payment out of the resources or at the expense of the company, which the deceased received for his own benefit whether directly or indirectly is treated as "benefits accruing to the deceased from the controlled company". But under Rule 11 (8) the Controller has been given the power to exclude as a benefit the receipt by the deceased of reasonable remuneration for services which he rendered as holder of an office under the company. That sub-rule provides that if it is shown to the satisfaction of the Controller that any income or periodical payment or enjoyment of the kind mentioned in Rule 5 received by the deceased represented reasonable remuneration to him for any services rendered by him as the holder of an office under the company, then that income shall, notwithstanding anything in rule 5, not be treated for the purposes of the Rules as a benefit accruing to the deceased from the company. The purpose of rule 11 (8) is obvious. It is plainly to prevent injustice and unfairness that would occur if the amount of reasonable remuneration received by the deceased is regarded as a benefit for determining the slice of the company's assets under Section 17 chargeable to estate duty. Such a reasonable remuneration is, therefore, excluded as a benefit under rule 11(8) of the Rules.

9. In the present case, the deceased

Bhagwandas received in the three years ending with his death an aggregate amount of Rs. 60 000/- as remuneration consisting of salary, and entertainment and conveyance allowances. Of this amount the Assistant Controller treated Rs. 30 000/- as reasonable remuneration and Rs. 30 000/- as excessive remuneration. This excessive remuneration was clearly a benefit accruing to the deceased from the company as is plain from the

Aggregate benefit to the deceased
for 3 accounting years: Rs. 30 000

Aggregate net income of the company
for 3 accounting years: Rs. 76 670

provisions of rule 5 and rule 11(8) With this aggregate amount of benefit to the deceased in the last three accounting years, and taking the aggregate amount of the net income of the company in the last three accounting years at Rupees 76,670/- the proportion of the company's assets chargeable to estate duty under Section 17 was determined by the Assistant Controller under sub-section (2) of Section 17 thus—

Net assets of company	=	Rs. 1,14,256
Rs. 2,92,000		

10. In this reference, the accountable person is not disputing the correctness of the slice of the company's assets corresponding to the excessive remuneration of Rs. 30 000/- determined under Section 17 (2) of the Act. What she contends is that the amount of the slice determined under Section 17 should have been reduced by the amount of the value of the share of the deceased, namely Rs. 1,00 000/- treating the excessive remuneration of Rupees 30,000/- as a benefit which accrued to the deceased by virtue of his interest in the shares of the company, and giving to her the relief of deduction of the value of shares from the value of the slice as provided by Rule 11 (3) (b) of the Rules.

11. In our judgment, this contention must be accepted. In coming to the conclusion that they did, both the Assistant Controller and the Appellate Tribunal overlooked the fact that Section 17 and Rule 11 have to be read together, and totally omitted to consider the effect of Rule 11 (9) of the Rules. The "slice" under Section 17 is computed on the basis of all benefits, that is to say, (a) benefits which accrued to the deceased by virtue of his interest in shares or debentures or by virtue of any power in relation to them exercisable by him, which may conveniently be described as "share benefits", and (b) other benefits, which may conveniently be described as "non-share benefits". As is evident from the provisions contained in Rule 11, that rule is designed to give relief from a double charge of estate duty. In fact, that rule has the heading "Limitation on, and prevention of duplication of, charge". Sub-rule (3) of Rule 11 proceeds on the basis that if "share benefits" accrued to the deceased and the shares are also liable to estate duty on his death, then it would be inequitable to levy estate duty both on the value of such shares and on the proportion of the company's assets corresponding to the "share benefits" determined under Section 17 (2). Therefore, Rule 11(3) permits reduction of the slice under Section 17 in the manner stated in clauses (a) and (b) of that rule.

If the "share benefits" accrued to the deceased, then, where the value of the shares equals or exceeds the "slice" of the company's assets corresponding to the "share benefits", there is no claim under Section 17 on such "slice", though the "non-share benefits" accruing to him give rise to a claim on the "slice" corresponding to the "non-share benefits". This is what is provided by Clause (a) of R. 11 (3) of the Rules. The other clause applies where the value of the shares is less than the slice of the company's assets determined under Section 17, in such a case the amount of the "slice" corresponding to the share benefits, which is chargeable to estate duty under Section 17, is reduced by the amount of the value of the shares or debentures.

12. Rule 11 (9) gives further relief in the matter of liability under Section 17. For the purpose of applying sub-rules (3) and (9) of Rule 11, the slice of the assets of the company under Section 17 corresponding to the "share benefits" and the slice corresponding to "non-share benefits" have to be calculated separately. Sub-rule (9) of Rule 11 envisages the situation that the two kinds of benefits may be so inter se related that any increase in one kind of benefit might result in a reduction of another kind of benefit. To illustrate, if the deceased received excessive remuneration, then that "non-share benefit" would result in a corresponding reduction of "share benefits", that is, dividends on the shares. It is, therefore, provided by Rule 11 (9) that where the deceased's share benefits could have been increased if he had not taken "non-share benefits", the "non-share benefits" shall be treated as "share benefits", for the purposes of sub-rule (3), to the extent that they could have been applied in increasing the "share benefits". This is provided by Clause (a) of Rule 11 (9). If, therefore, actual dividends, that is, "share benefits", accrued to the deceased, then those "share benefits" would be increased by the operation of Rule 11 (9) (a), and the slice of assets based on the "share benefits" would be calculated after

taking into account such increase. It is on this basis that Rule 11 (3) has to be applied. Clause (b) of Rule 11 (9) deals with the position when in the computation of the "slice" under Section 17 only "non-share benefits" are brought in to the exclusion to any extent of "share benefits". In such a case, the entire "non-share benefit", which alone comes into computation under Section 17, is treated as "share benefit" for the purposes of sub-rule (3). The principle on which Clause (b) of Rule 11 (9) has been framed seems to be that if the deceased had at any time an interest in shares or any power in relation to them exercisable by him or with his consent and if there accrued to him only "non-share benefits" and no "share benefits", then the "non-share benefits", can legitimately be attributed to the share-holding.

13. In the case before us, the deceased Bhagwandas did not get any dividend on his shares. He did not get any "share benefits." He only got "non-share benefits" in the form of remuneration consisting of salary, entertainment allowance and conveyance allowance. The excessive remuneration of Rs. 30,000/- determined by the taxing authorities, though a "non-share benefit", has to be treated, for the purposes of sub-rule (3) of Rule 11, as a "share benefit" under Rule 11 (9) (b) as the deceased Bhagwandas having no "share benefits" only the "non-share benefit" of Rs. 30,000/- was brought into computation of the slice under section 17 (2) of the Act. If, therefore the excessive remuneration of Rs. 30,000/- is, by virtue of Rule 11 (9) (b), a "share benefit", then sub-rule (3) of Rule 11 comes into operation, and for the purposes of sub-rule (3) the "slice" corresponding to Rs. 30,000/-, determined under Section 17, has to be regarded as "share benefits slice". The amount of the slice corresponding to Rs. 30,000/-, being Rs. 1,14,256 under Clause (b) of Rule 11 (3) the amount of the value of the shares has to be deducted from the amount of the slice. Thus in respect of the excessive remuneration of Rs. 30,000/- slice, which is to be treated as "share benefits slice" by virtue of Rule 11 (9) (b), the estate duty payable would be on Rs. 14,256/- only.

14. The accountable person had no doubt urged before the Appellate Tribunal that if the deceased Bhagwandas had not taken the salary and allowances which he did from the company, the benefit accruing to him by virtue of his holding shares would have increased, and, consequently, the entire benefit of Rs. 30,000 should be treated as attributable to the shares. This argument was obviously founded on the provisions of Clause (a) of Rule 11 (9). But that clause has no applicability here, as no "share benefit" accrued to the deceased

in the form of dividends. The Appellate Tribunal has nowhere found that besides the "non-share benefit" of Rs. 30,000/- the deceased got any "share benefit." As no "share benefit" accrued to the deceased, and in the computation of the slice under Section 17 only the non-share benefit was taken into account, it is Clause (b) of Rule 11 (9) that applies and makes the "non-share benefits" of Rs. 30,000/- as "share benefits" for the purposes of Rule 11 (3) of the Rules. As we have endeavoured to point out earlier under R. 11 (9) (b) and R. 11 (3) (b) the duty payable on the slice under Section 17 corresponding to Rs. 30,000/- is only on Rs. 14,256/-.

15. The accountable person was also not right in her submission that if the deceased Bhagwandas had not received the allowances that he did, then he would have received the whole amount of Rs. 30,000/- as dividends. If the deceased had not received the excessive remuneration, then it would have been divided between the shareholders as dividend if the company had decided to give dividend on the shares. In that case, Bhagwandas, who held one-third of the share-capital, would have received only Rs. 10,000/- by way of dividends in the three years ending with his death and not Rs. 30,000/-. Thus out of the benefit of Rs. 30,000/-, Rs. 10,000/- would have constituted "share benefit" and Rs. 20,000/- as "non-share benefit". As the deceased Bhagwandas did not actually get any "share benefit" in the form of dividend, Rule 11 (3) read with Rule 11 (9) would have then operated in the following manner — I. Rs. 10,000/- being the dividend amount which Bhagwandas would have received if excessive remuneration of Rs. 30,000/- had not been paid to him.

The slice u/s 17 (2) corresponding to this share-benefit would be—

Rs. 10,000/-

\times Rs. 2,92,000/- = Rs. 38,085½

Rs. 76,670/-

II. The remaining excessive remuneration of Rs. 20,000/- would be non-share benefit.

The slice u/s 17 (2) corresponding to this non-share benefit would be—

Rs. 20,000/-

\times Rs. 2,92,000/- = Rs. 76,170½

Rs. 76,670/-

III. In respect of the share benefits slice, namely,

(a) Rs. 38,085½ no estate duty would be payable under Rule 11, sub-rule (3) (a) as the value of the shares exceeds the slice amount.

(b) In respect of non-share benefit slice, the estate duty would be payable on Rs. 76,170½.

If, therefore, the contention advanced by the accountable person before the Appel-

late Tribunal had been acceded to by us, the slice under Section 17 chargeable to duty would have been Rs. 76,170/-, and not only Rs. 14,256/- as urged by her. As we have pointed out earlier it is Clause (b) of Rule 11 (9) that applies in the present case, and on the basis of that Clause and Clause (b) of Rule 11 (3) the slice amount of Rs. 14,256/- corresponding to excessive remuneration of Rs. 30,000/- determined under Section 17 has to be reduced by the value of the shares. Thus the amount chargeable to duty under Section 17 is only Rs. 14,256/-.

16 In this case, the guidance and authority of any decision of any High Court or of the Supreme Court was not available to us. But we have been able to approach the matter with some confidence with the aid of the arguments advanced by learned counsel for the parties and of the exposition of S 51 (2) of the U. K. Finance Act, 1940 (3 and 4 Geo 6 c. 29), and paragraph-5 of the Seventh Schedule to that Act given in Dymond's Death Duties and Green's Death Duties. The provisions contained in sub-rules (1) to (8) of Rule 11 of the Estate Duty (Controlled Companies) Rules, 1953, are *pari materia* with Section 51 of the English Act. Sub-rules (1) and (2) of Rule 11 correspond to sub-sections (1) and (1-A) of Section 51 of the U. K. Finance Act, 1940 and sub-rule (3) of Rule 11 corresponds to Section 51 (2) of that Act. Paragraph-5 of the Seventh Schedule to the U. K. Finance Act, 1940, is *pari materia* with sub-rule (9) of Rule 11 of the Rules. In Dymond's Death Duties (14th edn.—vol. 1) it has been stated at page 490—

"Just as for the purpose of Section 51 (1) it was necessary to distinguish between benefits received by virtue of the transfer and other benefits, so for the purpose of Section 51 (2) it is necessary to distinguish between (a) benefits which accrued to the deceased by virtue of his interest in shares or debentures, or by virtue of any power in relation to them exercisable by him or with his consent, and (b) other benefits. If benefits of both types accrued to the deceased, the primary slice (or what is left of it after applying the 'ceiling') must be divided into two parts. One part, corresponding to the benefits at (a) will be called the 'share-benefits slice' and the other corresponding to the benefits at (b) may be called the 'non-share-benefit slice'. Only the share-benefit slice can be given relief under Section 51 (2).

Paragraph 5 of the Schedule VII provides that, in cases where the deceased's share benefits could have been increased if he had not taken non-share benefits, the non-share benefits shall be treated as share benefits to the extent that they could have been applied in increasing the

share benefits. For example, if the deceased received excessive remuneration, the proportion of it corresponding to his shareholding will be treated as a share benefit."

Sub-sections (1) and (2) of Section 46 of the U. K. Finance Act, 1940 correspond to sub-sections (1) and (2) of Section 17 of our Estate Duty Act, 1953. On the avoidance of duplicate charge, it has been stated in Green's Death Duties (5th edn.) at page 218—

"Where Estate duty is payable on a proportion of the assets of a company under Section 46 and would also be payable on shares or debentures of the company in which the deceased at any time had an interest, relief from a double charge of duty is afforded. For this purpose, a distinction is made between—

A. Benefits which accrued to the deceased by virtue of an interest that he at any time had in the shares or debentures in question, or by virtue of a power having been at any time exercisable by him or with his consent in relation to such shares, etc., and

B. Any other benefits (including benefits attributable to any other shares, etc., held by the deceased which are not themselves taxable).

As between A. and B

(1) Where the deceased received, as consideration for an addition of assets, any interest in shares etc., the notional benefit prior to the addition is attributed to that interest.

(2) Benefits which accrued otherwise than as at A, are nevertheless treated as falling within A, where and so far as the money or other property, if not applied as it was in fact applied, could have been applied in increasing the benefits at A. (Finance Act, 1940, Schedule VII, para 5) For instance, if the deceased took, as unreasonable remuneration, amounts which he could have taken as dividends, those amounts are attributed to the shares."

The passages reproduced above support the view we have expressed about the effect and operation of Section 17 (1) and (2) of the Act and Rule 11 (3) and (9) of the Rules.

17. For the foregoing reasons, our answer to the question propounded is that the value of the shares amounting to Rs. 1,00,000/- should have been deducted from the sum of Rs. 1,14,256/- in computing the value of the estate under Rule 11 (3) of the Estate Duty (Controlled Companies) Rules, 1953. The accountable person shall have costs of this reference. Counsel's fee is fixed at Rs. 250/-.

MAJ/D V C.

Answer accordingly.

AIR 1969 MADHYA PRADESH 89
(V 56 C 28)

K. L. PANDEY AND A. P. SEN, JJ.

Madhya Pradesh State Road Transport Corporation, Jabalpur, Appellant v. Jahiram and another, Respondents.

Misc. (First) Appeal No. 144 of 1966, D/- 30-7-1968 from decree of claims Tribunal (Addl. Dist. J.) Rewa, D/-30-6-1966.

(A) Motor Vehicles Act (1939), Ss. 96 (2) and (6), 110-A to 110-F — Claim for compensation in respect of accident involving death or bodily injury to persons where there is policy of insurance against third party risk — Procedure provided in Act must be followed — Insurer must be made a party to proceedings.

It is a settled rule of construction of statutes that in case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, the forms, or remedies (there provided, and not others) must be strictly followed. AIR 1952 SC 64 Foll.; AIR 1964 SC 358 Ref. (Para 5)

It is clear from provisions of S. 110-A to 110-F of Motor Vehicles Act that there is now only one remedy for grant of compensation in respect of accidents involving the death, or bodily injury to persons, arising out of the use of motor vehicles, when there is a policy of insurance against third-party risk. That remedy is by way of application for compensation to be made to the Claims Tribunal under S. 110-A. The jurisdiction of the Civil Courts to entertain such claims having been barred by S. 110-F, the right must be enforced in the manner provided. (Para 5)

As a logical consequence, it follows that such claims have to be made in the manner prescribed. The remedy provided by the statute must be followed, and the form given by the statute must be adopted and adhered to. The Legislative object of inserting these sections in the Motor Vehicles Act by Act 100 of 1956, was to provide for a speedy and summary enforcement of third-party risk against an insurer.

In view of the clear provisions contained in S. 96 (2) and (6) of the Motor Vehicles Act, it can hardly be asserted that an insurer is not a party to an action for recovery of damages. Thus, the insurer must, of necessity, be a party to such proceedings. (Para 7)

(B) Motor Vehicles Act (1939), S. 110D — Appeal upon quantum of damages — Grounds.

In general, an appeal upon the quantum of damages will not be allowed unless either (i) the Tribunal has applied a wrong principle of law, or, misdirected itself or (ii) the amount awarded either

was so inordinately low or was so inordinately high that it must be held as erroneous. The normal rule, therefore, is that no appeal lies on the quantum of damages unless it involves a matter of principle: 1951 (2) All. ER 448, Ref.

Held, on facts of the case, that the interference was called for because the tribunal had misdirected itself by awarding an amount without any basis. (Para 8)

(C) Motor Vehicles Act (1939), S. 110B — Claims in personal injury cases — Duty of Claims Tribunal.

It is the duty of the Claims Tribunal in personal injury cases to separately ascertain and determine under different heads, pecuniary and non-pecuniary damages, if any, awardable to the claimant. Although the eventual award must be of a lump sum, nevertheless, the sum awarded must be made up of its constituent parts. In personal injury cases this course has to be followed by a Claims Tribunal while dealing with assessment, by indicating the different heads under which the damages are awarded, because the appeal to the High Court is by way of rehearing on the question of damages. Unless, this is done, High Court cannot determine whether the Claims Tribunal has acted on a wrong principle of law, or whether it has made entirely erroneous estimate of damages, and the very purpose of the appeal would be defeated. (Para 8)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 358 (V 51) = | |
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| Uttar Pradesh v. Singharasingh | 6 |
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| Captain Itbar Singh | 7 |
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| wami v. Returning Officer, | |
| Namakkal | 5 |
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| Taylor v. Taylor | 6 |
| (1859) 6 CB (NS) 336 = 28 LJCP 242, | |
| Wolverhampton New Water | |
| Works Co. v. Hawkesford | 5 |
| V. S. Dabir, for Appellant; R. K. | |
| Tankha (for No. 1) and V. S. Pandit | |
| (for No. 2), for Respondents. | |

SEN, J.:— The Madhya Pradesh State Road Transport Corporation (hereinafter referred to as the "MPSRTC"), has filed this appeal under Section 110-D of the Motor Vehicles Act (Act 4 of 1939),

against an award of the Claims Tribunal, Rewa, dated 30th June 1966 awarding a sum of Rs. 20,000/- as compensation to one Jahiram, for bodily injuries resulting from a road accident.

2. The facts giving rise to this appeal, so far as necessary, may be briefly stated. On 21st November 1962, a bus MPJ 2434 owned by the MPSRTC, while on its way from Rewa to Satna, met with an accident when it collided with a truck on a culvert of a river, near Mouja Rampur. As a result of the accident, the MPSRTC bus, together with all its passengers, fell beneath the culvert. The claimant, who was a passenger in the ill-fated bus, sustained serious injuries on his person and became unconscious as a result of the injuries sustained by him. He was brought back to Rewa and admitted in Gandhi Memorial Hospital, Rewa. An X-ray revealed fractures of the 2nd, 4th, 5th, 6th, 7th and 9th ribs on the left side of his chest. The claimant received treatment at the hospital for his injuries until 14th December 1962 when he was discharged, and he had evidently suffered damages for his disablement, loss of business, physical and mental worries and sufferings and medical treatment. On that account, he claimed Rs. 20,000/- as compensation, against the MPSRTC and its driver, one Fateh Mohammad. While denying its liability on account of the alleged rashness or negligence on the part of its driver, the MPSRTC asserted that the direct and proximate cause of the accident was the negligence of the driver of truck. Alternatively, it was pleaded that narrowness of the culvert, made it impossible for more than one vehicle to simultaneously pass and although Fateh Mohd. had acted as a person of ordinary prudence, he could not have foreseen the impending impact and, therefore, the accident was an inevitable accident not attributable to any negligence on his part. The quantum of compensation claimed was also disputed. After a trial on these issues, the Claims Tribunal found that the accident occurred due to rash and negligent driving of the bus and hence awarded Rs. 20,000/- as damages.

3. Before dealing with the merits of this appeal, it is necessary for us to set out a few more facts. The MPSRTC came to be constituted as a "State Transport undertaking", under Section 3 of the Madhya Pradesh State Road Transport Corporation Act (Act 64 of 1950), w.e.f. 5th June 1962. Its financial structure is that the Corporation has a fund under Section 27 called "The MPSRTC Fund", and as regards its third party liability arising out of the use of its vehicles, it has to set apart from out of its revenues, such sum as may be directed for meeting any such liability. A provision in that

behalf was made by Rule 26 of the Madhya Pradesh State Road Transport Corporation Rules, 1962, which is in these terms.

"26 Third Party Liability Fund.— There shall be established and maintained by the Corporation a Fund to be called the Third Party Liability Fund into which shall be paid every year from and out of the revenues of the Corporation such sum as may be directed by the State Government from time to time for meeting any liability arising out of the use of any vehicle of the Corporation, which the Corporation or any person in the employment of the Corporation may incur to third parties."

Initially when the Corporation had been established, it had no Third-Party Liability Fund in existence, and, therefore, all its vehicles were insured against third party risks under Section 94 (1) of the Motor Vehicles Act. This was until 19th July 1963 when the State Government issued a notification under Section 94 (3) exempting MPSRTC from the operation of Section 94 (1). The Third-Party Liability Fund by them had been established and maintained by that authority, in accordance with Rule 26.

Nevertheless, all liability arising out of Third-party risks between 5th June 1962 and 19th July 1963, was covered under a policy of insurance against third-party risks, taken out by the Corporation in respect of its each vehicle, and the insurers were the Indian Insurance Companies Pool. The accident in question had occurred on 21st November 1962, i.e., at a time when the MPSRTC had insured its vehicles in respect of third party risks. The present application for a claim for compensation had been filed on 18th January 1963 and initially, the insurers had been impleaded as opposite party No. 3 but apparently its name was struck off from the array of parties while lodging the application. The result has been that the application for compensation was imperfectly constituted inasmuch as the insurers were not impleaded as a party, nor is there anything on record to suggest that the Claims Tribunal had served any notice on them to appear and contest their liability in the proceedings before it.

4. The first contention relates to the invalidity of the proceedings before the Claims Tribunal. Section 110-A (2) of the Motor Vehicles Act provides that an application for compensation arising out of an accident involving death, or bodily injury to any person arising out of use of motor vehicles, made to a Claims Tribunal, must be in the form prescribed. This is provided for by Section 110-A (2), which reads, thus:—

"110-A (2) Every application under sub-section (1) shall be made to the

Claims Tribunal having jurisdiction over the area in which the accident occurred, and shall be in such form and shall contain such particulars as may be prescribed."

The form of the application has been prescribed for by Rule 3 of the Madhya Pradesh Motor Accidents Claims Tribunal Rules, 1939, framed under S. 111-A of the Motor Vehicles Act, which reads, thus:

"3. Applications:— (1) An application for a claim for compensation arising out of an accident of the nature specified in sub-section (1) of Section 110-A of the Act shall be made in Form 'A' appended to these rules. Such application shall be in duplicate and shall be signed and verified in the manner prescribed by Order VI, R. 15 of the Code of Civil Procedure, 1908 (V of 1908)."

Appended to these Rules, is the statutory Form 'A' prescribed under Rule 3, and it enjoins that the insurer should be impleaded as Opposite party No. 3. R. 7 (1) lays down that the Claims Tribunal shall issue notice to the party against whom the applicant claims relief (referred to as the 'opposite party'), who may then appear and contest the claim. After a Claims Tribunal has been constituted for any area, the jurisdiction of the Civil Courts to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, is barred under Section 110-F, of the Motor Vehicles Act.

5. It is a settled rule of construction of statutes that in case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, the forms, or remedies (there provided, and not others) must be strictly followed. In *N. P. Ponnuswami v. Returning Officer, Namakkal*, AIR 1952 SC 64, their Lordships of the Supreme Court have stated:—

"It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

Following the dictum of Willes J. in *Wolverhampton New Water Works Co. v. Hawkesford*, (1859) 6 CB (NS) 336, we think, it will be a fair inference from the provisions of Section 110-A to Section 110-F of the Motor Vehicles Act, to state that there is now only one remedy for grant of compensation in respect of accidents involving the death, or bodily injury to persons, arising out of the use of motor vehicles, when there is a policy of insurance against third-party risk. That remedy is by way of application for compensation to be made to the Claims Tribunal under Section 110-A. The jurisdiction of the Civil Courts to

entertain such claims having been barred by Section 110-F, the right must be enforced in the manner provided. Such claims clearly fall under the 3rd category, mentioned in Willes J. in (1859) 6 CB (NS) 336 (supra), namely:—

"But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

6. Where a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means no other mode is to be adopted. In *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2), Their Lordships have stated.

"The rule which applies is that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performances are necessarily forbidden."

[See, also *Taylor v. Taylor*, (1876) 1 Ch D 426], which has not been followed by their Lordships of the Supreme Court in *State of Uttar Pradesh v. Singharasingh*, AIR 1964 SC 358.

7. We have no manner of doubt that the intention of the Legislature as gathered from the words used in Sections 110-A to 110-F of the Motor Vehicles Act, is plain and unambiguous and they have one meaning only, namely, that no such claims can now be tried in the ordinary way. As a logical consequence, it follows that such claims have to be made in the manner prescribed. The remedy provided by the statute must be followed, and the form given by the statute must be adopted and adhered to. The Legislative object of inserting these sections in the Motor Vehicles Act by Act 100 of 1956, was to provide for a speedy and summary enforcement of third-party risks against an insurer.

The submission that insurers had no right to be impleaded as a party, is wholly unfounded. Their Lordships of the Supreme Court have in *British India General Insurance Co. Ltd. v. Captain Itbar Singh*, AIR 1959 SC 1331, indicated the nature of defences that are available to an insurer upon being impleaded as a party. We fail to appreciate how can the statutory defences be raised unless the insurer is made a party. That is the only manner in which the insurer can avoid its liability. In view of the clear provisions contained in Section 96 (2) and (6) of the Motor Vehicles Act, it can hardly be asserted that an insurer is not a party

to an action for recovery of damages. Thus, the insurer must, of necessity, be a party to such proceedings.

We must accordingly hold that the application as framed and presented before the Claims Tribunal, suffers from a serious infirmity and the only course now open is to remit the proceedings for a retrial, after allowing the claimant an opportunity to implead the insurers and serving on them a notice in order that they may appear and contest the claim to the limited extent provided in Section 96 (2) of the Act.

8. The proceedings have to be remitted for another reason. Even otherwise, in general, an appeal upon the quantum of damages will not be allowed unless either (i) the Tribunal has applied a wrong principle of law or misdirected itself or (ii) the amount awarded either was so inordinately low or was so inordinately high that it must be held as erroneous [See, *Nance v British Columbia Electric Railway Co Ltd*, 1951-2 All ER 448]. The normal rule, therefore, is that no appeal lies on the quantum of damages unless it involves a matter of principle. This case, however, calls for an interference because the tribunal has misdirected itself by awarding an amount without any basis. The Claims Tribunal has not, at all, applied its mind to the question of ascertaining the quantum of damages. In a schedule annexed to the application, the claimant had assessed Rs. 33,682.84 as damages suffered by him, but in para 6 of the application, he had limited his claim to Rs. 30,000/- as compensation. The MPSRTC in para 7 of the Written statement asserted that the figures mentioned in the schedule were imaginary, and also denied its liability for payment of the various amounts claimed. In dealing with this question, the Claims Tribunal has disposed of the matter in a very laconic manner. This is what it states—

"The damages of Rs. 20,000/- claimed by the applicant for permanent disablement, loss of business, physical and mental worries and sufferings and for the special damages incurred by the applicant in the medical treatment are reasonable and fair and the applicant is entitled to get damages of Rs. 30,000/- from the non applicant."

The expression 'reasonable and fair' used by the Claims Tribunal carries us nowhere. It was the duty of the Claims Tribunal to separately ascertain and determine under different heads pecuniary and non pecuniary damages, if any, awardable to the claimant. Although the eventual award must be of a lump sum, nevertheless the sum awarded must be made up of its constituent parts. In personal injury cases this course has to be followed by a Claims Tribunal while

dealing with assessment, by indicating the different heads under which the damages are awarded, because the appeal to the High Court is by way of rehearing on the question of damages. Unless, this is done this Court cannot determine whether the Claims Tribunal has acted on a wrong principle of law, or whether it has made entirely erroneous estimate of damages and the very purpose of the appeal would be defeated.

9. We, accordingly, allow the appeal and set aside the award made by the Claims Tribunal, and remit the proceedings to it with a direction that it shall, with advertence to the observations that we have made direct the claimant to implead the insurers, the Indian Insurance Companies Pool, as 'Opposite Party No. 3' in the proceedings, and after service of notice to them, allow the parties to raise such pleas as are open and to hear and decide the claim afresh, in accordance with law. The costs shall abide the event. Hearing fee Rs 100/- if certified.

RSK/DVC.

Appeal allowed.

AIR 1969 MADHYA PRADESH 92
(V 56 C 29)

P V DIXIT C.J AND G P SINGH, J
Sher Singh, Petitioner v State Transport Authority, Gwalior and others, Respondents.

Misc. Petn. No. 348 of 1968, D/- 28-10-1968

Motor Vehicles Act (1939), Ss 44(3), (4) and 45 proviso 2 — Scope — Inter-regional route — Applications for permit made by persons in different regions to respective Regional Transport Authorities — State Transport Authority directing all such applications to be decided only by Regional Transport Authority of a specified region — Direction without jurisdiction.

Where persons in different regions apply for permit for an inter regional route to the respective Regional Transport Authorities but the State Transport Authority directs all such applications to be decided only by the Regional Transport Authority of a specified region, the direction is without jurisdiction.

(Para 2)
It will be more in public interest as also fair to all applicants if all such applications can be heard and disposed of by one Authority (Para 4)

If the State Transport Authority decides to perform the duties of a Regional Transport Authority for an inter-regional route it can certainly issue directions under S 44(4) of the Motor Vehicles Act

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to the Regional Transport Authorities concerned not to exercise that duty. S. 44 (3)(b) and (4) therefore clearly authorise the State Transport Authority to grant permits on an inter-regional route and to deprive the Regional Transport Authorities of their jurisdiction to that extent.

(Para 5)

The power of the State Transport Authority under S. 44(3) (a) "to co-ordinate and regulate the activities and policies of the Regional Transport Authorities", however wide it may be, does not include the power to deprive one Regional Transport Authority of its quasi-judicial jurisdiction and to confer the same on another Regional Transport Authority. The words "activities and policies" in S. 44(3)(a) are more appropriate to describe administrative functions rather than judicial or quasi judicial. Further, the words "co-ordinate and regulate" postulate the continuance of that which is co-ordinated or regulated. They do not ordinarily include deprivation. Under the scheme in Chapter IV, an application for permit is to be heard and disposed of by the Regional Transport Authority to which it is made. The duty to dispose of applications made to it is a judicial function and cannot be co-ordinated or regulated by issue of directions by the State Transport Authority. AIR 1964 SC 1573 & AIR 1966 Raj 127 (FB), Foll. (1961) MP No. 295 of 1960, D/- 31-7-1961 (MP) Expl. (Para 6)

Thus, the direction by the State Transport Authority authorising the Regional Transport Authority of a specified region to decide all applications for permits for inter-regional route, made to the respective Regional Transport Authorities, is without jurisdiction. (Para 8)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Raj 127 (V 53) =
ILR (1966) 16 Raj 187 (FB), Jagdish Prasad v. Transport Appellate Tribunal 6
(1964) AIR 1964 SC 1573 (V 51) =
(1964) 7 SCR 1, B. Rajagopala Naidu v. S. T. A. Tribunal, Madras 6
(1961) M. P. No. 295 of 1960, D/- 31-7-1961 (MP), Rewa Transport Services v. General Manager C. P. T. S. 7
R. K. Tankha, for Petitioner; Y. S. Dharmadhikari, for Respondent No. 3.

ORDER :— This petition under Article 226 of the Constitution arises out of a case relating to the grant of stage carriage permits on the route, Tikamgarh-Gwalior via Niwari, Jhansi and Dabra. This route is inter-statal and inter-regional falling within the States of Madhya Pradesh and Uttar Pradesh. The portion of the route which is within the State of Madhya Pradesh falls within two

regions viz., Rewa and Gwalior. Under the inter-statal agreement two single trip permits can be issued for this route by the Madhya Pradesh Authorities. Ratanlal who is respondent No. 3 to this petition made an application for permit on the route on 20th October, 1964 to the Regional Transport Authority, Gwalior. No action was taken on that application and on 20th December, 1964 the Regional Transport Authority, Gwalior decided to invite fresh applications. This order, however, was not carried out and no notification was published inviting applications. In the meantime, the petitioner and some others applied to Regional Transport Authority, Rewa for getting permits on this route.

The petitioner's application was made on 15th July, 1966 and was published in the Gazette on 2nd September, 1966 along with other applications. The State Transport Authority realising that the exercise of concurrent jurisdiction by the Regional Transport Authorities of Rewa and Gwalior in the matter of grant of permits on this route may not be in the interest of the public and may result in conflict, issued a direction that the applications for permits on this route, though received by both the Authorities, shall be decided only by the Regional Transport Authority, Gwalior. In view of this direction of the State Transport Authority, the Regional Transport Authority, Rewa sent all the applications received by it for grant of permits on this route, including the application of the petitioner, to the Regional Transport Authority, Gwalior.

It seems that the respondent No. 3 came to know of the order of the Regional Transport Authority, Gwalior deciding to invite fresh applications sometime in July, 1966 and on 15th July, 1966 he filed a revision against that order before the State Transport Authority. This revision was allowed by the order of the State Transport Authority on 31st May, 1968, in which it was held that the Regional Transport Authority, Gwalior should have decided the application of the respondent No. 3 and should not have passed the order inviting fresh applications. On this ground the order proposing to invite fresh applications was set aside and the Regional Transport Authority, Gwalior was directed to first determine the application of the respondent No. 3. After this order, the Secretary, Regional Transport Authority, Gwalior by a memo dated 4th June, 1968 returned the applications including the application of the petitioner, which were received from the Regional Authority Rewa, back to that Authority on the ground that applications submitted to one Authority cannot be transferred to another Authority.

The Regional Transport Authority, Gwalior then published the application of the respondent No. 3 in July 1963 and proposed to consider that application alone on 24th September, 1968. The petitioner then filed this petition under Articles 226 and 227 of the Constitution praying that the order of the State Transport Authority in revision and the order of the Secretary, Regional Transport Authority Gwalior, returning the petitioner's application to the Regional Transport Authority, Rewa, be quashed. It is also prayed that the Regional Transport Authority Gwalior be directed to dispose of the applications of the respondent No. 3 and the petitioner together in accordance with law.

2. The main contention raised by the learned counsel for the petitioner is that by the direction of the State Transport Authority issued on 16th November 1966 the Regional Transport Authority Gwalior got jurisdiction to decide the applications that were made at Rewa including the application of the petitioner and therefore, the Secretary Regional Transport Authority Gwalior should not have sent back those applications to the Regional Transport Authority Rewa. It is also argued that as the applications of the petitioner and respondent No. 3 are all ripe for hearing, these applications and such other applications for permits on this route which may also be ripe for hearing should be heard together by the Regional Transport Authority Gwalior. In answer, the learned counsel for the respondent No. 3 argued that the direction of the State Transport Authority was in excess of the power conferred on that Authority and therefore the Regional Transport Authority, Gwalior rightly refused to decide the applications made to the Regional Transport Authority, Rewa.

3. The rival contentions raised in this petition relate to construction of sub-sections (3) and (4) of Section 44 of the Motor Vehicles Act, 1939 which read as follows:

"(3) A State Transport Authority shall give effect to any directions issued under Section 43, and subject to such directions and save as otherwise provided by or under this Act shall exercise and discharge throughout the State the following powers and functions, namely—

(a) to co-ordinate and regulate the activities and policies of the Regional Transport Authorities, if any, of the State;

(b) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by a Regional Transport Authority, to perform those duties in respect of any route common to two or more regions;

(c) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities and

(d) to discharge such other functions as may be prescribed."

(4) For the purpose of exercising and discharging the powers and functions specified in sub-section (3) a State Transport Authority may, subject to such conditions as may be prescribed, issue directions to any Regional Transport Authority and the Regional Transport Authority shall in the discharge of its functions under this Act, give effect to and be guided by such directions."

4. Before we proceed to examine the submission in relation to these sub-sections, we will first examine other relevant provisions. The power to grant stage carriage permit is vested in the Regional Transport Authority under Section 48 and this power is to be exercised on application for permit made to that Authority under Section 46. Section 45 provides as to which Regional Authority application for permit should be made. The second proviso to that section enacts that if it is proposed to use the vehicle or vehicles in two or more regions lying in different States, the application should be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business. After application for permit is received, the Regional Transport Authority has to publish the same under Section 57 inviting representations and fixing a date for hearing of the application. The application is then to be granted or refused having regard to the matters set out in Section 47.

Under the scheme of these sections an application for permit is to be disposed of by the Regional Transport Authority to which it is made. In case of an inter-state route which passes through two or more regions the Regional Transport Authority of all these regions may receive applications for grant of permit. If contestants for permits on such a route reside or have their place of business in different regions for application for permit on such a route can be made to the Regional Transport Authority of the Region where the applicant resides or has his principal place of business. This is what happened in the instant case. As already stated the respondent No. 3 made his application to the Regional Transport Authority, Gwalior whereas the petitioner and some others made their applications to the Regional Transport Authority Rewa. In the normal course these applications cannot be heard together or disposed of by one Authority. The Gwalior Authority must dispose of the application made to it and similarly the applications made to the Rewa Autho-

rity must be disposed of by that Authority. The total number of permits that can be granted on the route by the Madhya Pradesh Authorities is limited by the inter-statal agreement to two single trip permits.

It would be therefore more in public interest as also fair to all applicants if all those applications could be heard and disposed of by one Authority. The question is whether this can be achieved by issue of a direction of the State Transport Authority.

5. We now revert to sub-sections (3) and (4) of Section 44 which we have reproduced earlier. It is first argued by the learned counsel for the respondent that these sub-sections cannot be utilised for depriving a Regional Transport Authority of its jurisdiction to grant permits. Such a broad statement is plainly wrong. A look at sub-section (3) (b) will show that in case of a route which is common to two or more regions, the State Transport Authority may, if it thinks fit or if so required by a Regional Transport Authority, perform the duties of a Regional Transport Authority. If the State Transport Authority decides to perform the duties of a Regional Transport Authority for an inter-regional route it can certainly issue directions under sub-section (4) to the Regional Transport Authorities concerned not to exercise that duty. Otherwise the object of taking over the duties of the Regional Transport Authorities by the State Transport Authority will not be served. Sub-sections (3)(b) and (4) therefore clearly authorise the State Transport Authority to perform the function of granting permits on an inter-regional route and to deprive the Regional Transport Authority of their jurisdiction to that extent.

6. But the point is whether instead of adopting the course under sub-section (3)(b), it was open to the State Transport Authority to authorise one of the two Regional Transport Authorities to dispose of all the applications made to both. This action of the State Transport Authority is sought to be justified by the counsel for the petitioner under sub-section (3)(a). Clause (a) of sub-section (3) empowers the State Transport Authority to co-ordinate and regulate the activities and policies of the Regional Transport Authorities. The power to co-ordinate and regulate the activities and policies of the Regional Transport Authorities, however wide it may be, does not, in our opinion, include the power to deprive one Regional Transport Authority of its quasi-judicial jurisdiction and to confer the same on another Regional Transport Authority.

The words "activities and policies" are more appropriate to describe administra-

tive functions rather than judicial or quasi-judicial. Moreover, the words "co-ordinate and regulate" postulate the continuance of that which is co-ordinated and regulated; they do not ordinarily include deprivation. Under the scheme of sections in chapter IV to which we have already referred, an application for permit is to be heard and disposed of by the Regional Transport Authority to which it is made. The duty to dispose of applications made to it is a judicial function and cannot be co-ordinated or regulated by issue of directions by the State Transport Authority.

In *B. Rajgopala Naidu v. S. T. A. Tribunal, Madras*, AIR 1964 SC 1573, Their Lordships held that Section 43-A (Madras Amendment) of the Act which empowered the State Government to issue orders and directions to State (Transport Authorities or to?) Regional Transport Authorities in respect of any matter relating to road transport was limited in its application to administrative matters. One of the reasons that their Lordships gave in support of this conclusion was that judicial functions conferred on tribunals established by statute cannot be regulated by issue of administrative or executive directions. The same consideration applies in limiting the scope of Section 43(3) (a) by construction to administrative activities and policies of the Regional Transport Authorities.

Indeed at one place their Lordships in *Rajgopala's case*, AIR 1964 SC 1573 also adverted to Section 44 of the Act and said that "the field covered by Section 43-A like that covered by Sections 42, 43 and 44 is administrative and does not include the area which is the subject matter of exercise of quasi-judicial authority by the relevant tribunals. Following *Rajgopal's case*, AIR 1964 SC 1573 a Full Bench of Rajasthan High Court in *Jagdish Prasad v. Transport Appellate Tribunal*, AIR 1966 Raj 127 (FB) has held that the State Transport Authority cannot by issue of directions under Section 44(3)(a) regulate the grant of permits as it will encroach upon the judicial functions of the Regional Transport Authorities. These cases support the conclusion reached by us.

7. The learned counsel for the petitioner drew our attention to the decision of a Division Bench of this Court in *Rewa Transport Services v. General Manager C. P. T. S.* (1961) MP No. 295 of 1960, D/-31-7-1961 (MP). In this case it was observed:

"We may in this connection point out that where an inter-state route is also an inter-regional route in one or both States, the permit should be dealt with under Section 44(3) of the Act by the State Transport Authorities, who could also, in exercise of their power, issue suitable

directions under Section 44(4) of the Act to the subordinate Regional Transport Authorities."

The reference in the above passage to Section 44(3) is obviously to section 44(3) (b) because it is only under Clause (b) of sub-section (3) that the State Transport Authority can itself deal with the grant of permits on an inter-regional route. The view expressed in this passage is in line with our interpretation of clause (b). But this case does not in any way support the argument that judicial functions of Regional Transport Authorities can be affected by issue of directions under clause (a) of sub-section (3).

We have already expressed the view that it was open to the State Transport Authority, if it thought fit so to do, to have exercised its power under section 44(3)(b) and to have assumed jurisdiction for granting permits on the inter-regional route. Had this course been adopted and suitable direction issued under sub-section (4), all applications for permits could have been decided by the State Transport Authority itself. This course would have also been in public interest and fair to all the applicants. It would still be open to the State Transport Authority, if it so thinks fit, to act under sub-sections (3)(b) and (4) of Section 44.

2. On the conclusion reached by us that the State Transport Authority had no jurisdiction to direct that the application for permits made to Regional Transport Authority, Rewa be also decided by the Regional Transport Authority, Gwalior, this petition fails and is dismissed. In the circumstances of this case we do not make any orders as to costs. The security amount shall be refunded to the petitioner.

JRM/D.V.C.

Petition dismissed.

AIR 1969 MADHYA PRADESH 95 (V 56 C 30)

SURAJ BHAN AND A. P. SEN, JJ.

State of Madhya Pradesh, Appellant v. Ram Charan Kishan, Respondent.

Criminal Appeal No. 189 of 1966, D/- 1-5-1968, from judgment of S. J., Gwalior, D/- 18-7-1966.

Essential Commodities Act (1955), Ss. 7 and 8 — Inter-Zonal Wheat and Wheat Products (Movement Control) Order 1964, Ss. 6, 3 and 4 — Offence under — Attempt to commit is equally an offence — Preparation and attempt — Distinguished, 1962(1) Cr. LJ 830 Diss. — Penal Code (1860), S. 511.

Section 3 of the Movement Control Order makes an attempt to move or transport wheat without a permit as good

an offence as the completed acts of movement or transport from inside the State to a place outside.

The dividing line between a mere preparation and an attempt to commit a crime may be rather thin in some cases and the question, whether there has been an attempt or only a preparation to commit it has to be decided on the facts of each particular case. (Paras 7, 9)

The carts laden with wheat were seized after they had crossed the river bank of Pahuj into the river bed itself, while they were nearing the border between the two States of M. P. and U. P. Although the carts were on the river-bed, on the side of the river Pahuj which was within the State of Madhya Pradesh, nevertheless, they were actually seized while they were proceeding towards the State boundary which was at the centre of the river.

Held, that the seizure was effected while the accused were attempting to export the wheat from a place within the Zone to a place outside it. AIR 1953 Madh Pra 216, Disting. 1962 (1) Cr. LJ 830 (Mys) Diss. AIR 1950 Ori 114 & AIR 1951 Ori 284 & AIR 1952 Ori 164, Rel. on.

(Para 8)

The protection under CL VII of S. 6 of the Order could not be claimed as the clause did not permit movement of grain from one State to another. The Mandi as contemplated by clause (vii) must be within the same Zone itself and not outside it.

(Para 10)

Cases Referred: Chronological Paras

- (1962) 1962 (1) Cr. LJ 830 = ILR
(1961) Mys. 361, Baburao Balwant
v. State of Mysore 8
(1953) AIR 1953 Madh Pra 216 (V 40) =
1953 Cr. LJ 1361, State of Madhya
Bharat v. Narain Singh 8
(1952) AIR 1952 Ori 164 (V 39) =
1952 Cr. LJ 918, Vaikunthan Jaga-
nadhram v. State of Orissa 9
(1951) AIR 1951 Ori 284 (V 38) =
52 Cr. LJ 837, The King v. Tusti-
pada Mandal 9
(1950) AIR 1950 Ori 114 (V 37) =
51 Cr. LJ 914 (SB), State of Orissa
v. Hari Charan 9
R. S. Bajpai, Addl. G. A. for the State;
J. P. Gupta, for Respondent.

JUDGMENT :— The State Government of Madhya Pradesh have filed this appeal against the order of acquittal passed by the Sessions Judge, Gwalior, dated 18th July 1966, setting aside the order of conviction passed by the Magistrate First Class, Bhandar, dated 24th April 1966, convicting the accused Ram-charan under Section 7 of the Essential Commodities Act, 1955, read with Sections 3 and 4 of the Inter Zonal Wheat & Wheat Products (Movement Control) Order, 1964, and sentencing him to Ri-

the properties inspected, because no attention has been paid in the trial Court with reference to the alleged reclamation of jungle lands into cultivable lands and that in such a case, income from such land should be excluded and there were also areas which were rocky and could not be cultivated and this too should be taken into account. All these facts, according to the petitioner in the court below, could be proved only by appointment of a Commissioner through his report. On this ground it was stated in the court below that the decree granted by the trial court for mesne profits could not be sustained. The lower appellate court has devoted its entire order to a consideration of the scope of Order XLI Rule 27 C. P. Code and a decision of the Allahabad High Court and of the Supreme Court, and being of opinion that the appellate court had the power, he ordered appointment of a Commissioner.

2. It is rather surprising that the Second Additional District Judge did not examine the application for appointment of a Commissioner on its merits whether it was required in the interests of justice. I may observe that appointment of a Commissioner in the appeal is a rarity and is seldom resorted to. In my view, such an appointment is not authorised by Rule 27 of Order XLI. That rule relates to additional evidence and the language of Rule 27 (1) (b) does not lend itself to a construction that the report of a commissioner to be appointed and submitted in the appellate stage is regarded as additional evidence for purposes of that rule. It is true that Section 107 (2) C. P. Code gives the Appellate Court the same powers and the same duties as nearly as may be as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted in them. Wide as the phraseology of this sub-section may appear, I am inclined to think that when sub-section (1) and the matters mentioned therein are kept in view, the power of the Appellate Court under sub-section (2) should be understood not as widely as it may prima facie appear to justify. In any case, I think assuming that Section 107 (2) authorises the appellate Court to appoint a Commissioner for inspection, that is a power which should be very sparingly used and only in the interests of justice. The normal course which the Appellate Court in such cases should adopt is to allow the appeal itself from the decree for mesne profits and then to direct the trial Court to appoint a Commissioner if it thought fit on the merits, consider the Commissioner's report and then come to the conclusion on the quantum of mesne profits. The Second Additional District Judge in this case may well have adopt-

ed that course, but only on his judgment of the merits and the justice of the case.

3. As I said, the Lower Appellate Court seems to have taken it for granted that the application for appointment of a Commissioner at the appellate stage should be granted as a matter of course, which is not the case. The order of the Lower Appellate Court amounts to this that because the appellate Court possesses the power, according to it, therefore it made an order for appointment of a Commissioner. Clearly that view is wrong. A Commissioner, even if there is power, can be appointed only if it is justified on the merits.

4. The order of the Court below is set aside. It is, however, open to the Lower Appellate Court in disposing of the appeal to see whether the ends of justice have suffered at the trial stage because proper investigation had not been made as to the physical features and the other features pointed out by the defendant and whether the defendant had been diligent in prosecuting his case in the trial Court, and if it is satisfied on such an examination, to set aside the decree for mesne profits and remit the matter to the trial Court for fresh disposal. This observation is not to be understood by the Lower Appellate Court as an invitation to it to allow the appeal, which I have no doubt, the Court below will consider on its own merits.

5. The petition is allowed in those terms. No costs.

RSK/D.V.C.

Petition allowed.

AIR 1969 MADRAS 145 (V 56 C 35)

KRISHNASWAMY REDDY, J.

T. S. Baliah, Petitioner v. T. S. Rangachari, Respondent.

Criminal Revn. Cases Nos. 645 to 648 of 1967, D/- 14-2-1968.

(A) Income-tax Act (1922), S. 52 — Section does not repeal S. 177 of Penal Code — Penal Code (1860), S. 177.

Section 52 of the Income Tax Act (1922) has not repealed S. 177 of Penal Code.

(Para 36)

The object and the purposes of these two enactments are different. The subject matter of the offence under Section 177 I. P. C. is much wider and comprehensive than the subject-matter of the offence created under Sec. 52 of the Income-tax Act for the purpose of enforcing effectively the provisions of the said Act. The Indian Penal Code is a penal statute whereas the Income-tax Act is fiscal and deals with revenue. Hence it cannot be said in this back ground, that Section 52 of the Income-tax Act though creates an

JL/KL/E794/68

offence similar to that of Section 177 I P C. but narrower in scope, takes away the entire subject matter provided under Section 177 I P C. (Para 14)

If the intention of the Legislature was that the prosecution would be barred even under any other enactment like the Indian Penal Code in respect of the same matter it could have said so specifically in S 28 (4) of the Act that the prosecution is not only barred under the Income-tax Act but also under any other law. In the absence of such a provision it is reasonable to infer that the intention of the Legislature in creating offence under Section 52 is not to repeal any other similar offence under any other law. Both the statutes are two distinct enactments and they can certainly stand together. (Para 14)

There is no inconsistency between the provisions of these two enactments. Even assuming that differences and inconsistencies exist it cannot be said that both the provisions are wholly incompatible or the application of both would lead to absurdity. Case law Discussed.

(Paras 25 and 26)

(B) Income-tax Act (1961) S 297 (2) (a) — Proceedings for the assessment of that person for that year — Meaning of — Includes prosecution instituted under S 52 of Income-tax Act (1922)

The prosecution under S 52 of Income-tax Act 1922 pending on the commencement of the Act of 1961 is saved under S 297 (2) (a). (Paras 45 and 52)

The words proceedings for the assessment of that person for that year in S 297 (2) (a) are so comprehensive, so as to include even the proceedings in respect of prosecution. The words are comprehensive in the context and that would include every proceeding till the assessment is realised. There cannot be any doubt that institution of prosecution is one of the modes to realise the amount assessed, besides the levy of punishment.

(Para 43)

The institution of prosecution is a necessary action to be taken for the purpose of levy assessment and collection of the tax including penalty. If on the other hand, the Legislature intended to exclude and to destroy the right to institute prosecution, it could have excluded such right expressly and specifically. The institution of prosecution is only a last resort, if necessary to be adopted by the authorities for the purpose of levy assessment and collection of tax. Normally, prosecution is not resorted to. Even if prosecution is instituted, it is made compoundable. These circumstances would show that the Legislature would not have taken away that discretion of the authorities to institute prosecution in respect of assessment, levy and collection of tax before the commence-

ment of the Act of 1961. AIR 1961 SC 609 & AIR 1958 SC 795 & AIR 1955 SC 84 & AIR 1961 SC 1265 Rel. on AIR 1961 SC 1026 Dist. (Para 49)

(C) Income-tax Act (1961) Ss. 277 and 279 — Income-tax Act (1922) Ss. 52 and 53 — Prosecution under S 52 after valid sanction by Inspecting Assistant Commissioner — Commencement of Act of 1961 during pendency of prosecution — No objection on ground that under S 279 of new Act the Commissioner alone can institute prosecution, can be raised — If prosecution is launched under the old Act which was in force at the time of repeal, the entire procedure provided under the old Act alone should be followed. AIR 1961 SC 1265 Rel. on. (Para 53)

(D) Income-tax Act (1961) S 297 (2) (b) — Provision is not violative of Article 14 of Constitution — Classification of person who filed returns before commencement of Act as one class and persons who filed return after commencement of Act as another, is justifiable — Constitution of India Art. 14. (Para 54)

(E) Civil P. C. (1908) Pre. — Interpretation of statutes — Repealing statute — Construction — Duty of Court.

In the absence of any express repeal, the Courts do not lean in favour of an implied repeal. The Court will always be against the repeal of an earlier statute when the Legislature has not expressly done so unless the Court finds that the provisions of the two enactments are wholly incompatible or that the two statutes together would lead to wholly absurd consequences. (Para 12)

Cases Referred Chronological Paras

(1965) AIR 1985 SC 932 (V 52) =

1965 (2) Cri LJ 24, Harish Chandra v State of Madhya Pradesh 20

(1961) AIR 1961 SC 609 (V 48) =

(1961) 2 SCR 765 C. A. Abraham v I. T. Officer 51

(1961) AIR 1961 SC 1028 (V 48) =

(1961) 2 SCR 760 L. T. Commr. B & O v Pratabsingh 50

(1961) AIR 1961 SC 1265 (V 48) =

(1961) 3 SCR 923 Income-tax Commr v Bhikaji Dadabhai & Co 47, 53

(1958) AIR 1958 SC 795 (V 45) =

ILR (1958) Ker 1307 A. N. Lakshman v I. T. Officer 46

(1957) AIR 1957 SC 458 (V 44) =

1957 Cri LJ 575 Om Prakash v State of U. P. 33

(1955) AIR 1955 SC 84 (V 42) =

1955 Cri LJ 254, State of Punjab v Mohar Singh 41

(1955) AIR 1955 Bom 451 (V 42) =

ILR (1955) Bom 984 (FB) The State v Pandurang 34

(1955) AIR 1955 Cal 236 (V 42) =

1955 Cri LJ 784, Amarendra Nath Roy v State 35

- (1954) AIR 1954 SC 752 (V 41)=
1955-1. SCR 799=1954 Cri LJ 1822,
Zaverbhai Amalda v. State of
Bombay 28
(1937) 1937-1 KB 518=106 LJKB
367, Smith v. Benabo 19, 27
(1893) 1893-1 QB 612=62 LJMC 81,
Summers v. Holborn Dist. Board
of Works 18
(1891) 1891-2 QB 170=60 LJMC
172, Fortescue v. Vestry of
St. Mathew Bethnal Gree 16
(1864) 33 LJ P.M. & A. 193=12 LT
316, 'The India' 12

V. Ganapathisubramania Iyer, for Petitioner; C. K. Venkatanarasimhan, Special Public Prosecutor, for Respondent.

ORDER:— The petitioner in all these cases is the same. They are dealt with together as the points raised are substantially the same.

2. The revision petitioner is a cine-actor. Four complaints were filed against him by the Income-tax Officer, Central Circle-6, Madras, alleging that he had been systematically filing false returns of his income and had omitted to give true information regarding his professional earnings liable to be taxed from the year 1957 with a view to evade payment of tax and he had deliberately concealed material particulars of his income in spite of notices having been issued by the Department to file a true and correct statement of income. The first three complaints relating to the assessment years 1958-59, 1959-60, 1960-61 respectively were filed before the Chief Presidency Magistrate, Madras, under Section 52 of the Income-tax Act, 1922, and under Section 177, I. P. C. The fourth complaint which is in respect of the assessment year, 1961-62 was filed under Section 277 of the Income-tax Act of 1961 and under Section 177, I. P. C.

3. The revision petitioner raised preliminary objection before the learned Chief Presidency Magistrate in respect of the first three complaints on the grounds that the complaint under Section 177, I. P. C. was not maintainable in law as the operation of Section 177, I. P. C. was excluded to cases relating to Income-tax matters, that the prosecution under Section 52 of the Income-tax Act, 1922, will also not apply as it was repealed by the Income-tax Act of 1961 and that the sanction given by the Inspecting Assistant Commissioner of Income-tax was invalid. In the fourth complaint, an additional ground was taken that Section 277 of the Income-tax Act of 1961 is invalid and ultra vires of the Constitution of India and in excess of the administrative competence and opposed to Article 14 of the Constitution.

4. The learned Chief Presidency Magistrate dismissed the petitions holding that

the points of law raised by the petitioner were such that could be agitated in the course of trial. He, therefore, thought it unnecessary to give any finding on the points raised by the petitioner.

5. In respect of the first three complaints, the learned Counsel appearing for the petitioner contended, firstly that the complaint under Section 177, I. P. C. is incompetent as it must be deemed to have been impliedly repealed by the enactment of Sec. 52 of the Income-tax Act, 1922, and secondly, the prosecution under Section 52 of the Income-tax Act of 1922, is also incompetent as the Income Tax Act of 1961 repealed the earlier Act of 1922 and the proceedings in respect of prosecutions under the Income-tax Act of 1922 were not saved by the repealing Act of 1961. In respect of the fourth complaint, he further contended that Section 277 of the Income-tax Act of 1961 is ultra vires offending Article 14 of the Constitution.

6. To appreciate the contentions of the learned counsel for the petitioner in respect of the first three complaints, it will be necessary to note the relevant provisions of the Indian Penal Code and the Income-tax Act of 1922.

7. Section 177 I. P. C. is as follows:—
"Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes as true, information on the subject which he knows or has reason to believe to be false shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;"

8. Section 52 of the Income Tax Act, 1922 is as follows:—

"If a person makes a statement in a verification mentioned in Section 19A or Section 20A or Section 21 or Section 22 or sub-section (2) of Section 26A or sub-section (3) of Section 30 or sub-section (3) of Section 33, or furnishes a certificate under sub-section (9) of Section 18, which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

9. In this section, it may be relevant to note that by Act No. VII of 1939, the words "be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both" were substituted for the words "be deemed to have committed the offence described in Section 177 of the Indian Penal Code." Before the amendment Section 52 by its

deeming clause adopted the offence under Section 177 I. P. C., but after amendment, it has created a substantive offence under the Act with the same punishment as provided under Section 177 I. P. C.

10. Though Section 177 I. P. C. and Section 52 of the Income Tax Act of 1922 appear to be substantially the same, the former is wider in its scope whereas the latter confines only to the matters mentioned in the said section. Section 177 I. P. C. deals with the offence mentioned therein generally making any false information furnished by a person who is legally bound to give such information to any public servant, an offence whereas Sec. 52 of the Income-tax Act of 1922 confines itself in respect of false information furnished in the verification submitted by the assessee to the Income-tax Officer. It does not include even any false information furnished by an assessee in any proceeding under the Income-tax Act other than the verification mentioned in the said section. It, therefore, appears that any false statement in the proceedings under the Income-tax Act other than the statements made in verification mentioned in Section 52, will come within the mischief of Section 177 I. P. C. The facts constituting an offence under S 52 of the Income-tax Act may very well be an offence under Section 177, I. P. C. But the facts constituting an offence under Section 52 of the Income-tax Act, as the scope of the latter, as pointed out already, is confined to the matters mentioned therein. Section 26 of the General Clauses Act provides that when two or more statutes create an offence of the same nature, the offender shall be liable to be prosecuted and punished under either or any of these statutes but shall not be liable to be punished twice for the same offence. Prima facie from the facts of the present case, the prosecution of the petitioner under Section 177 I. P. C. and Section 52 of the Income-tax Act of 1922 would appear to be competent by virtue of Section 26 of the General Clauses Act. But even if both the charges are proved, there cannot be two punishments.

11. It is contended that Section 177 I. P. C. must be deemed to have been repealed as it is repugnant to Section 52 of the Income-tax Act of 1922 as both cannot co-exist in view of certain material differences between these two sections. The differences are said to be as follows:-

Section 177, I. P. C. is non-compoundable whereas the offence under Sec. 52 of the Income-tax Act is compoundable with the permission of the Inspecting Assistant Commissioner by virtue of Clause (2) of Section 53 of the said Act. The prosecution under Section 177 I. P. C. can be instituted by any public servant under Section 193 Cr. P. C. whereas the prosecution under Section 53 of the Income-

tax Act has to be instituted at the instance of the Inspecting Assistant Commissioner as provided under Section 53 (1) of the said Act. An offence under Section 177 I. P. C. is triable by a Presidency Magistrate a Magistrate of the First Class or Second Class whereas the offence under Section 52 cannot be tried by a Second Class Magistrate unless specially empowered by the Central Government. If penalty is levied under the Income-tax Act in respect of certain matters, no prosecution can be instituted by virtue of the provision under Section 28 (4) of the Income-tax Act in respect of the same matters whereas there is no such bar under Section 177 I. P. C. It is contended that both the provisions cannot co-exist as they are repugnant to each other.

12. Before we consider this aspect, it may be necessary to consider whether the Parliament intended to repeal Section 177 I. P. C. by enacting Section 52 of the Income Tax Act. Both are Central Acts. It is very significant to note that the later enactment does not expressly repeal Section 177 I. P. C. In the absence of any express repeal, the courts do not lean in favour of an implied repeal. The court will always be against the repeal of an earlier statute when the Legislature has not expressly done so unless the court finds that the provisions of the two enactments are wholly incompatible or that the two statutes together would lead to wholly absurd consequences. In this context it will be worthwhile to note the passage at page 344 of *Craies on Statute Law* (5th Edition) quoting Dr Lushington in — *'The India'*, (1864) 33 L. J. P. M. & A 193 which is as follows

"What words will establish a repeal by implication it is impossible to say from authorities or decided cases. If on the one hand the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms, so on the other hand, it is not necessary that any express reference be made to the statute which it is intended to repeal. The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject-matter were taken away by the subsequent statute."

13. It has, therefore, to be considered whether the subject-matter of both the enactments is the same and if so, whether the later statute namely, Section 52 of the Income-tax Act had taken away the entire subject-matter of Section 177, I. P. C. before we consider the repugnancy or incompatibility between these two provisions. To determine whether a later statute repeals by implication an earlier,

it is necessary to scrutinize the terms and consider the true meaning and effects of the earlier Act. The Indian Penal Code is a codification of the common law offences and comes under Item I in the concurrent List III of the VIIIth Schedule under the head "Criminal Law, including all matters included in the Indian Penal Code at the commencement of the Constitution". This item excludes offences against laws with respect to any of the matters specified in List I or List II. The Indian Income-tax Act comes under Item 82 in List I "taxes on income other than agricultural income". The purpose of the enactment of Income-tax Act is to assess and collect tax on income and to enforce the provisions of the said Act, to achieve the said purpose. The Income-tax Act created offences of its own providing punishments in respect of certain matters by virtue of the power conferred on the Parliament in Item 93 of List I, namely offences against laws with respect to any of the matters in the list.

14. The object and the purposes, therefore, of these two enactments are different. The subject-matter of the offence under Section 177, I. P. C. is much wider and comprehensive than the subject-matter of the offence created under Section 52 of the Income-tax Act for the purpose of enforcing effectively the provisions of the said Act. The Indian Penal Code is a penal statute whereas the Income-tax Act is fiscal and deals with revenue. Can it be said in this background, that Section 52 of the Income-tax Act though creates an offence similar to that of Section 177, I. P. C. but narrower in scope, takes away the entire subject-matter provided under Sec. 177 I. P. C.? The object and the purpose of the two enactments being different and the offence under the enactment being wider than the other, I am of the view that it would not have been intended by the later enactment to repeal the earlier. That this could not have been the intention of the Legislature can be gathered from some of the provisions of the Income-tax Act itself, as for instance, in cases where penalty is levied in respect of certain matters provided in Section 28 (4) of the Act, the prosecution is barred in respect of the same matter under that Act. If the intention of the Legislature was that the prosecution would be barred even under any other enactment like the Indian Penal Code in respect of the same matter, it could have said so specifically that the prosecution is not only barred under the Income-tax Act but also under any other law. In the absence of such a provision, it is reasonable to infer that the intention of the Legislature in creating offence under Section 52 is not to repeal any other similar offence under

any other law. Both the statutes are two distinct enactments and they can certainly stand together.

15. The learned Counsel appearing for the petitioner relied upon the following decisions in support of his contention.

16. In the decision in *Fortescue v. Vestry of St. Mathew Bethnal Gree*, (1891) 2 QB 170, it has been held that there was an implied repeal of Section 72 of Michael Angelo Taylor's Act by Section 119 of the Metropolis Management Act, 1855. While examining both the provisions of the earlier and later statutes, Charles, J., observed that both Acts deal with the question of paving and management of streets in the Metropolis. It is further observed at page 177 of the said decision as follows:—

"It is true that Section 72 of the earlier Act is not expressly repealed, but it is a well-recognized principle that an Act describing the quality of an offence, or prescribing a particular punishment for it, is impliedly repealed by a later Act altering the quality of the offence, or prescribing another punishment for it."

17. In the present case, as already found by me, the subject-matter of the two enactments, namely, Indian Penal Code and the Income-tax Act is not the same. The quality of the offence mentioned in Section 177, I. P. C. is not altered in Section 52 of the Income-tax Act. Nor a different punishment is provided under the latter from what is provided under the former. The punishment provided under both the sections is the same namely, simple imprisonment of six months or a fine of one thousand rupees, or both.

18. In *Summers v. Holborn District Board of Works*, (1893) 1 QB 612, it was held that Section 6 of the Metropolitan Streets Act, 1867 and Section 1 of the Metropolitan Streets Act Amendment Act, 1867 repealed Section 65 of the Michael Angelo Taylor's Act. In that case also, the subject-matter of both the Acts was the same and in the later Act, when there was a variation from the earlier which was entirely inconsistent with the later, it was held that there was an implied repeal of the earlier by the later statute. Even in that case, Lord Coleridge, C. J., observed that difficulties arise in determining whether there would be repeal by implication in the particular case before the Court.

19. In *Smith v. Benabo*, 1937-1 KB 518, it was held that Section 75 of the General Paving Metropolis Act, 1817 was impliedly repealed by Sections 122 and 123 of the Metropolis Management Act, 1855. There also the subject-matter of both the enactments was the same. These decisions, in my opinion, do not support the contention of the petitioner.

20. The learned Counsel also relied upon a decision of the Supreme Court in *Harish Chandra v State of Madhya Pradesh*, AIR 1965 SC 932. The point that arose in that case was whether the extension of the Essential Supplies (Temporary Powers) Act, 1946 and the Indian Scrap Order of 1943 to Madhya Bharat repealed the Madhya Bharat Essential Supplies (Temporary Powers) Act, 1948 and the Madhya Bharat Scrap Control Order. Here also, the subject-matter of the Central Act and the State Act was substantially the same. But the Supreme Court held that the State Act was repealed by the Central Act as the provisions were not identical and could not therefore, stand together. The Supreme Court pointed out that there were marked differences between the provisions of the two orders and found that it would not be possible for the two to stand together. The Supreme Court observed as follows: at page 937.

"What we desire to emphasise is that the two orders, though achieving substantially the same object, are not identical in their provisions. If that is so, it is obvious that on the extension to Madhya Bharat of the Indian Scrap Order the Madhya Bharat Scrap Order would stand repealed and be replaced by the Indian law."

21. If the subject-matter of the two enactments are not the same and if the subject-matter of the two sections, namely, Section 177, I. P. C. and Sec. 52 of the Income-tax Act are not identical in that the earlier is wider and the latter is narrower in scope, the inconsistency or the repugnancy between these two provisions will not be a bar for them to co-exist and stand together. Only if it is found that the subject-matter of both the enactments and the subject-matter of both the offences are the same and identical, the question of inconsistency or repugnancy may arise and if the provisions of the earlier Act are repugnant or inconsistent with the latter, it can be presumed that the latter will prevail over the earlier and repeal the earlier. The learned Counsel contended that the subject-matter of both the offences being the same and identical, they cannot stand together in view of the differences and inconsistencies between these provisions and that, therefore, Section 177 I. P. C. must be deemed to have been repealed by Section 52 of the Income-tax Act, at least to the extent touching the matters provided under the later Act. I have already found that the subject-matter of the two enactments is not the same. But, however assuming that they are the same and identical, we have to see whether there are differences and inconsistencies between these two provisions and if so, whether they are of

such a nature that they could not stand together.

22. We have already noted the apparent differences between the two provisions, namely (1) Section 52 of the Income-tax Act is compoundable whereas Section 177 I. P. C. is not (2) the prosecution under Section 52 of the Income-tax Act is to be instituted at the instance of the Inspecting Assistant Commissioner whereas the prosecution under Section 177 I. P. C. is by any public servant provided under Section 195 Cr. P. C. (3) the offence under Section 177 I. P. C. is triable by a Presidency Magistrate, a Magistrate of the First Class or Second Class whereas the offence under Section 52 cannot be tried by a Second Class Magistrate unless specially empowered by the Central Government, and (4) if a penalty is levied under the Income-tax Act, the prosecution for any offence under that Act relating to the same matter for which the penalty has been levied, will be barred. It has been already noted that there was no difference either in the procedure to be adopted in respect of trial of both these offences or in the matter of punishment. These differences, in my opinion, are not at all inconsistent or repugnant to each other.

23. If the offence under Section 52 of the Income-tax Act is compoundable, that may not be a reason to say that a person cannot be prosecuted under Section 177 I. P. C. since it is not compoundable. There cannot be any dispute that a person can be prosecuted under both the enactments, if the facts disclosed the offences provided under the said enactments. If for instance, in the present case, it is shown that the offence under the Income-tax Act was compounded, that may be a defence for him when he is prosecuted under that Section, but he cannot escape the prosecution under Section 177 I. P. C. if the facts disclosed offences under that section. If in a particular case a person is prosecuted under several offences and some of them being compoundable, it cannot be said that the prosecution for non-compoundable offences along with compoundable offences is incompetent. If in such a case the parties compound the compoundable offences, the prosecution could still continue with the trial of non-compoundable offences. Similarly if the prosecution has to be instituted at the instance of the Inspecting Assistant Commissioner, for an offence under Section 52 of the Act it can still co-exist and stand together with the offence under Section 177 I. P. C. though the prosecution under that Section could be instituted only by the public servant. If under both these sections a person is prosecuted and it is shown that the prosecution under any one of these two sections is incompetent for the lack of pro-

per sanction, to that extent the prosecution will be void. For instance, if proper sanction was not obtained under Section 52; but the sanction under Sec. 177 I. P. C. is properly obtained, the prosecution under Sec. 52 will be incompetent whereas the trial under S. 177 I. P. C. can proceed. Even in respect of trial of both these offences, it is provided that a Presidency Magistrate or a First Class Magistrate can try, but Section 177 I. P. C. can be tried by a Second Class Magistrate unless he is specially empowered by the Central Government. This, in my opinion, does not make any difference. If a person is prosecuted for two offences, one triable by a superior Court and the other by a Lower Court, the Superior Court can try both the offences. In this case, the Second Class Magistrate cannot try the offence under Section 52 of the Income-tax Act. Certainly, the First Class Magistrate or a Presidency Magistrate as the case may be, may try. In Craies on Statute law — Page 367 — it is stated.

"Thus an Act authorising trial by quarter Sessions can stand with an earlier Act enacting that the offence should be tried by the Queen's Bench or at Assizes."

24. If penalty is levied in respect of the matters mentioned in Section 28 of the Act, by virtue of Clause (4) of the said Section, no prosecution for an offence against that Act could be instituted in respect of the same facts.

25. Even here, I do not find any inconsistency between the provisions of the two enactments. The prosecution under this Act will be barred if penalty is levied. It can be defended in a prosecution under Section 177 I. P. C. and Section 52 of the Income-tax Act that the prosecution under Section 52 is barred because of the imposition of penalty and if true, the result would be that the prosecution under Section 52 could be dropped; but still, the prosecution under Section 177 I. P. C. would continue. As already noted, it is very significant to note that Section 28 (4) has barred the prosecution in respect of an offence under that Act namely, the Income-tax Act. Section 28 (4) of the Act runs as follows:

"No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section."

26. This provision does not, therefore, bar a prosecution for an offence under any other Act in respect of the same facts if they constitute an offence. Even assuming these differences exist, it cannot be said that both the provisions are wholly incompatible or the application of both would lead to absurdity. Section 177 I. P. C. is a common law offence.

27. In Archbold's Criminal Pleading Evidence and Practice 34th Edition page

4, it is stated that "if the offence is one which was already an offence at common law and the statute merely prescribes a new penalty or a new remedy, the remedy at common law is not taken away except by express negative words". It is, therefore, clear that even if a new remedy is provided under the later Act, it does not take away the offence under the common law. The learned Counsel relied upon the decision in 1937-1 KB 518. In that case, the proceedings were taken under a statute which has been repealed instead of being taken under one which was in force. In that case, Section 122 of the Metropolis Management Act, 1855, in substance described exactly the same offence as that which was described by S. 75 of the General Paving Metropolis Act, 1817 But the later Act provided different penalties and procedure from those imposed and prescribed by the earlier Act. In that context, Goddard, J., observed as follows; at page 525:

"..... it is a well settled rule of construction that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute."

28. The Supreme Court also reiterated the same principle in Zaverbhai Amaldas v. State of Bombay, 1955-1 SCR 799= (AIR 1954 SC 752) in the following terms:

"It is a well settled rule of construction that if a later statute again describes an offence created by a previous one and imposes a different punishment or varies the procedure, the earlier statute is repealed by the later statute."

29. In the instant case, we have noted more than once that the punishment imposed and the procedure prescribed in both the enactments are the same and there are no variations. The procedure to be adopted in the trial of the offence under both the enactments is summons procedure and there is no variation between these two enactments in respect of the procedure. Therefore, this decision will not apply to this case.

30. The penalties imposed by statute for offences already punishable under a prior statute are regarded as cumulative or alternative and not as replacing the penalty to which the offender was previously liable.

31. Maxwell, on the Interpretation of Statutes, 10th Edition at page 186 states:

"It would seem that an Act which (without altering the nature of the offence, as by making it felony instead of misdemeanour) imposes a new kind of punishment, or provides a new course of procedure for that which was already an offence, at least at common law, is usually regarded as cumulative and as not superseding the pre-existing law."

32. In page 369 of *Crales on Statute Law*, it is stated thus:

"Subsequent Acts of Parliament in the affirmative, giving new penalties and instituting new modes of proceedings, do not repeal former methods and penalties ordained by preceding Acts without negative words."

33. In *Om Prakash v State of U. P.*, AIR 1957 SC 458 in dealing with the point whether the Prevention of Corruption Act, 1947 repealed Sec. 409 I P. C. as far as public servants are concerned it was observed that the Legislature would not have intended in the normal course of things that a temporary statute like the Prevention of Corruption Act should supersede an enactment of antiquity, viz., the Penal Code even if the matter covered the same field.

34. In the *State v Pandurang*, AIR 1955 Bom 451 (FB), it was held by the Full Bench that Section 409 I P. C. was not impliedly repealed by the Prevention of Corruption Act as it was impossible to say that the provisions of the two were wholly incompatible or that the two statutes together would lead to wholly absurd consequences. It was pointed out in that case that there were inconsistencies between the two enactments in that the Prevention of Corruption Act provided a different procedure in respect of trial, sanction, evidence etc. After giving due consideration to these inconsistencies, applying Section 26 of the General Clauses Act, Chagla C. J., on behalf of the Bench observed as follows at page 453 with which I respectfully agree:

"..... when Section 26 provides that the offender shall be liable to be prosecuted and punished under either or any of those enactments, what the Legislature clearly intended was that that he shall be liable to be prosecuted according to the procedure laid down under the enactment under which he was being prosecuted, and in the Full Bench decision also the view that we have taken is that the special procedure set up under the Prevention of Corruption Act does not entitle a public servant to insist that the only proceeding which would be instituted against him must be under the Special Act and not under the Criminal Procedure Code

Therefore in our opinion, Section 26 has application provided the same act has been constituted an offence under more than one enactment. It makes no difference to the application of Section 26 that the procedure laid down in the two enactments with regard to the prosecution of the offender is different or even if different sentences are provided under the two enactments"

35. The Calcutta High Court in *Amarendra Nath Roy v State*, AIR 1955 Cal 236, had taken a similar view

36. For the foregoing reasons, I hold that Section 52 of the Income-tax Act, 1922 has not repealed Section 177 I. P. C. Therefore, the prosecution under Section 177 I P. C. in all the four complaints is competent

37. In respect of the prosecution under Section 52 of the Income-tax Act, 1922, in the first three complaints, it was contended by the learned Counsel for the petitioner that by the repeal by the Income-tax Act of 1961, the prosecution in respect of the prior proceedings under the earlier Act was not saved and that, therefore, the prosecution under Section 52 of the repealed Act is unsustainable

38. Section 297 (1) of the Income-tax Act, 1961, repealed expressly the Income-tax Act, 1922 and under clause (2) the matters referred to in clause (2) (a) to (m) have been saved notwithstanding the repeal of the Income-tax Act, 1922. It was contended that under Clause (2) of Section 297, the prosecution in respect of proceedings, pending on the commencement of the Act of 1961 is not expressly saved and, therefore, it must be presumed that the Legislature had not intended to save prosecutions in respect of proceedings pending at the commencement of the said Act,

39. Section 6 of the General Clauses Act is as follows:

"Where this Act, or any Central Act or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not —

(a) revive anything not in force or existing at the time at which the repeal takes effect, or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed

40. This section emphasises therefore, that unless a different intention appears in the repealing Act, ordinarily any legal proceeding can be instituted in respect of

any matter pending under the repealed Act if that Act was in force at the time of repeal.

41. The principle under Section 6 has been succinctly stated in *State of Punjab v. Mohar Singh*, AIR 1955 SC 84 which is as follows:—

"Wherever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. The Court cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. The provisions of Section 6 of the General Clauses Act will apply to a case of repeal even if there is simultaneous enactment unless a contrary intention can be gathered from the new enactment. Of course, the consequences laid down in Section 6 of the Act will apply only when a statute or regulation having the force of a statute is actually repealed."

42. It has, therefore, to be considered whether the repeal and the saving clause under Clause (2) of Section 297 has in fact destroyed the right to institute prosecution in respect of proceedings which were pending at the commencement of the Act. A careful scrutiny of the provisions will indicate that it was not the intention of the Legislature to take away the right of instituting prosecution in the circumstances aforesaid.

43. Section 297(2)(a) says that "where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed." The question is whether the words "Proceedings for the assessment of that person for that year" are so comprehensive, so as to include even the proceedings in respect of prosecution. I am of the view

that the words are comprehensive in the context and that would include every proceeding till the assessment is realised. There cannot be any doubt, institution of prosecution is one of the modes to realise the amount assessed, besides the levy of punishment.

44. "Proceeding" is defined in *Shorter Oxford English Dictionary* as "a legal action or process; any act done by authority of a Court of law; any step taken in a cause by either party". In *Ramanatha Iyer's Law Lexicon*, "Proceeding" is described as "an act necessary to be done in order to attain a given end; a prescribed mode of action for carrying into effect a legal right."

45. The term "proceeding", therefore, is a very comprehensive term and generally speaking, means prescribed modes of action for enforcing a legal right and hence it necessarily embraces the requisite steps by which judicial acts are invoked. In my view, the "proceedings" referred to under Section 297 (2) (a) will no doubt include the prosecution also and it is, therefore, saved.

46. In *A. N. Lakshman v. I. T. Officer*, AIR 1958 SC 795, while considering the meaning of "assessment" as occurred in Section 13 (1) of Finance Act, 1950, it was held that the word "assessment" must be taken in its comprehensive sense and the collection of words in the said section namely 'levy, assessment and collection' would indicate that what was meant was the entire process by which the tax is ascertained, demanded and realised.

47. In *Income-tax Commissioner v. M/s. Bhikaji Dadabhai & Co.*, AIR 1961 SC 1265, a point arose whether the words "Levy, assessment and collection of income-tax" would include penalty. It was held that imposition of penalty being a necessary concomitant or incident of the process of assessment, levy and collection of tax would include penalty also. What happened in that case was that the Hyderabad Income-tax Act was repealed by the Finance Act, 1950. Sub-section (1) of Section 13 of the Finance Act, 1950 provided:

"If immediately before the 1st day of April, 1950, there is in force in any part B State ... any law relating to income-tax or super-tax — that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922. "

48. From this, it was contended that what was saved after repeal was only 'levy, assessment and collection of income-tax' and penalty was not saved. The High Court held that 'penalty' was not

saved as it was not expressly provided and according to the High Court, what was saved was levy, assessment and collection of income-tax. The Supreme Court dissented from the view of the High Court and held that this will include 'penalty' also and that the proceedings for imposing a penalty could be continued even though it was not specifically saved.

49 It was contended by the learned Counsel that Section 297 (2) (f) saves any proceeding from the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, and that, therefore, when penalty has been specifically saved, if the Legislature had intended to save prosecution also, it could have specifically said so. I am unable to agree with the contention of the learned Counsel. The institution of prosecution is a necessary action to be taken for the purpose of levy assessment and collection of the tax including penalty. If on the other hand the Legislature intended to exclude and to destroy the right to institute prosecution, it could have excluded such right expressly and specifically. The institution of prosecution is only a last resort, if necessary to be adopted by the authorities, for the purpose of levy, assessment and collection of tax. Normally prosecution is not resorted to. Even if prosecution is instituted it is made compoundable. These circumstances would show that the Legislature would not have taken away that discretion of the authorities to institute prosecution in respect of assessment, levy and collection of tax before the commencement of the Act of 1961.

50 The learned Counsel for the petitioner relied upon the decision in *I. T. Commr B & O v Pratabsingh* AIR 1961 SC 1026. In that case, the Income-tax Officer issued notice to the assessee under the old Section 34 on 8-8-1948 for assessing the escaped income. The assessment was completed on 26-8-1948. Section 34 was amended by Act 48 of 1948 which came into force on 8-9-1948. Proviso to Section 34 after amendment required that the Commissioner must be satisfied that the case was fit for the issue of notice under Section 34. It was held that the amended provision indicated a different intention which excluded the application of clauses (b) and (c) of Section 6 of the General Clauses Act. In that case, it is very significant to note that though assent was obtained for the amendment to Section 34 on 8-9-1948, according to the proviso to that section, it was deemed to have come into force on 20-3-1948. It is, therefore, clear by virtue of the proviso in that case that even in August, 1948 when notice was given by the Income-tax Officer, the amendment, to Section 34 namely that the Commissioner must be

satisfied that the case was fit for the issue of notice under Section 34, was in force by virtue of the deeming clause. This decision will not certainly apply to this case as the repealed Act was in force at the commencement of the repeal.

51. In *C. A. Abraham v I. T. Office* (AIR 1961 SC 609) the Supreme Court observed that when interpreting a fiscal statute the court cannot proceed to make good deficiencies if there be any and must interpret the statute as it stands and in case of doubt in a manner favourable to the tax-payer.

52. Taking into consideration that the institution of prosecution is not a part of the levy and assessment of the tax but a consequence of failure to do certain things provided in the Act, I do not think any doubt can be entertained in respect of the interpretation of the saving clause. Thus offences during the continuance of a statute can be prosecuted and punished even after its repeal as the repealing Act had not obliterated the offences committed when the earlier statute was in force. I am, therefore, of the view that the prosecution under Section 52 of the Income-tax Act, 1922 is not taken away by the repealing Act and the prosecution under that section is competent and sustainable in law. It was also contended by the learned counsel that the repealing Act had provided under Section 279 of the said Act that the Commissioner of Income-tax alone could sanction prosecution for the offence under Section 277 of the new Act, and that the prosecution in the present cases was sanctioned by the Inspecting Assistant Commissioner which would be invalid. There is no substance in his argument.

53. It is clear that under Section 53 (1) of the old Act, the Inspecting Assistant Commissioner can institute prosecution under Section 52 of the said Act, but whereas under the new Act, the Commissioner alone can institute prosecution under Section 277 of the new Act which is similar to the offence under Section 52 of the old Act. At the commencement of the new Act, Sections 52 and 53 were in force. If that were so applying the principle laid down in AIR 1961 SC 1263 the Inspecting Assistant Commissioner would be the competent authority to institute prosecution under Section 52 of the old Act. If prosecution is launched under the old Act which was in force at the time of repeal, the entire procedure provided under the old Act alone should be followed.

54. In respect of the fourth complaint relating to the prosecution under Section 277 of the Income-tax Act, 1961 which is a substantial reproduction of Section 52 of the old Act, it is contended by the learned Counsel in addition to the points

raised in the other three complaints that Section 297 (2) (b) is violative of Article 14 of the Constitution in that it made a discrimination between the persons placed in similar position in respect of return of income filed after the commencement of the new Act for the assessment year ending on the 31st day of March, 1962 and persons who filed return of income for the said period before the commencement of the new Act. I do not see any force in this argument at all. The learned Counsel is unable to show as to how Article 14 is attracted. The discrimination made between the persons who filed the returns before the commencement of the new Act must be taken as one class and the persons who filed their returns after the commencement of the Act as another. In my view, this will be justifiable classification. As the Income-tax Act of 1961 in substance has reproduced the relevant provisions dealt with, of the old Act in respect of the first three complaints, the points which were taken in the first three complaints apply to this also and since I have answered all those points, it may not be necessary to repeat the same.

55. In the result, I find that there is no substance in any of the points raised by the learned Counsel and all the petitions are dismissed.

CWM/D.V.C.

Petitions dismissed.

AIR 1969 MADRAS 155 (V 56 C 36)
RAMAKRISHNAN AND NATESAN, JJ.

V. Mohamed Haneef and Co. and others, Petitioners v. Regional Director, Employees' State Insurance Corporation, Respondent.

Writ Petns. Nos. 1166 of 1962, 2652 of 1966 and Letters Patent Appeal No. 43 of 1964, D/- 3-11-1967.

(A) Employees' State Insurance Act (1948), S. 2 (12) — 'Factory' — In case of a tannery, mere use of power for pumping water cannot be described as use of power in manufacturing process so as to attract definition of 'factory' — AIR 1961 Mad 7, Overruled — Question whether manufacturing process is carried on with aid of power is one of inference from facts — Held, tanneries in question did not come within definition of factory.

In the case of a tannery the mere use of power for pumping water which is used for the subsequent manufacturing purposes cannot be described as the use of power in the manufacturing process so as to bring the tannery within the definition of 'factory' under the Employees' State Insurance Act. The reference to pumping of oil, water or sewage under

the definition of manufacturing process in S. 2 (k) (ii) of the Factories Act is intended to deal only with pumping installations where the main process itself is pumping of oil, water or sewage. The sub-clause is not intended to cover pumping which is merely ancillary to some other manufacturing process: AIR 1961 Mad 7, Overruled; ILR (1965) 1 Mad 293, Approved.

(Para 19)

The question whether the manufacturing process is being carried on with the aid of power is ultimately one of inference from facts. The test is not whether power is necessary for the manufacturing process but whether in fact power is used in the manufacturing process. The nature of the definition is such that for its application no principles in the abstract could be laid down: Case law discussed.

(Para 19)

The mere existence of the pump set worked by power cannot make the premises a factory. The requirement of the definition is not just that power is used in any part of the premises. The essential postulate is that power must be used in aid of the manufacturing process in the premises.

(Para 20)

The pumping of water has little to do with the actual tanning process. It cannot be said that the pumping process is so integrated with the manufacturing process within the tannery premises as to make it part of the manufacturing process. The pumping of water by power is not incidental to the tannery process which goes on within the premises. In the absence of other indicia, it will be making a distinction without difference to hold that as the pump set is just outside the compound wall it must be held to be in aid of the manufacturing process. The absence of distance in a case of this kind without any other clinching features shows no nexus between the manufacturing process and the pumping. To differentiate between tanneries where the pump set is just outside the premises and adjoining the compound wall and tanneries where the pump set is situated at a distance, and make the former liable for contribution, will be to make a classification without any rational basis for the same. It follows that the tanneries in question as worked do not fall within the scope of S. 2 (12) of the Employees' State Insurance Act read with the Factories Act, 1948.

(Para 21)

(B) Employees' State Insurance Act (1948), S. 2 (12) — Word "Premises" — Meaning of — Includes precincts — Separation of place where 20 persons are employed from location of power plant by boundary walls — Establishment is, nevertheless, "factory".

To make the place a factory it is a requirement that a place forming precincts must be a definite place with bound-

daries, and it is essential that the place must be an adjunct of the principal premises. But merely enclosing a part of the premises of an establishment where 20 persons are employed with boundary walls and locating the place where power for the manufacturing process of the establishment is utilised just outside or adjoining land, may not be sufficient to take the establishment out of the definition of 'factory' if all the other conditions are satisfied. Case law discussed.

(Para 6)

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Pleader for Respondents (in W P Nos. 1166 of 1962 and 2652 of 1966) and for Appellant (in L. P. A. No 43 of 1964)

NATESAN, J.—In these cases we are concerned with the true scope of the definition of 'factory' in Section 2 (12) of the Employees' State Insurance Act (Central Act 34 of 1948) and whether the tanneries in question in these cases would come under that definition of 'factory'. For the tanneries it is contended that they do not, while the Regional Director Employees State Insurance Corporation, contends that they do fall under the definition of 'factory' in the Act. A brief reference to the circumstance under which the question arises for determination is necessary at this stage for a proper appreciation of the problem.

2 The petitioner in W P No 1166 of 1962 owns a tannery at Ranipet in North Arcot District, wherein the several processes of tanning of hides and skins are carried on by manual labour. The premises where the tanning is carried on are enclosed with walls and within the premises the raw and dried skins and hides undergo various processes, such as soaking, lining, unhairing, flashing, delining, scudding, colouring, buffing, etc. The water which is essential at the several stages of the tanning processes is obtained from a well in an open space outside the compound. Water from the said well is pumped into a tub near the well with the help of one horse power motor pump set worked by electric energy. From the aforesaid tub the water is led by a channel on the ground into the premises for washing, cleaning and other tannery processes done by hand. The water flows through the channel into the tannery premises by gravity. More than twenty people are employed in the process of tanning within the premises but have no access to the pump set which is in charge of an independent care-taker. Electric Power is not used within the premises at any stage for the tanning processes.

The dispute between the petitioner and the Regional Director Employees State Insurance Corporation, the respondent in the petition, arises on the demand of the respondent for contribution from the petitioner under the Employees' State Insurance Act. Section 38 of the Act enjoin that all employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act. The contribution under the Act in respect of an employee shall comprise contribution payable by the employer referred to as the employer's contribution and the one payable by an employee referred to as the employee's contribution. Under Section 73 D the employer's special contribution payable under Chapter V-A may be recovered as if it were an arrear of land revenue and

Section 85 provides for penalties for failure to submit returns, to pay contributions, etc., in terms of the several provisions of the Act. The petitioner contends that for the establishment to come within the definition of 'factory' under the Act, the basic requirement of the definition, namely, that the manufacturing process must be carried on with the aid of power, should be satisfied, and that it is not so in the present case. Therefore the petitioner denies its liability to submit returns and pay contributions under the Act. There is no serious dispute as to the facts by the Regional Director. It is only said that the well with the pump set is situated just about five feet north-west from the western wall of the tannery premises and the eastern embankment of the well is connected with the western wall of the tannery premises. It is also said that the petitioner pays rent for the tannery building and also for the open space where the well is situated.

The Regional Director would contend that the requirements of 'factory' within the meaning of Section 2 (12) of the Act are satisfied in this case. The petitioner, on threat of proceedings, by the Regional Director of non-compliance with the requirements under the Act and default of payment of contribution, has come to this Court praying for the issue of writ of mandamus, against the respondent directing him to forbear from enforcing the provisions of the Act.

3. The Letters Patent Appeal No. 43 of 1964 and W. P. No. 2652 of 1966 relate to another tannery located at Vaniyambadi in North Arcot District. The East Asiatic Company (India) Private Ltd., owning the tannery applied in the Court of Addl. Commissioner for Workmen's Compensation for a declaration that it was not liable to the Employees' State Insurance Corporation for the employer's special contribution prescribed in Section 73-D of the Act in respect of its tannery. Here also power is not used within the factory premises for any manufacturing purpose. But power is used only for pumping out water from a well outside the tannery premises. There is a well inside the tannery premises with an oil engine for pumping water therefrom. But the water from this well is not used in the manufacturing process due to some technical reasons. Water from the well outside the premises alone is brought through conduit pipes for the manufacturing process. The well in question from which water is drawn for manufacturing process is situated in a cocoanut-thope, a furlong away from the tannery premises; and in the open space between the well and the tannery premises there is another tannery owned by a third person.

This well, it is said, is common to several persons and with the aid of

power water is pumped from the well to a raised tub and stored there. From this tub the water flows through pipe lines laid under the premises of the tannery belonging to a third party. On reaching the petitioner's tannery premises the water is filled in pits for the several tanning processes. Power is used only at the stage of lifting the water from the well to the tub and thereafter there is free flow of water to the tannery premises by the force of gravity. Within the premises the tanning processes are carried on with the manual labour and no power is used. The Addl. Commissioner for the Workmen's Compensation decided that the act of pumping water is also manufacturing process and as admittedly there is a well inside from which water is pumped by an oil engine, all the essentials of definition of 'factory' under the Act are satisfied.

Against this order of the Addl. Commissioner for Workmen's Compensation, the owners of the tannery preferred an appeal to this Court as provided for under Section 82 (2) of the Act. On this appeal Venkatadri, J., upheld the contention of the owners of the tannery that they were not carrying on manufacturing process with the aid of power in any part of the premises and that therefore the order of the Addl. Commissioner for Workmen's Compensation was not correct. Before the learned Judge the very maintainability of the appeal was questioned. But the learned Judge overruled the objection. The Letters Patent Appeal has been preferred by the Regional Director against the decision of Venkatadri, J., inasmuch as the maintainability of the appeal has been questioned and the owners of the tannery premises are not sure of the same, they have ex abundanti cautela preferred W. P. No. 2652 of 1966 under Article 226 of the Constitution for the issue of a writ of certiorari or any other appropriate writ quashing the impugned order. As differing views have been expressed by learned single Judge of this Court in the application of the Act to tanneries utilising water similarly obtained, W. P. No. 1166 of 1962 which in the first instance came up for hearing before Srinivasan, J., was referred by the learned Judge for hearing by a Division Bench. It is thus all the matters are now before us.

4. The essential requisite for the establishments in question — we are using a natural expression — to be liable for contribution is that they must fall within the definition of 'factory' in the Employees' State Insurance Act, 1948. The Act which is intended to provide for certain benefits to employees in case of sickness, maternity and employment injury and related matters, by Section 1 (4), enacts that it shall apply in the first instance to all

factories including factories belonging to the Government other than seasonal factories Under Section 2 (12) 'factory' is defined thus:—

"'factory' means any premises including the precincts thereof whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Indian Mines Act 1952 or a railway running shed."

The expressions "manufacturing process" and "power" shall have the meanings respectively assigned to them in the Factories Act 1948"

The Factories Act to which we have to refer for the definition of the expressions, "manufacturing process" and "power" defines factory under Section 2 (m) thus:

"'factory' means any premises including the precincts thereof.—

(1) Whereon ten or more workers are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952."

(Relevant part only extracted).

The material difference in the language is, whereas in the Factories Act ten or more persons should be working in the premises, in the Act now under consideration the requirement is 20 or more persons and secondly whereas the Factories Act speaks of "ten or more workers are working or were working", the Act under consideration speaks of persons "employed or were employed for wages". We may here point out that even under the Employees' State Insurance Act, 1948, previously the language employed was 'persons are working or were working' and it is by Act 44 of 1966 the words 'are employed or were employed for wages' were substituted. The amendment gets a wider coverage of persons entitled to be benefited by the Employees' State Insurance Act. As will be apparent by a reference to a definition of 'worker' and 'employee' in the respective Acts, whereas the object of the Factories Act is to secure health, safety and welfare, proper working hours and other facilities for workers employed and working in factories, the object of the State Employees' Insurance Act is to secure maternity, disablement and medical benefits to employees in factories and establishments and also benefits to their dependents. The Factories Act does not extend its benefits to those working outside factory premises and precincts, whereas the State Em-

ployees' Insurance Act by the definition of 'employee' extends its benefits to persons working in the establishments and those working outside, that is, to field workers. Under the Factories Act the requirement is ten or more persons are or were working in the establishment where under the State Employees' Insurance Act the requirement is "twenty or more persons are or were working in the establishment." Under both the Acts the manufacturing process must be carried on with the aid of power.

5. 'Manufacturing process' is defined under Section 2 (k) of the Factories Act thus

"Manufacturing process" means any process for —

(i) making, altering, repairing, ornamenting finishing packing oiling, washing, cleaning breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water or sewage

(Relevant part only set out).

"Power" is defined in the said Act thus:—

"Power" means electrical energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency."

6. Now, we shall proceed to examine the requirements for 'factory' under the Employees' State Insurance Act, 1948, in the light of the above definitions. For an establishment to be a 'factory' the following conditions must be satisfied. (1) there must be a premises which also includes its precincts, (2) 20 or more persons must be employed in the premises for wages or must have been employed on any day of the preceding 12 months, (3) manufacturing process must be carried on in any part of the premises and (4) the manufacturing process must be carried on with the aid of power or is ordinarily so carried on. If the aforesaid conditions are satisfied then the entire premises including the precincts thereof would be a 'factory' under the Act, even though the actual manufacturing process is carried on in a part of the premises. Neither the expression 'premises' nor the term 'precincts' is defined in the Act. Stroud's Judicial Dictionary interprets 'premises' as some definite place within metes and bounds, for example land or land with buildings upon it. The term 'precincts' is defined in Shorter Oxford Dictionary thus:

"The space enclosed by the walls or other boundaries of a particular place or building or by an imaginary line drawn around".

'Precincts' is a relative word and is really an adjunct of a premises. The word

'precincts' comes from the Latin *Prae Cingere* meaning 'to surround or gird'. Webster's 20th Century Dictionary, for the expression 'precincts' in plural gives the meaning environs. It is defined further as an enclosure between buildings, walls, etc., specifically the grounds immediately surrounding a religious house or Church. The terms 'premises' indicates the main building and its appurtenances. Lest any part of vacant lands attached to the establishment should be omitted in the definition precincts are included or added to the premises. The use of mechanical process whether within the premises proper or on the precincts, would make the place a factory, if other conditions are satisfied. In Halsbury's Laws of England, 3rd Edition, Vol. 17, at p. 15, 'factory' is described thus:

"A Factory must occupy a fixed site but a place is not excluded from the definition of factory only by reason of the fact that it is in the open air. Subject to the exceptions mentioned hereafter, the area of the factory in the whole space contained within its walls."

As will be seen from the definitions it is a requirement that a place forming precincts must be a definite place with boundaries, and it is essential that the place must be an adjunct of the principal premises. But merely enclosing a part of the premises of an establishment where 20 persons are employed with boundary walls and locating the place where power for the manufacturing process of the establishment is utilised just outside or adjoining land, may not be sufficient to take the establishment out of the definition of 'factory', if all the other conditions are satisfied. In *Nagpur Electric Light & Power Co. v. E. S. I. Co.* (1967) 2 Lab LJ 40 at p. 43=(AIR 1967 SC 1364 at p. 1366) the Supreme Court had to consider the question whether certain employees of the Nagpur Electric Light and Power Company were employees within the meaning of Section 2 (g) of the Employees' State Insurance Act. After referring to the requirements for a premises to constitute a factory under the Act, Bachawat, J., delivering the judgment of the Court observed:—

"The premises constituting a factory may be a building or open land or both—see *Ardeshir H. Bhiwandiwala v. State of Bombay*, 1961-2 Lab LJ 77=(AIR 1962 SC 29). Inside the same compound wall, there may be two or more premises; the premises used in connection with manufacturing processes may constitute a factory, and the other premises within the same compound wall may be used for purposes unconnected with any manufacturing process and may form no part of the factory".

Dealing with the reasoning of the High Court that the whole area over which the

process of transmission was carried on including the sub-stations where electricity was stored and supplied to the consumers by further transmission lines would all be a factory, it was said:—

"We cannot accept this line of reasoning. It seems to us a startling proposition that every inch of the wide area over which the transmission lines are spread is a factory within the meaning of Section 2 (12). "A factory must occupy a fixed site" — See Halsbury's Laws of England, 3rd Edn., Vol. 17, Article 15 p. 15. The company's factory has a fixed site. It is located inside the Kamptee Road premises and its boundaries are fixed by the compound wall of the premises."

7. In *Regional Director E. S. I. Corpn. v. Sriramulu Naidu*, (1960) 1 Mad LJ 257 at p. 262=(AIR 1960 Mad 248 at p. 251) the Division Bench observed:

"In our opinion the scope of the statutory definition of the term 'factory' and the application of the Act (the Employees' State Insurance Act, 1948) cannot be decided on the basis of what the employer, either for the sake of efficiency or convenience of management, does, e. g., by dividing the factory into various departments. The essential requisites of a factory under the Act are (1) a premises, geographical area within a certain boundary, (2) in a part of which at least manufacturing process should be carried on with the aid of power and (3) twenty or more persons should be working in the premises. It is not necessary that all the twenty persons should be working in the same section or department."

8. There is no dispute that the tanning establishments under consideration carry on manufacturing process. Raw and dried skins and hides undergo various processes with a view to their adaptation for profitable use, sale and disposal. This manufacturing process is manifestly carried on by manual labour within the premises of the establishments and not outside.

9. Really the substantial question for consideration in these cases is whether it could be said that the manufacturing process is being carried on with the aid of power for the reason that the water utilised in the process is lifted by power from a well before it is taken through channels or pipes to the tannery premises. This involves an interpretation of the clause 'manufacturing process is being carried on with the aid of power'. The manufacturing process that has been carried on in the establishments is tanning. The question is whether it can be said that the tanning is done with the aid of power. In these cases power comes into the picture only in that the water is lifted from a well situated outside the

establishments by electric power and stored in tubs and therefrom the water is diverted into the establishments, the water flowing into the establishments in a normal way the ground levels facilitating the flow

The words 'carried on with the aid of power' do not appear to us to have been used as terms of art and they are not technical expressions. The words should be construed in the sense which people conversant with the subject-matter with which the statute deals would attribute to them. The words 'with the aid of power' look to us plain English words meaning that power is employed in the manufacturing process that is it also assists the manufacturing process. The vital question for consideration is whether power in aid of manufacturing process is used in any part of the premises or precincts. If power is used outside the premises and not even on the precincts can it be said that the manufacturing process which is carried on in the premises is done with the aid of power merely for the reason the water used has been lifted from the well with the aid of power?

10. For ascertaining the force of the expression 'with the aid of power' we may usefully refer to the decision in *Law v Graham*, (1901) 2 KB 327 at p 330 in which the application of words 'steam, water or other mechanical power is used in aid of the manufacturing process' came up for consideration. Under the English Factory Act, 1878, a premises would be factory wherein any manual labour was exercised by way of trade or for purposes of gain in or incidental to adapting for sale of any article and wherein or within precincts of which, steam, water or other mechanical power was used in aid of the manufacturing process carried on there. In the premises beer was bottled for sale, but the filling was done by manual labour. The bottles however before being filled up were washed by a rotary brush driven by a small gas-engine held in position by hand. Lord Alverstone, C. J., while of the view that by a somewhat strained construction it is possible to regard the process of bottling the beer brought in casks wholesale as adapting of the article for sale, held that the washing of the bottles by mechanical means could not be fairly called a process which was used "in aid of" the bottling of the beer. He observed,—

"It is true that the bottles must be clean, and that the respondents wash them because they are going to put beer into them, but, in my opinion, that operation is not "in aid of" in the sense in which those words are used in the section."

11. Another decision which is relevant in the context is that of *Rajagopalan, J.*,

in *New Taj Mahal Cafe Ltd. v. Inspector of Factories*, AIR 1956 Mad 600 at p 602. The question in that case was whether the use of a refrigerator run by electric power for storage purposes, in a restaurant where the preparation of food stuffs and other eatables was done in a kitchen forming part of the restaurant would fall within the definition of manufacturing process so as to bring the restaurant under the definition of 'factory' in Section 2 (m) of the Factories Act for the reason that power could be considered to be used in aid of manufacturing process. The learned Judge observed.—

"..... every place where a Frigidaire is used will not become a factory, even if the requisite number of persons are engaged in work on the premises where a refrigerator is in use. If a refrigerator was the only appliance driven by power that was used in the restaurant, what the statutory authorities had to decide was whether any manufacturing process was carried on with the aid of that refrigerator, that is with the aid of the power that was needed to work that refrigerator

Normally refrigerator is used for the purpose of storage. Even in a restaurant articles are kept in the refrigerator till they are required for sale. Mere storage as such will not be part of the manufacturing process as defined by Section 2 (k) Factories Act of 1948

"..... If, however, a refrigerator is used for treating or adopting any article with a view to its sale, then the test required by Section 2 (k) would be satisfied. If, however, ice-cream is made with the aid of a refrigerator like a 'Frigidaire', then the Frigidaire would have been used for making or otherwise treating or adapting the article for sale."

12. The decision in *Longhurst v Guildford Water Board*, (1961) 3 All ER 545 at p 550 though dealing with a somewhat different set of facts, is also instructive. Here the use of power comes in at the subsequent stage, that is, after the processes of the main purpose of the factory were over. Water collected from springs and streams within an area flowed by gravity into a filter house where the water was contained in filter beds and there cleansed of impurities. From the filter house the water passed into a large concrete tank. There was a pump house physically separated from the filter house and three engines therein with pumps drew water from the tank, put it under pressure and forced it along mains either up to a reservoir for distribution by fall of gravity to the houses in the District or through the mains direct to the houses. Under Section 151 (6) of the English Factories Act 1937, where a place within the precincts forming a factory is solely used for some purpose other

than the process carried on in the factory, it is deemed not to form part of the factory for the whole purpose of the Act, and the question was whether the pump house was not part of that factory, since the pumping of water was not incidental to filtering of water, but was only part of the distribution of water to consumers. Lord Guest, in his speech in the House of Lords said:

"The 'processes carried on in the factory' cannot refer to any process whether it be a factory process or not. It must be a process which brings the premises within the definition of a factory under Section 151 (1)..... Now, the main purpose of the factory in the present case is the filtering of water. The sole question which then arises is whether the pumping of the water is incidental to that purpose. Such storage as is merely a necessary and a transitory incident of the manufacturing process may be a factory purpose. It was argued that the pumping of the water was a necessary incident to the filtering, but, in my opinion this was a different and new process which was being carried on. It was not necessary to the filtering of water that it should be pumped. All that was necessary was that it should run away by gravity from the filters. The pumping was necessitated by the fact that the reservoir was situated at a higher level than the pumping station. The pumping, in my opinion, was part of the distribution of the water and not incidental to its filtering."

13. The actual tanning process in the tanneries now under consideration is admittedly carried on by hand. It mattered little to the tanning how the water required for cleaning was brought into the tannery premises. That aspect plays no part in the process. It is not necessary for the manufacturing process carried on within the premises that the water should flow at any particular pressure. Nor is it urged for the Regional Director that the tannery process requires flow of water at any particular velocity or quantity for more effective and convenient user of water in the tanning. The mere fact that water has been lifted at some point by mechanical process using power, will not itself make the manufacturing process carried on in the tannery as a process carried on with the aid of power. The use of electric energy is at too remote a point and unconnected with the actual manufacturing process to associate it with the manufacturing process and treat its user as in the course of manufacturing process. We may well illustrate the absurdity of the proposition by an illustration. One can conceive of a case where water is transported from a distance for tanning pur-

pose in cisterns mounted on carts drawn by bullocks or even by motor vehicle fitted with water tanks. Water may be pumped into the cisterns or tanks with electric power. It would be ridiculous to contend that the manufacturing process in the tannery is being carried on with the aid of electric power for the reason that water is pumped into the cisterns or tanks. Can it make any distinction if instead of water being brought to the tanning premises as aforesaid water is led through conduit pipes from tubs near the well into which the water is pumped? We think, not.

If there is no distinction in such a case, the fact that the well is situated in the immediate neighbourhood of the establishment or adjacent to the establishment cannot be of much significance. The distance of the well from which water is taken, or the ownership of the intervening land in third party by itself is not a safe test. In a particular case it may emphasise or accentuate the disassociation. In A. R. Md. Sulaiman v. Regional Director of E. S. I. Corporation, W. P. No. 691 of 1959 (Mad) the electric pump was not installed in the premises of a tannery but in land adjoining subsequently acquired. The water lifted was mainly used for the purpose of irrigation; but was also used for purposes of tanning as a supplemental source. There was a well within the premises which was not worked by electric power. The question arose whether the establishment was a factory under the Act. The learned Judge Veeraswami, J., in rejecting the contention that the tannery is a factory, remarked:

"It may be assumed that cleaning is a manufacturing process. But that by itself is not sufficient. Can it be said that because water which is pumped out with the aid of power is used in the process of cleaning the hides and skins, cleaning is done with the aid of power? The respondent urges that such cleaning with such water conformed to the requisites of the definition of a factory. But as I understand the definition, it is not sufficient to carry on cleaning with water pumped out from a neighbourhood premises or precincts with the aid of power." The learned Judge observes that cleaning that is done with water pumped out with electric power is not cleaning done with the aid of power; but however distinguishes an earlier case M. H. Ismail Sahib & Co. v. Regional Director, E. S. I. Corporation, (1961) 1 Mad LJ 16 at p. 17=(AIR 1961 Mad 7) remarking only:

"But it may be seen that in that case the pump-installation was within the precincts of the tannery and in that sense the learned Judge regarded it as part of the tanning process. But that is not the

case here. The respondent has not been able to show that the pumping of water is done within the precincts of the factory."

in (1961) 1 Mad LJ 16 at p. 17=(AIR 1961 Mad 7 at p. 8) referred to above, a decision of the present Chief Justice as he then was, where electric power was employed in the establishment for the pumping and storage of water which was subsequently used for several of the processes in tanning, the reasoning for the finding that the establishment is a factory runs thus:—

"Water is required for the manufacturing process, presumably at a particular spot and in particular flow of force. This is not merely a case of a small quantity of water being utilised in the ordinary way, for, in that event, the employee would not take the trouble to use electrical energy to pump and store water in large quantities, and at a height. But, since the use of the electrical energy enables the employer to utilise the water in such manner as is required in the manufacturing process itself, in effect he is using power for conducting a part of that process."

Of course if water is desired for tanning at a particular phased flow or at a given velocity and if electric power is employed for the purpose of securing water at the required flow or velocity, clearly the power is utilised in aid of the manufacturing process. But, such a requirement is not made out in the cases now before us. The reasoning in the case just cited must therefore be confined to the facts of that case.

14. In the above case the establishment in question was held to be a factory on another ground also. It was observed therein that the very pumping and storage of water in the establishment amounted by itself to a manufacturing process as defined in the Act. The learned Judge followed for the proposition the decision of Ramachandra Iyer J (as he then was) in *Moosa Kazimi v. K. M. Sheriff*, AIR 1959 Mad 542. With great respect to the learned Judges we are unable to hold that the very pumping and storage of water as found should amount to manufacturing process as defined in the Act. True, Section 2 (k) of the Factories Act, while defining manufacturing process includes in the process, pumping oil, water or sewage. Section 2 (k) contains several sub-clauses, cls. (i) to (v). Sub-clause (i) itself is very wide in its scope and coverage and any one of the works enumerated therein where power is used would make the process a manufacturing process carried on with the aid of power. Pumping oil, water or sewage in the context of the several sub-clauses of Section 2 (k) can only refer to the operation of pumping itself as a substan-

tial activity. Pumping itself must be the process. There are pumping installations where oil, water or sewage etc. are pumped and power is used for the purpose of pumping. The reference must be to cases where the process of pumping is intended to aid the adaptation of the liquid for use or disposal. The manufacturing process of the establishments under consideration is tanning. Pumping is not the objective or work of these establishments. Water is not processed in the establishments for storage and distribution through water mains at pressure. It cannot be contended that the place where the pumping is carried on can itself be regarded as an independent factory. At that place there may be only one man.

15. The case in AIR 1959 Mad 542 which was followed in (1961) 1 Mad LJ 16 at p. 17=(AIR 1961 Mad 7 at p. 8) was concerned with the definition of 'factory' in the Factories Act 1948 read with Payment of Wages Act. The establishment in question was a restaurant to which a bakery was attached and the question arose whether the use of electric power for the purpose of lifting water used in the bakery and restaurant would convert the premises into a factory when more than the required number of persons worked in the premises. Referring to the presence of an electric motor for the purpose of lifting water, it was observed in that case that the definition of the term 'manufacturing process' would comprehend such a case. Reliance was placed on the decision of the Bombay High Court in *Laxmibai v. Chairman and Trustees, Bombay Port Trust*, AIR 1954 Bom 180 at p. 181 where it was observed: "On the evidence it is clear that in the pumping station in question a process was employed for the purpose of pumping water and if such a process was employed it was a manufacturing process."

That was a case under the Workmen's Compensation Act which also adopted the definition of 'manufacturing process' in the Factories Act and may be the evidence in that case warranted the conclusion that the pumping itself was a manufacturing process. In *Moosa Kazimi's* case, AIR 1959 Mad 542 where the establishment was a hotel with a bakery annexed the distribution of water pumped by electric power was integrally connected with the hotel and bakery business of the establishment in question. A reference to Section 7 of the Factories Act gives some help in the interpretation of Section 2 (k). Under Section 7 the occupier shall, 15 days before his occupation or use of any premises as a factory, send to the Chief Inspector a written notice containing certain particulars inter alia the name and situation of the factory, the nature of the manufacturing process carried on in the factory during the pre-

vious 12 months in the case of a factory in existence and during the next twelve months in the case of all factories and the nature and quantity of power to be used. We do not think that in describing the nature of manufacturing process carried on in the factories in question a proper answer would be the pumping of water. In Maxwell on Interpretation of Statutes, 7th Edn., at page 183 it is said:

"In determining either the general object of the Legislature or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should in all cases of doubtful significance be presumed to be the true one."

In W. P. No. 691 of 1959 (Mad) above cited, dealing with the argument that as water used in the tannery was pumped out with the aid of electric power and pumping of water was a manufacturing process as defined by Section 2 (k) (i) of the Factories Act 1948 the tannery was a factory, the learned Judge Veeraswami, J., observed:

"The difficulty in accepting the first ground pressed for the respondent lies in the fact that, although the electric pump is used as a supplemental source for supply of water to the tannery its location is not in the premises or the precincts thereof. Nor was it said that 20 or more persons are working the pump, if that alone is to be taken as the manufacturing process within the meaning of the Factories Act. In the circumstances, it cannot, therefore, be held that only because of the pumping of water with the aid of power from the land lying to the north of the premises and precincts of the tannery, the tannery is a factory within the statutory definition under the Employees' State Insurance Act."

In Latheef Hameed & Co. v. Regional Director, E. S. I. C., W. P. No. 1023 of 1962 (Mad) again a case of tannery where electric power was employed for lifting water from a well, the learned Judge, the present Chief Justice, following his earlier decision in (1961) 1 Mad LJ 16= (AIR 1961 Mad 7) said:

"Learned Counsel for the writ petitioner is unable to show me any data wherefrom I can draw my inference that the force of flow of water, the height from which it is made to flow, and, the impact of water in cleaning, which is clearly due to the power of gravity depending on the height of storage, are matters not vital to the washing process. Obviously they are vital parts of it, and it is for these excellent reasons that the manufacturer, who knows best, has used electric energy to store up water at a height, so that he may have flow of water which has force and impact on the

skins as part of cleaning."

This decision proceeds on the basis that the establishment has taken to electric power for storing of water for greater convenience and effective utilisation of water for the purpose of cleaning. On the facts as taken clearly electric power was utilised for manufacturing process. The decision stands on its own facts as the former one. In line with this decision we may refer to Newton v. John Stanning & Son Ltd., (1962) 1 All ER 78. In that case there was a pump house within the curtilage of the factory premises and the factory was carrying on the work of bleaching and finishing of textiles. Transmission machinery was used in the pump house to pump water under pressure into the mill in the factory. The question was whether the pump house was a factory under the English Factories Act 1937. It was held that it was impossible to say that the pump house must be treated as separate from the factory, since a process was being carried on therein which was undoubtedly for or incidental to the working of bleaching and finishing of textiles. It was found as a fact in that case that the pump was an essential part of the works. There was no question of the pump house in that case being a separate factory on its own and it was held that the pump house was an integral part of the works.

16. Securing water required in a factory by electricity may in a given case be so integrated with the other processes in the tannery as to form a part of manufacturing process. The question whether in a particular case power aids the manufacturing process is a question that has to be determined on a conspectus of several factors. The disassociation of the well and pumping from the factory premises will be an element which has to be taken into consideration. The mere fact that water utilised has been pumped by electricity will not connect the pumping process with the manufacturing process carried on in a factory. There must be certain interlinking in the functioning of the pump with the manufacturing process carried on in the factory. One can think of water being forced at pressure through the mains for the purpose of the factory. One can also conceive of water specially treated being pumped into the factory with the use of electric power.

17. In P. R. Abdullah and Co. v. The Regional Director, W. S. I. Corporation, C. M. A. No. 150 of 1959 (Mad) the tannery consisted of two sets of buildings separated by a private road. From a well adjacent to the godown in one of the buildings water was pumped by electricity and carried through pipes under the private road to the part of the factory

where skins were tanned. The learned Judge Ramachandra Iyer, J., (as he then was) after noticing the decision in (1961) 1 Mad LJ 16=(AIR 1961 Mad 7) referred to the decision of the Division Bench in (1960) 1 Mad LJ 257=(AIR 1960 Mad 248) and summarised the ruling in that case thus:

"In that case it was held that the essential requisites of a factory within the meaning of the term in the Act were (1) a premises, geographical area within a certain boundary (2) in a part of which at least manufacturing process was carried on with the aid of power and (3) twenty or more persons should be working in the premises, though it was not necessary that all the twenty persons should be working in the same section of department, so long as the efforts of all the departments were co-ordinated to achieve the main object of the factory". Dealing with the case before him, it was observed.

'But that cannot mean that where two buildings constitute a factory from the mere circumstance that a private road intervenes between them they should be viewed as two distinct premises in considering the question of the applicability of the Employees' State Insurance Act. The pumping of water is essential to the manufacturing process carried on on the side of the road. Between the two buildings, that is, one where water is pumped out and the one where it is received, there is a pipe connection which should be sufficient to constitute the two buildings as one premises"

In the above case the only question considered was whether the place where water was pumped could be considered part of the premises where tanning process was being carried on.

18. The questions raised and the conflicting views on the matter have been considered by Srinivasan, J., in M. S. Abdulla Basha & Co. v. Regional Director, E. S. I. Corporation, W P No 1487 of 1961=ILR (1965) 1 Mad 293. In that case the well in question was situated at a distance of about 30 yards from the tannery and neither the well nor the pump set belonged to the tannery establishment. For the establishment it was said that water was obtained on payment of a sum of Rs 20/- per month to the owners of the well and the water was brought into the factory through a channel from the site of the pump set. The learned Judge after noticing that the decision of Veeraswami, J. in W F No 691 of 1959 (Mad) should govern the case while discussing the legal position, observed.

".... I may express it as my view that the mere fact that water is brought into the premises with the aid of power

is not by itself sufficient to establish that a manufacturing process is carried on with the aid of power. If what is adumbrated by the learned Additional Government Pleader is the sole test, it is easy to conceive of a situation where this argument may lead to somewhat startling results. Supposing the water required for the purpose of cleaning is secured from a source of municipal supply, that is, taken from a tap in the premises of the factory, can it be said that since the municipality supplies the water by using power in its installation, the water so received by the petitioner factory and used in some manufacturing process the process itself is carried on with the aid of power?"

The learned Judge also gives another illustration of water being transported to the factory premises by a lorry or other means of mechanical propulsion, the water being pumped out from a well elsewhere. Pointing out that the illustrations indicate that the construction sought to be placed upon the expression 'with the aid of power' is somewhat strained, the learned Judge goes on to observe

"What is contemplated by the definition is that power should be used in the carrying on of the manufacturing process. As I understand the process involved, it consists in soaking raw hides and skins in water. It is not stated that any part of the cleaning operation is carried on with the aid of power, such as to say, by storing the water in the tanning vats by mechanical means with the aid of power or by the use of power in scrapping the skins or the like associated operations. The solitary circumstance that water is pumped out of the well and stored in the vats is relied upon by the respondent in his claim that the cleaning process itself must be said to be done with the aid of power"

The learned Judge distinguishes the decision in (1960) 1 Mad LJ 257=(AIR 1960 Mad 248) with the observation that it principally turned upon the question whether the two premises constituted a single unit, and that it was not decided therein that the use of the water derived with the aid of power would amount to the use of power in manufacturing process. Referring to the decision in (1961) 1 Mad LJ 16=(AIR 1961 Mad 7) where it was observed that the very pumping and storage of water amounted to a manufacturing process, the learned Judge observed.

"With great respect I am unable to follow this decision. Firstly, it seems to me that the various sub-clauses of the definition of 'manufacturing process' are mutually exclusive. The first sub-clause in Section 2 (k) which defines 'Manufacturing Process' is itself of very broad

amplitude and covers a variety of processes, the carrying out of any one of which with the aid of power would make the process a manufacturing process. Sub-clause (2), which reads "pumping of oil, water or sewage" is in the context distinct and is intended to deal with mere pumping operations for it might otherwise be contended that since pumping per se does not affect any alteration in the article no process of manufacture is at all involved. There are large pumping installations, which deal with oil, water or sewage, which utilise power for the purpose of pumping and unless this part of the definition is available, such installations could not be brought within the category of factories. AIR 1954 Bom 180 was a case of that kind. This sub-clause was not to my mind intended to take in an ancillary operation of pumping water as in the present case and to postulate the use of that power as covering use of power in aid of the manufacturing process itself. It is not the case of the department that water is required in a particular flow or force to serve the purpose of any of the manufacturing process involved. Water in fact is required in a static condition as it were for the purpose of soaking the raw hides and skins to make them pliant and to facilitate the cleaning of the skins. Had it been a case where water had to be directed in a powerful flow which could be achieved only with the aid of power, and that this kind of flow was necessary for the purpose of cleaning or any of the associated processes of manufacture, then undeniably power could be said to be used in the process of manufacture. But where water is pumped for the purpose of securing its supply and nothing more and power is not used in the process of manufacture itself, it seems difficult to hold that this part of the definition would at all be attracted."

The learned Judge concludes:—

"Giving the matter my careful consideration, I am of opinion that unless power is directly used in the process of manufacture, the premises cannot come within the definition of 'factory' in the Act. The use of power for pumping water, which water is used for subsequent manufacturing purposes, with nothing more cannot justify the inference that the power is used in the process of manufacture."

19. Having given the most careful consideration to the differing views expressed in the decisions of the learned Single Judges of this Court which led Srinivasan, J., to refer W. P. No. 1166 of 1962 to a Division Bench, we are inclined to agree with the approach of Srinivasan, J., in the application of the definition of 'factory' to tanneries like those under consideration, that where water is pumped for securing its supply and nothing

more, and power is not used in the manufacturing process itself the definition is not attracted. The mere use of power for pumping water which is used for the subsequent manufacturing purposes cannot be described as the use of power in the manufacturing process. We are in concurrence with Srinivasan, J., in his view that the reference to pumping of oil, water or sewage under the definition of manufacturing process is intended to deal only with pumping installations where the main process itself is pumping of oil, water or sewage. The sub-clause is not intended to cover pumping which is merely ancillary to some other manufacturing process. Only, we would like to circumscribe the requirement by a limitation. The question whether the manufacturing process is being carried on with the aid of power is ultimately one of inference from facts. It may happen that in a particular establishment the pumping of water and utilisation of it in the manufacturing process is so integrally connected with the manufacturing process that the pumping cannot be dissociated from it. May be that the actual process of tanning is carried on by manual labour. All the same the pumping of water may in a given case be so intimately linked up with the manufacturing process in its location, object and operation, say as envisaged in (1961) 1 Mad LJ 16 at p. 17=(AIR 1961 Mad 7 at p. 8) to secure flow of water with force and impact for the cleaning of skins with a view to more efficient and economical working of the tannery, that it would be difficult to disassociate the pumping process from the actual tanning process. The test is not whether power is necessary for the manufacturing process but whether in fact power is used in the manufacturing process. The nature of the definition is such that for its application no principles in the abstract could be laid down. We can only indicate the true scope of the several material expressions in the definition.

20. We shall now examine the cases on hand in the light of the above discussion. In W. P. No. 2652 of 1966 which is also the subject of L. P. A. No. 43 of 1964, the Addl. Commissioner for Workmen's Compensation would hold the premises as a factory for the only reason that within the tannery premises there is a well and water from the well is pumped by an oil engine, that is, by the use of power. The contention of the establishment is that the water from this well is not used in the manufacturing process due to technical reasons, and the water used for tanning is brought from a well outside the tanning premises. It is also the contention of the establishment that the well from which water is taken for the tannery, no doubt by the use of

power, is situated in the corner of a Coconut Thope owned in common with others at a distance of nearly a furlong from the tannery premises. In the view he has taken that the presence of an oil engine attached to the pump within the tannery would itself be sufficient, the Addl. Commissioner for Workmen's Compensation thought that it was not necessary for him to examine the contention on behalf of the establishment that the water is pumped from a well situated on different premises far away from the tanning premises. There is no finding even that water from the well in the tanning premises was to any extent used in the tanning process. The mere existence of the pump set worked by power cannot make the premises a factory. The requirement of the definition is not just that power is used in any part of the premises. The essential postulate is that power must be used in aid of the manufacturing process in the premises. There being so such finding in this case by the Additional Commissioner for Workmen's Compensation, the order in question has to be quashed.

21. Coming to W P No 1166 of 1962, in the counter-affidavit of the Regional Director Employees' State Insurance Corporation, it is admitted that the pump set is situated outside the western compound wall of the tannery. All that is stated is that the eastern embankment of the well is connected with the western wall of the tannery. The employer, it is stated, pays rent not only for the tannery but also for the open space where the well is situated. It is not denied that the water from the well is taken only by an earthen channel into the tannery wherein the washing and cleaning process of the skins is done only by hands. Nor is the statement in the affidavit that labourers working in the tannery have no access to the pump set which is in charge of an independent care-taker, denied. The water it is stated, is first stored in a tub near the well and the water so stored is used also for personal needs of the labourers and others, that is for bathing and drinking purposes. It is one horse power motor that pumps the water into the tub. On the facts the pumping of water has little to do with the actual tanning process. It cannot be said that the pumping process is so integrated with the manufacturing process within the tannery premises as to make it part of the manufacturing process. The pumping of water by power is not incidental to the tannery process which goes on within the premises. In the absence of other indicia, it will be making a distinction without difference to hold that as the pump set is just outside the compound wall it must be held to be in aid of the manufacturing process. The ab-

sence of distance in a case of this kind without any other clinching features shows no nexus between the manufacturing process and the pumping. To differentiate between tanneries where the pump set is just outside the premises and adjoining the compound wall and tanneries where the pump set is situated at a distance, and make the former liable for contribution, will be to make a classification without any rational basis for the same. It follows that the tanneries in question as worked do not fall within the scope of Section 2 (12) of the Employees State Insurance Act read with the Factories Act 1948 and that the provisions of the Employees' State Insurance Act cannot be applied to the tanneries. A writ will issue as prayed for in W P No 1166 of 1962. The order dated 7-4-1961 made by the Regional Director, Employees' State Insurance Corporation the subject of W P No 2652 of 1966 is hereby quashed and the Rule Nisi therein made absolute. In the circumstances it is unnecessary to examine the maintainability of the appeal, C. M. P No 270 of 1961. L. P A. Nn 43 of 1964 is therefore dismissed. Having regard to all the circumstances, there will be no order as to costs in the writ petitions and the Letters Patent Appeal.

JHS/D V C.

Order accordingly

AIR 1960 MADRAS 166 (V 56 C 37)

SRINIVASAN AND SADASIVAM JJ

Minor Sivaraman and another Appellants v P M Shanmugasundara Mudaliar and others, Respondents

Appeals Nos. 244 of 1961 and 572 of 1962 and Memorandum of Cross Objections in A. S No 244 of 1961 D/- 30-8-1967 against the decree of Sub J Erode D/- 1-4-1961

Civil P C. (1908) O 21, Rr 103 and 98 — Scope — Order of dismissal of claim under O 21, R 98 — Unsuccessful party should file a suit within one year to establish his right claimed — O 21, R. 103 does not require him to establish his right within one year — Only suit is required to be filed within one year AIR 1949 Mad 586 (FB), Foll, AIR 1946 Mad 76 & AIR 1943 Mad 36 & AIR 1956 Mad 19, Rel. on, AIR 1937 Mad 582 & AIR 1950 Mad 19 held overruled by AIR 1949 Mad 586 (FB), AIR 1960 Cal 580, Dissented from. (Paras 10 & 11)

Cases Referred Chronological Paras
(1967) AIR 1967 SC 1134 (V 54) =
(1967) 1 SCR 153 Ramrati Kuer
v Dwarika Prasad Singh 5
(1960) AIR 1960 Cal 580 (V 47)
Goparam v Sewantilal 11

JL/LL/E775/68

- (1956) AIR 1956 Mad 19 (V 43)=
 (1955) 1 Mad LJ 322, Abdul Rahim
 Rowther v. Swaminatha Odayar 11
 (1950) AIR 1950 Mad 19 (V 37)=
 (1949) 1 Mad LJ 286, Umanath v.
 Pedru Souza 10
 (1950) AIR 1950 Mad 41 (V 37)=
 (1949) 2 Mad LJ 466, Venkata
 Ramiah Chetty v. China Pulliah 12
 (1949) AIR 1949 Mad 586 (V 36)=
 (1949) 1 Mad LJ 593 (FB),
 Seethamma v. Kotareddi 8
 (1946) AIR 1946 Mad 76 (V 33)=
 ILR 1946 Mad 536, Kaleswar Mills
 Ltd. v. Govindaswami 9
 (1943) AIR 1943 Mad 36 (V 30)=
 (1942) 2 Mad LJ 315, Akkammal v.
 Komaraswamy Chettiar 9, 11
 (1937) AIR 1937 Mad 582 (V 24)=
 (1937) 1 Mad LJ 667, Palaniappa
 v. Ramaswami 9, 11
 R. Gopalaswami Iyengar and M. Srinivasan,
 for Appellants; T. R. Srinivasan
 and T. Shanmughan, for Respondents.

SADASIVAM, J.:— The suit properties consisting of two houses bearing Door Nos. 4 and 5, South Hanumantharayar Koil Street, Erode, were purchased by one Karuppuswami Mudaliar, who died in 1944. The said Karuppuswami Mudaliar had two sons, Sivaraman and Samiappa. Sivaraman predeceased Karuppuswami in 1939 leaving his widow Karuppayee and three sons, Palaniappa, Shanmugham and Vyapuri. The other son Samiappa, the first defendant in the suit, married Kaveriammal as his first wife and through her he had a daughter Perianayaki alias Ghanambal, who is the second plaintiff in the suit, the first plaintiff being the husband of the said second plaintiff. Dhanalakshmi, the third defendant, is the second wife of Samiappa and the second defendant Sivaraman is the minor son of Samiappa through Dhanalakshmi. Karuppuswami Mudaliar executed a settlement deed Ex. A-2 dated 4-2-1940 in favour of Kaveriammal in respect of the suit properties and two other properties describing them as his self-acquired properties. He has mentioned in the settlement deed that as his son Samiappa was ill-treating him and not maintaining him, he had executed the settlement deed giving the suit properties and other properties absolutely to Kaveriammal, but subject to the condition that she should maintain him during his lifetime.

But even on 6-9-1940 Karuppuswami executed the cancellation deed, a registration copy of which has been marked as Ex. B-2, on the ground that he was not maintained properly and that he desired to have the earlier settlement deed Ex. A-2 revoked. Kaveriammal who had conveyed the properties under Ex. B-3 dated 17-6-1940 in favour of her maternal uncle Marimuthu Mudaliar got back the properties under the settlement deed

Ex. B-5 on 26-5-1943. On 27-2-1956, she executed a settlement deed Ex. A-1 in favour of the plaintiffs, namely, her son-in-law and daughter. It is on the strength of this settlement deed the plaintiffs have filed the suit to recover Rs. 10,800 as damages for use and occupation for three years from 3-9-1956 to 3-9-1959, from the defendants. The plaintiffs did not sue for possession of the two houses on the ground that they had filed R. C. O. P. No. 116 of 1958 on the file of the District Munsif's Court, Erode against the tenant for possession.

2. The contention of the defendants is that the suit properties were not the separate properties of Karuppuswami Mudaliar, but were his joint family properties, that Karuppuswami Mudaliar had no right to execute the settlement deed in favour of Kaveriammal, that there was a partition between Samiappa and his nephews, that as Samiappa, was not mentally sound the suit properties were managed by the third defendant on behalf of her husband and her son Sivaraman by letting out to tenants and that the eviction proceedings taken by the plaintiffs against one Perianna Goundan as though he was a tenant are not valid. Even Kaveriammal had filed petitions for eviction in respect of houses bearing door Nos. 4 and 5 South Hanumantharayar Koil Street, Erode. Her eviction petition in respect of the house bearing Door No. 5 was dismissed in H. R. C. No. 179 of 1949 on 8-4-1950 on the ground that she had no title to the property. Her petition for eviction in respect of the house bearing door No. 4 ended in her favour in H. R. C. No. 10 of 1949. But her application for delivery in pursuance of the eviction order was not successful as she was obstructed by the third defendant and the petition filed by her for removal of obstruction and delivery was dismissed. The plaintiffs themselves filed R. C. O. P. No. 116 of 1958 against one Perianna Goundan treating him as a tenant in respect of premises No. 5 South Hanumantharayar Koil Street, Erode, and obtained an ex parte order of eviction and attempted to take delivery through Court, but they were obstructed by defendants 2 and 3. The petition filed by the plaintiffs for removal of obstruction and delivery was dismissed. The contention of the defendant is that the suit is not maintainable, not having been filed within the period of limitation specified in respect of orders made in execution proceedings.

3. The learned Subordinate Judge overruled the contentions of the defendants and decreed the suit for damages at the rate of Rs. 97/- per month. Defendants 2 and 3 have preferred Appeal No. 244 of 1961, and the first defendant has filed Appeal No. 572 of 1962 against the decree passed against them and the plain-

tiffs have filed a memorandum of cross-objections in Appeal No 244 of 1961 claiming that the trial Court ought to have decreed Rs 200/- per month as damages for use and occupation.

4. Sri M. S. Venkatarama Iyer appearing for defendants 2 and 3 urged three points before us namely that the suit properties are joint family properties of Karuppuswami Mudaliar and his sons, that even if Karuppuswami Mudaliar was absolutely entitled to the suit properties the settlement deed Ex. A-2 has been validly revoked by Karuppuswami for non fulfilment of the condition subsequent in the document and that the suit is not maintainable inasmuch as Kaveriammal and the plaintiffs have not filed suits within one year to set aside the summary orders made under Order XXI, Rule 99 C. P. C. as required under Order XXI Rule 103 C. P. C. Sri M. S. Venkatarama Iyer also wanted to argue that the defendants had acquired title to the suit properties by adverse possession, but he was unable to point out any plea in the pleadings, or any issue to justify his raising such an argument.

5. Sri M. S. Venkatarama Iyer appearing for defendants 2 and 3 referred to paragraph 12 of the judgment of the learned Subordinate Judge in which it is stated that the learned Advocate for the plaintiffs placed sole reliance on the recitals in the settlement deed Ex. A-2 that the suit properties are the self acquired properties of Karuppuswami Mudaliar and criticised the finding of the Subordinate Judge that he was inclined to agree with the contention as there was no reason why Karuppuswami Mudaliar should introduce false recitals in a document executed twenty years prior to the case. He urged, on the strength of the decision in *Ramrati Kuer v Dwanka Prasad*, AIR 1967 SC 1134 at p. 1140 that the statement in Ex. A 2 is not admissible and in any case, no value should be attached to it.

In the said case there was a recital in the gift deed of 1953 that the donor got the properties from her husband. It is not stated in that decision that the statement is inadmissible in evidence. Such statements are admissible under Section 13 of the Evidence Act, though the value to be attached to the statement would depend upon the facts and circumstances of each case. But the statement in the gift deed was held to be of no value in the above case as the donor who was not alive at the time of the litigation, had made a statement several years earlier in 1923 that her husband predeceased her father in law and that thus earlier statement of 1925 was admissible under Section 32 (3) of the Indian Evidence Act and it was entitled to great weight as

it was made at a time when there was no trouble whatsoever in the family

6. It is true that the statement of Karuppuswami in Ex. A-2 that the properties covered by it are his self acquired properties is a self-serving statement and it is not possible to find solely on the strength of this statement that the properties covered by it were his self-acquired properties. But there are several other circumstances in this case which have been referred to by the learned Subordinate Judge in other portions of his judgment and they clearly support the recitals in Ex. A-2. Though Karuppuswami executed Ex. A-2 in 1940 the first defendant did not protest or take any action in respect of the same. Kaveriammal filed O S No 120 of 1945 on the file of the District Munsif's Court, Erode, against her husband Samiappa and Karuppayee the brother's widow of Samiappa. Samiappa was insane at that time and he was represented by his brother's son Palaniappa in that suit.

Karuppayee was given up in that suit and Kaveriammal got an ex parte decree against her husband for Rs. 2000/- being the value of the house covered by the settlement deed Ex. A-2 which was demolished and removed by her husband and Karuppayee. Thus, on the strength of the settlement deed, Kaveriammal got a decree against her husband, as evidenced by Ex. A-4. In execution of the decree, she attached certain amount in the Erode Urban Bank on the ground that the amount belonged to her husband. But the brother's sons of her husband filed a claim on the ground that in a partition between them and the first defendant herein, evidenced by a registered document dated 16-5-1946 the amount fell to their share. But it is clear from the order Ex. A-5 that the partition deed was brought about two months after the decree only with the intention to defraud the decree-holder Kaveriammal and at any rate to delay the execution and realisation of the decree, and the claim was dismissed.

If really the properties covered by Ex. A-2 were joint family properties of Karuppuswami it is unlikely that the brother's sons of the first defendant would have kept quiet. Subsequently Kaveriammal filed O S No 20 of 1947 on the file of the District Munsif's Court Erode, against her husband Samiappa, her husband's brother's son Palaniappa and Karuppayee. It is true she exonerated Palaniappa and Karuppayee. But she got a decree against her husband Samiappa for arrears of rent in respect of the houses covered by Ex. A 2. The contention of defendants 2 and 3 that Samiappa was insane and was not represented by any guardian in O S No 20 of 1947 has been rightly rejected by the learned Subordinate Judge.

There is nothing to show that Samiappa continued to be insane when the suit O. S. No. 20 of 1947 was instituted on the file of the District Munsif's Court, Erode, though he was no doubt, treated as insane at the time of the earlier suit.

In fact, according to defendants 2 and 3, there was registered partition deed dated 16-5-1946 between Samiappa and his brother's sons. It should be noted that the said registered partition was subsequent to the earlier suit O. S. No. 120 of 1945, on the file of the District Munsif's Court, Erode and prior to O. S. No. 20 of 1947, on the file of the same Court. Apart from these proceedings, there is one other strong circumstance, which clearly supports the case of the plaintiffs. Samiappa was arrested and sent to civil Jail in execution of the decree obtained by his first wife Kaveriammal. But his second wife Danalakshmi Ammal, her brothers and her father joined together and told Samiappa that they would not give a single pie to Kaveriammal and that he might go to jail. The grievance of Samiappa was that his second wife Danalakshmi Ammal did not help him, though she was in possession of his properties and the properties covered by the settlement deed. Samiappa filed a counter, Ex. A-11, in the claim petition by his second wife Danalakshmi Ammal mentioning the above facts and admitting that he had to pay the arrears of rent in respect of the house properties covered by the settlement deed executed by his father in 1940, to his first wife Kaveriammal.

It should be noted that the third defendant Danalakshmi Ammal claims to be in possession of the suit properties only on behalf of her husband Samiappa. Hence in the face of the admission of Samiappa in Ex. A-11, the third defendant cannot claim the suit properties on his behalf. It is true that it is open to the second defendant as the grandson of Karuppuswami Mudaliar to put forward a claim that the suit properties are joint family properties. But the suit properties were really purchased by Karuppuswami. Mr. M. S. Venkatarama Iyer urged that the suit properties were purchased from out of the income of the Press run in the name of Sivaraman. The mere fact that Karuppuswami conducted a Press in the name of his eldest son Sivaraman would not make the Press a joint family property. In fact, the evidence of Danalakshmi Ammal is that the Press belonged to Karuppuswami. Thus the above facts clearly justify the conclusion of the learned Subordinate Judge that the suit properties are the self-acquired properties of Karuppuswami and that he was competent to execute the settlement deed Ex. A-2.

7. There is no substance in the contention that the settlement deed Ex. A-2 was executed by Karuppuswami in favour of Kaveriammal on condition that she should maintain him and hence Karuppuswami was entitled to revoke the settlement deed on the failure of Kaveriammal to maintain him. Under Ex. A-2 Karuppuswami Mudaliar has given absolute interest in the properties covered by it to Kaveriammal. It is true one of the terms of the settlement deed is that Kaveriammal should maintain Karuppuswami during his lifetime. But there is no power of revocation in the settlement deed Ex. A-2. Whatever cause of action Karuppuswami might have had to recover maintenance from Kaveriammal, he had no right to cancel the settlement deed Ex. A-2. Hence the revocation of the settlement deed by Karuppuswami is invalid. The third and last contention urged by Sri M. S. Venkatarama Iyer is a substantial one and, in our opinion, it has to be accepted. Under Order XXI, Rule 103, C. P. C.

"Any party not being a judgment-debtor against whom an order is made under Rule 98, Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit (if any), the order shall be conclusive."

Kaveriammal did not file a suit within one year after the order Ex. B-80 when her application to remove the obstruction caused by the third defendant, Danalakshmi Ammal, and deliver the house bearing door No. 4, South Hanumantharayar Koil Street, Erode, in pursuance of the order in H. R. C. No. 10 of 1949 on the file of the District Munsif's Court, Erode, was dismissed. Instead of taking steps to vacate the order, Kaveriammal merely settled the properties in favour of her daughter and son-in-law. Even the plaintiffs (who claim under Kaveriammal) filed an eviction petition against one Perianna Goundan treating him as a tenant in the premises No. 5, South Hanumantharayar Koil Street, Erode, and got an ex parte order for eviction in R. C. O. P. No. 116 of 1958, on the file of the District Munsif's Court, Erode; they were obstructed by defendants Nos. 2 and 3, when they attempted to take delivery of the house in execution of the order of eviction, and their application for removal of obstruction and delivery was dismissed. The plaintiffs did not file a suit within one year as required under Order XXI, Rule 103, C. P. C. They, however, relied on the fact that the present suit was pending at the time when the order Ex. B-78 was passed.

8. In Seethamma v. Kotareddi, (1949) 1 Mad LJ 593=(AIR 1949 Mad 586) (FB), a Full Bench of this High Court has held

that the provisions of Order XXI, Rule 63 C. P. C. are mandatory and the decision in a claim petition is final unless the party aggrieved takes the course indicated in the rule by instituting a suit to supersede it within a year. It has been further held that the specific provisions of Order XXI, Rule 63, override the more general principle enunciated in Sec. 11, C. P. C. In that case, the decree-holder in O S No 527 of 1930 on the file of the District Munsif's Court, Ellore, attached certain properties and brought them to sale. But the mother of the judgment-debtor preferred a claim in respect of some of the properties on the ground that she had obtained a maintenance decree with a charge over those properties. But even four days prior to the claim petition filed by the mother of the judgment-debtor the decree-holder filed O S No 231 of 1936 on the file of the District Munsif's Court, Ellore, representing the general body of creditors for a declaration that the charge decree obtained by the mother of the judgment-debtor was collusive and not binding on the creditors and that the property already purchased was not liable for her maintenance. The claim petition was dismissed on the representation of the decree-holder that he had already filed the original suit, O S No 231 of 1936, on the file of the District Munsif's Court, Ellore. The mother of the judgment-debtor succeeded in establishing the validity of her charge decree when O S No 231 of 1936 went up to the High Court. But when she filed an execution application for enforcing the maintenance decree the auction purchasers filed O S No 91 of 1943 for a declaration that she cannot execute her decree as she had not filed a suit within one year for setting aside the order dismissing her claim, and this contention was accepted by the Full Bench.

9 In *Kaleswar Mills Ltd. v Govindaswami*, I.L.R. 1946 Mad 536=(AIR 1946 Mad 76) the decision in *Akkammal v Komaraswamy Chetty* (1942) 2 Mad LJ 315=(AIR 1943 Mad 36) affirmed later in the above Full Bench was followed and it was held that the claim in that suit was barred as against the obstructors by reason of the provisions of Order XXI, Rule 103 C. P. C. It was pointed out in this decision that though the Division Bench case in (1942) 2 Mad LJ 315=(AIR 1943 Mad 36) dealt with the effect of Order XXI, Rule 63 C. P. C. on principle, what was laid down in that Bench decision would also govern the case under consideration as the procedure indicated by the Code is the same, and Order XXI, Rule 103 C. P. C. corresponds to Order XXI, Rule 63 C. P. C.

10 Two earlier single Judges' decisions of this Court, taking a contrary

view were not referred to, or discussed, in the Full Bench decision. In *Palaniappa v Ramaswami*, AIR 1937 Mad 582, Venkataramana Rao, J., has held that the institution of a suit under Order XXI, Rule 103 C. P. C. is not the only remedy against the order under Order XXI, Rule 98 C. P. C., and that the rule only contemplates the establishment of a right to the property to supersede the order. He has held that if such a right is established within a year the order must be held to have been superseded and that it is not necessary to institute a suit within one year. He observed that the policy underlying Order XXI, Rule 103 C. P. C. is to have a speedy settlement of the questions of title raised in execution sales and that what makes the order conclusive under Order XXI, Rule 103 is not the failure to institute a suit, but the failure to have the right established.

In *Umanath v Pedru Souza*, AIR 1950 Mad 19 Govindarajachari, J., has relied on the above decision of Venkataramana Rao, J., and held that where a suit or an appeal already filed by the claimant is pending at the time when an order under Order XXI, Rule 98 C. P. C. dismissing his claim is made it is not obligatory on his part to file another suit under Order XXI, Rule 103 C. P. C. within one year of the order under O XXI R. 98 C. P. C. and that in such a case, the order is subject to the decision in the suit or appeal pending at the time. But these decisions should be deemed to have been overruled by the Full Bench decision, which has considered the principles governing the question. There is nothing in Order XXI, Rule 103 C. P. C. to show that it requires an unsuccessful party only to establish his right within a year. It only requires that the unsuccessful party should file a suit within a year to establish the right claimed.

11. Sri T. R. Srinivasan, appearing for the plaintiffs brought to our notice the decision in *Gopiram v Sewantilal*, AIR 1960 Cal 580 which relied on the above decisions in AIR 1937 Mad 582 and AIR 1950 Mad 19 and distinguished the decision in *Abdul Rahim Rowther v Swaminatha Odayar* (1955) 1 Mad LJ 322=(AIR 1956 Mad 19) which followed the Full Bench decision in (1949) 1 Mad LJ 593=(AIR 1949 Mad 586) (FB) and held that a suit to set aside a summary order under Order XXI, Rule 103 C. P. C. was maintainable in spite of the fact that there was a pending suit for the same relief when the summary order was passed. It has been held in the above Calcutta decision that if a competent Court gives a decision in a pending suit within a year of the passing of the summary order the decision must be accepted as valid because the time-limit for challenging the summary order has not

yet run out and the party in whose favour the order is made in the summary proceeding cannot get any advantage of it, the summary order not having attained finality.

Having regard to the Full Bench decision, the above Calcutta decision cannot be accepted. Further, the reasons given in the Calcutta decision to distinguish the decision in (1955) 1 Mad LJ 322=(AIR 1956 Mad 19) are hardly convincing and several anomalies would arise if the principle of that decision is followed. The terms of Order XXI, Rule 103, C. P. C. are quite clear that the summary order is conclusive subject to the result of a suit filed within a year. It would be adding to the rule to state that the summary order would be conclusive subject to the result of a pending suit, if a decision of competent Court in a pending suit is obtained within one year.

Order XXI, Rule 103 does not at all refer to the necessity of obtaining a decree of a court within one year, as what all it requires is the filing of a suit within one year. It was held in the Calcutta decision that the summary order was superseded by the decree passed by the trial court in a pending suit within a year. But it does not state as what would happen if the decree of the trial Court is taken up in appeal, or second appeal, and if the summary order is relied on by the other party, as in the case before us, and in other cases in which the principle of the Full Bench decision had been applied.

The Calcutta decision would lead to the anomalous result that a party who gets a decree in a pending suit within 356 days in an ordinary year and 366 days in a leap year could rely on that decision to supersede the summary order, but he would fail if he obtains such a decree even one day late through no fault on his part. It is a well-known principle that an act of Court shall prejudice no man, based on the maxim *actus curiae neminem gravabit*. Hence a person who has obtained a decision in a pending suit even after one year can legitimately contend that the delay in obtaining the decision was due to no fault on his part, but due to the delay on the part of the Court in making the decision and hence the decision in the pending suit, though made after an year of the summary order, would supersede the summary order.

We are, therefore, unable to accept the principle of the Calcutta decision following the decisions of single Judges of this Court, which are contrary to the Full Bench decision, which affirmed the earlier Bench decision in (1942) 2 Mad LJ 315=(AIR 1943 Mad 36). Hence the fact that the plaintiffs had obtained a deci-

sion in their favour in the lower Court in a suit which was pending at the time when the summary order was passed, cannot affect the applicability of the principle of the Full Bench decision to the facts of this case. The orders, Exs. B-78 and B-80, have become conclusive by reason of the failure on the part of the plaintiffs, and their predecessor-in-title Kaveriammal, to file appropriate suits within one year.

12. Sri T. R. Srinivasan, appearing for the plaintiffs, urged that the third defendant Danalakshmi Ammal did not set up title in herself, but only that of the joint family of her husband, that as Samiappa was not a party to the summary orders, they would not bind him and that the summary orders could not affect the rights of the defendants. It is true as pointed out in Venkata Ramiah Chetty v. Chinna Pulliah, (1949) 2 Mad LJ 466=(AIR 1950 Mad 41) the decision under Order XXI, Rule 103, C. P. C. becomes conclusive only as between the parties, unless displaced by the result of a suit to be instituted by the party against whom the order is made within a period of one year, and that persons who are not parties to the summary order cannot be affected by the order. It is clear from the summary orders in this case that the Court found that the third defendant Danalakshmi Ammal was in possession of the suit properties not on her own account, but on account of the joint family of her husband and son. The summary orders negated the claim of the plaintiffs that they are entitled to possession by virtue of the settlement deed relied on by them, which proceeded on the basis that the properties are the self-acquired properties of Karuppuswami.

If the orders, Exs. B-78 and B-80, have become conclusive as against the plaintiffs only so far as the parties, namely, defendants 2 and 3, are concerned, the plaintiffs can have no relief by way of damages for use and occupation as against them. It is true that the first defendant was not a party to the summary orders and they will not bind him. But for the prior litigations, the plaintiffs can have no remedy as against the first defendant, even if the summary orders are not conclusive, as they can be taken as pieces of evidence which negated the basis of the plaintiffs' claim.

13. The plaintiffs obtained an eviction order on the ground that Perianna Goundan was their tenant and they filed an application under Order XXI, Rule 97, C. P. C. only to remove the obstruction caused by Danalakshmi Ammal. But the averments in the plaint filed earlier are totally different and contradictory. It is stated in the plaint that Kaveriammal executed a settlement deed in favour of the plaintiffs and put them in possession

of the properties covered by the document and that defendants 2 and 3, at the instigation of the first defendant or of their own accord, assaulted the plaintiffs and trespassed into the suit houses. The second defendant is a minor. It is stated that the third defendant acted on behalf of the second defendant.

Thus even according to the averments in the plaint, it is defendants 2 and 3 who are in wrongful possession of the two houses bearing door Nos. 4 and 5, South Hanumantharayar Koil Street, Erode. We have already referred to the fact that in spite of the adverse order Ex. B-78 Kaveriammal did not file a suit within one year to set aside the order, but executed the settlement deed, Ex. A-1 in favour of the plaintiffs. In his evidence the second plaintiff stated that he took possession of the suit properties ten or fifteen days after Ex. A-1 but the defendants beat him and threw him out of possession. The present suit is not for a declaration of title and possession of the suit properties, but only for damages for use and occupation for the period 3-9-1958 to 3-9-1959. Thus the plaintiffs have no consistent case whether they were in possession of the suit houses through tenants, or whether the defendants or defendants 2 and 3 alone are in unlawful possession of the same. We have already referred to the counter-affidavit Ex. A 11 filed by Samiappa in E. A. No 1193 of 1957 in E. P. R. No 1879 of 1957 in O S No 20 of 1947 stating that his wife Danalakshmi Ammal, with the help of her brothers and father, took all the immovable properties and sent him to jail.

Thus, there is no satisfactory evidence that the first defendant Samiappa had possession of the suit properties. There can be no doubt that the third defendant alone had possession of the suit properties and she claimed that she was in such possession on behalf of the joint family of her husband and son and this claim has been upheld by the District Munsif's Court, Erode in the two summary orders, Exs. B-78 and B-80. The plaintiffs cannot, therefore claim any damages for use and occupation from any of the defendants, as the first defendant has not been proved to have been in occupation of the suit properties and the possession of the third defendant was on behalf of the joint family of her husband and son. It is unnecessary to express any opinion in this appeal as to how far the orders Exs. B-78 and B-80 could be used against the first defendant in a regular suit for title and possession, having regard to the decisions in the prior suits O S No 120 of 1945 and O S No 20 of 1947, on the file of the District Munsif's Court, Erode, inasmuch as the first defendant was not a party to the summary orders.

14. In the result, Appeal No 244 of 1951 is allowed with costs and the suit filed by the plaintiffs is dismissed with costs. Counsel's fee one set. The other appeal filed by the first defendant, Appeal No 572 of 1962, is also allowed, but without costs. The memorandum of objections filed by the plaintiffs in forma pauperis for a larger amount of damages necessarily fails and is dismissed, but in the circumstances we make no order as to costs. The plaintiffs should pay the Court-fee due to Government in the suit and in the cross objections.

GGM/D.V.C.

Order accordingly.

'AIR 1969 MADRAS 172 (V 56 C 33)

ISMAIL, J

Govindasami Pillai, Appellant v T M Srinivasa Chettiar and others, Respondents.

Second App No 345 of 1963 and S A. 571 of 1964 and S A. 1357 and 1557 of 1965, D/- 24-1-1968 against decree of Sub Court, Kumbakonam in A. S. No. 114 of 1960

(A) Tenancy Laws — Madras Cultivating Tenants Protection Act (25 of 1955), S 2 (a) — Cultivating Tenant — Private agricultural land of landlord — Agricultural lease is governed by the Act and not by Transfer of Property Act — Hairs of original lease are cultivating tenants and not trespassers — (Transfer of Property Act (1882), S 117) (Para 4)

(B) Civil P C. (1908) S 100 — Finding of fact — Amount awarded as damages for use and occupation is a finding of fact — Its correctness cannot be canvassed in second appeal (Para 5)

(C) Civil P C. (1908) Ss 9 and 11 — Bar to jurisdiction of Civil Court — Tenancy Laws — Madras Estates Land (Reduction of Rent) Act (30 of 1947), S 3A (4) (b) — Question whether particular land is private land or ryoti land — Decision of Tribunal on appeal is final and Civil Court's jurisdiction is expressly barred — Writ petition challenging order of Tribunal — Dismissal on ground that proper remedy is by suit — Order cannot confer jurisdiction on Civil Court by invoking principle of res judicata.

Under S 3-A (4) (b) of Madras Act (30 of 1947) the decision of the tribunal whether a particular land is a ryoti land or not is final and the correctness of that decision cannot be canvassed in any Court of law AIR 1964 SC 807, Rel. on.

(Para 6)
But whenever a party comes before the Court and raises the plea that a particular land in an estate is a ryoti land or private land, it is for the Court to consider the

provision contained in Section 3-A (4) (b) of the Act and take that into account for determining whether it has jurisdiction to proceed with the matter or not.

(Para 8)

A Civil Court whose jurisdiction is expressly taken away by a statutory provision cannot get jurisdiction by having recourse to the principle of *res judicata*. Whenever a question of jurisdiction is involved, it will be the duty of the Court to consider the same and decide it. The principle of *res judicata* cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, and a party cannot by his admission, omission or previous conduct or consent confer jurisdiction on a Court, where none exists. AIR 1929 All 132 & AIR 1930 All 254 & AIR 1936 Pat 198, Rel. on.

(Para 8)

On the basis of a final decision of a decision of a Revenue Tribunal under S. 3A (4) (b) that a certain land was private land the landlord filed a suit for recovery of rent in a Civil Court. The suit was decreed and an appeal against the decree was pending. In the meanwhile the defendant challenged the decision of the Revenue Tribunal by a writ petition but it was dismissed on the ground that the proper remedy was to institute suit. The defendant contended in the pending appeal that the order on the writ petition that the Civil Court had jurisdiction to decide the question operated as *res judicata* and therefore the Civil Court had jurisdiction to determine whether the land in suit was ryoti land.

Held (i) that the statement in the order dismissing the writ petition did not constitute a determination of the question regarding the jurisdiction of the Civil Court to go into the issue whether particular land is a ryoti land or not. Before a plea of *res judicata* can be sustained either under the provisions of the Civil Procedure Code or under the general principles, it must be established that the determination which is said to constitute *res judicata* was with reference to a matter which was directly and substantially in issue between the parties in the earlier proceedings. Explanation III to S. 11 C. P. Code states that the matter referred to in the section must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(Para 8)

(ii) that the order of dismissal of writ petition did not operate to confer jurisdiction on the Civil Court to decide whether the suit lands are ryoti lands or not, which jurisdiction has been taken away by the express provision contained in Section 3-A (4) (b) of Madras Act 30 of 1947.

(Para 8)

Cases	Referred:	Chronological	Paras
(1966) AIR 1966 SC 1061	(V 53)=		
(1963) Supp (2) SCR 542,	State of		
West Bengal v. Hemant Kumar			8
(1964) AIR 1964 SC 807	(V 51),		
Desikacharyulu v. State of A. P.			6
(1958) AIR 1958 Pat 270	(V 45)=		
ILR 37 Pat 201, Ganesh v.			
Baidyanath			6
(1947) AIR 1947 PC 78	(V 34)=		
74 Ind App 50, Raleigh Invest-			
ment Co. Ltd. v. Governor-Gener-			
al in Council			8
(1936) AIR 1936 Pat 198	(V 23)=		
ILR 14 Pat 633, Dt. Board Dhar-			
banga v. Suraj Narain			8
(1932) AIR 1932 Cal 108	(V 19)=		
36 Cal WN 238, Abdul Hamid v.			
Bijoychand			6
(1931) AIR 1931 Mad 268	(V 18)=		
135 Ind Cas 13, Krishnaswami v.			
Manikka			6
(1930) AIR 1930 All 254	(V 17)=		
1930 All LJ 352, Nathan v. Har-			
bans Singh			8
(1929) AIR 1929 All 132	(V 16)=		
10 L. R. A. Rev. 173, Jwala Debi			
v. Amir Singh			8
(1925) AIR 1925 PC 55	(V 12)=		
48 Mad LJ 64, Fateh Singh v.			
Jagannath Baksh Singh			6
(1869-70) 13 M. I. A. 160=2 Sar.			
500, Watson v. Collector of			
Rajashya			6

K. Parasaram, for Appellant; R. Kesava Iyengar, for Respondent.

JUDGMENT:— These four appeals raise a common question. S. A. No. 1557 of 1965 is filed by the respondents in S. A. 1357 of 1965 to the extent to which the decisions of the courts below went against them.

2. The short facts, the narration of which is necessary for the purpose of appreciating the rival contentions of the parties, are that the village of Mathi in Tanjore Dt. is an estate to which the Madras Estates Land Act of 1908 and the Madras Estates Land (Reduction of Rent) Act 1947 applied; but not the Madras Estates (Abolition and Conversion into Ryotwari) Act 1948. The respondents to the first three appeals claimed that the lands with reference to which they filed the present suit for recovery of rent were private lands. It is the common case of the parties that a notification under the Madras Estates Land (Reduction of Rent) Act 1947 was made by the Government fixing reduced rates of rent for ryoti lands in the village of Mathi. However, the Madras Estates Land (Reduction of Rent) Act 1947, as originally passed did not contain any provision for deciding the question whether a particular piece of land is a ryoti land or a private land in an estate with reference to which a notification has been made under the said

Act. Subsequently, by an amendment made in 1956 namely Madras Act 29 of 1956 Section 3-A was introduced prescribing the machinery for the purpose of determining whether any land in a village is or is not ryoti land. Under that section, provision was made for determining that question by the Collector and a right of appeal was provided to the Tribunal having jurisdiction over the village. Section 3-A (4) (b) of the Act states that the decision of the Tribunal on the appeal shall be final and shall not be liable to be questioned in any court of law.

3 In this case, the respondents herein filed an application before the Collector for determining the question whether the lands involved in these appeals are ryoti lands or private lands. The application was transferred to the Revenue Divisional Officer Kumbakonam, who by an order dated 20-2-1959 made in M. A. 22 of 1957 decided that the lands are private lands. The appellants herein took up the matter on appeal to the Tribunal, and the Tribunal by its order dated 12-3-1960 dismissed the appeal thereby confirming the conclusion of the Revenue Divisional Officer that the lands are private lands and not ryoti lands. At that stage the respondents herein filed suits for recovery of rent from the appellants herein. The appellants resisted the claim on several grounds, the most important of which is that the lands are ryoti lands situate in an Inam estate and therefore the respondents are not entitled to file the suit in the Civil Court for recovery of rent. After the Tribunal dismissed the appeal, the respondents preferred a writ petition on the file of this Court for quashing the order of the Tribunal. By an order dated 4-4-1962 Veeraswami, J. dismissed the writ petition in the following terms—

"The petitioner's proper remedy is to institute a suit. The petition is dismissed. The rule is discharged. No costs.

I must point out at this stage that the suits filed by the respondents herein were decreed by the learned District Munsif of Kumbakonam, and against the said judgments and decrees, the appellant herein had preferred appeals to the learned Subordinate Judge of Kumbakonam, and during the pendency of the said appeals, the order above quoted in the writ petition was passed by this Court. Before the learned Subordinate Judge the appellants put forward only two contentions, namely the suit lands are not private lands of the plaintiff and the Civil Court had jurisdiction to go into that question and secondly there was no relationship of landlord and tenant between the parties. Except in the appeal which has given rise to S. A. 1357 of 1965 in all the other appeals, the learned Sub-

ordinate Judge held that the relationship of landlord and tenant existed between the parties. With regard to the question as to whether the lands are private or ryoti lands, he came to the conclusion that the order of the Estates Abolition Tribunal holding that the lands are private lands was final and the Civil Court had no jurisdiction to go into that question. Since the order in the writ petition had been passed by that time, an argument seems to have been advanced before the learned Subordinate Judge that in view of the terms of the order in the writ petition, the Civil Court had jurisdiction to go into the question as to whether the lands were private lands or ryoti lands. The learned Subordinate Judge dealt with this contention in his judgment in the following terms—

"The learned Counsel for the appellants also urged another aspect of the case. His contention is that inasmuch as in the writ petition No 401 of 1960 filed by him to quash the order of the Estate Abolition Tribunal in this case, the High Court has been pleased to observe that the petitioner's proper remedy is to institute a suit, he is entitled to put forward a defence that the suit lands are not private lands of the plaintiffs and that they are ryoti lands. It is not possible for me to accept such a contention. No such right of defence is given to the appellants in the suit in question. His right to question the character of the land in the suit has been barred as already observed by me under the provisions of the Amending Act referred to above."

With the result, the appeals preferred by the appellants herein were dismissed. The above facts arose in S. A. 345 of 1963 and the facts in the other appeals are similar with some immaterial differences in dates etc. With regard to the appeal which has given rise to S. A. 1357 of 1965 and 1557 of 1965 there was a further question that was decided by the learned Subordinate Judge. The learned Subordinate Judge applying the provisions contained in the Transfer of Property Act held that the defendants in the suit who were not the original lessees, but the sons of the original lessees, were not tenants and consequently they were trespassers, and they were liable to pay damages for use and occupation. In S. A. 1357 of 1965 preferred by the tenants, the decision of the learned Subordinate Judge was challenged not only on the ground that the Civil Court had jurisdiction to decide the question whether the suit land is ryoti land or private land, but also on the ground that the finding of the learned Subordinate Judge that the appellants were only trespassers was illegal. S. A. 1557 of 1965 filed by the landlord against the same judgment, in addition to challenging the finding of

the learned Subordinate Judge that the respondents therein were not tenants, but trespassers also challenges the quantum of the amounts awarded by the Subordinate Judge as damages for use and occupation. Therefore, the common question that arises in all these appeals is whether the Civil Court has jurisdiction to go into the question whether the suit lands are ryoti lands or private lands. The additional question that arises for consideration in S. A. 1357 of 1965 and 1557 of 1965 is that whether the conclusion of the learned Subordinate Judge that the appellants in S. A. 1357 of 1965 were only trespassers is correct or not. I shall first dispose of the additional ground arising in S. A. 1357 of 1965 and 1557 of 1965.

4. The common case of the parties is that the lands are agricultural lands and the leases were agricultural leases. If that was the case, the provisions of the Transfer of Property Act as such will not apply. If the case of the landlord that the lands are private lands is accepted, then the provisions contained in the Madras Cultivating Tenants Protection Act 1955, will apply. Section 2 (a) of the Act defines 'cultivating tenant' in relation to any land as meaning a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied, and includes any such person who continues in possession of the land after the determination of the tenancy agreement and the heirs of such person, but does not include a mere intermediary or his heirs. In view of this definition, the appellants in S. A. 1357 of 1965 as heirs of the original lessee, will be cultivating tenants within the scope of the Act. Consequently, the conclusion of the learned Subordinate Judge that the appellants in S. A. 1357 of 1965 are trespassers cannot be supported. On this question, there was no dispute before me between the two parties.

5. With regard to the amount awarded to the appellant in S. A. No. 1557 of 1965, that being a finding on a pure question of fact, its correctness cannot be canvassed in the second appeal. Therefore, S. A. 1357 of 1965 and 1557 of 1965 will be allowed to the extent of vacating the finding of the learned Subordinate Judge holding that the appellants in S. A. 1357 of 1965 are trespassers and not tenants.

6. Then remains the common question arising in all the appeals as to the jurisdiction of the Civil Court to determine whether the suit lands are private lands or ryoti lands. I have already referred to the provision contained in Section 3-A (4) (b) of Madras Act (30 of 1947). That provision makes it abundantly clear that the decision of the Tribunal whether a

particular land is a ryoti land or not is final and the correctness of that decision cannot be canvassed in any Court of law. If authority is needed in support of such a conclusion, reference can be made to the decision of the Supreme Court in *Desikacharyulu v. State of A. P.*, AIR 1964 SC 807 dealing with a similar provision contained in the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. Mr. K. Parasaran, learned Counsel for the appellants in these cases did not contend that notwithstanding the provision already referred to by me, a Civil Court has got jurisdiction to decide whether a particular land in an estate is ryoti land or not. On the other hand, in view of the express provision contained in Sec. 3-A (4) (b) of the Act, no such contention is possible. The contention of Mr. Parasaran is that the order in the writ petition constitutes *res judicata* as between the parties so as to prevent the respondents from raising the contention that the Civil Court had no jurisdiction to determine whether the lands in question are private lands or ryoti lands. It is unfortunate that the express provision contained in Section 3-A (4) (b) of the Act was not brought to the notice of the learned Judge who disposed of the writ petition. I must also point out one further fact. Against the order in the writ petition, the appellants preferred a writ appeal to this Court; but they have chosen to withdraw the same. Under these circumstances, the contention of the learned Counsel Mr. K. Parasaran, is that the statement contained in the order in the writ petition, namely, the petitioner's proper remedy is to institute a suit, constitutes the determination of the question whether the Civil Court has jurisdiction to decide whether the lands in question are private lands or ryoti lands or not and that determination has been rendered by this Court in the presence of both the parties and hence binding on both the parties, and consequently it is not open to the respondents to raise the plea of want of jurisdiction in the Civil Court on this point in the suits for recovery of rent instituted by them. On the other hand, the contention of Mr. R. Kesava Aiyangar, the learned Counsel for the respondents, is that the dismissal of the writ petition would operate as a *res judicata* preventing the appellants herein from raising the contention that the suit lands are ryoti lands and not private lands. Mr. R. Kesava Aiyangar in support of his contention relied on the decisions of the Privy Council in *Watson v. Collector of Rajashya*, (1869-70) 13 M. L. A. 160 and in *Fateh Singh v. Jagannath Baksh Singh*, 48 Mad LJ 64=(AIR 1925 PC 55), the decision of the Calcutta High Court in *Abdul Hamid v. Bijoychand*, AIR 1932 Cal 108, the decision of the

Patna High Court in *Ganesh v Baidyanath*, AIR 1958 Pat 270 and the decisions of this Court in *Krishnaswami v. Manikka*, AIR 1931 Mad 268 and *Veeraragu v Manikkavasagam*, AIR 1934 Mad 68. In reply, the contention of Mr. K. Parasaran is that none of these decisions will prevent him from putting forward the contention that the lands are ryoti lands, because the writ petition filed by the appellants was not dismissed after considering the merits, but summarily, on the ground that the alternative remedy of a suit was available to the appellants.

7. In the view I am taking in relation to the first contention of Mr. K. Parasaran, it is unnecessary for me to decide whether the dismissal of the writ petition would constitute *res judicata*, so as to prevent the appellants from raising the contention that the suit lands are ryoti lands.

8. So far as the main question argued by Mr. K. Parasaran, I must point out that the learned Counsel was not able to bring to my notice any decision which has taken the view that a Civil Court whose jurisdiction has been expressly taken away by the statutory provision can get jurisdiction by having recourse to the principle of *res judicata*. Mr. Parasaran relied on the decision of the Supreme Court in *State of West Bengal v Hemant Kumar*, AIR 1966 SC 1061. In my view, that decision does not lay down any such proposition. Really speaking, it is very doubtful whether such a plea of *res judicata* will be available to the appellants at all. Before a plea of *res judicata* can be sustained either under the provisions of the Civil Procedure Code or under the general principles, it must be established that the determination which is said to constitute *res judicata* was with reference to a matter which was directly and substantially in issue between the parties in the earlier proceedings. Explanation III to Section 11, C. P. Code states that the matter referred to in the section must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. As I pointed out earlier, the writ petition was dismissed after the suit was decreed and before the appeal was disposed of by the Subordinate Judge. With the result, neither the judgment in the writ petition nor the pleading in the writ petition were filed in these proceedings for the purpose of establishing that the question regarding the jurisdiction of the Civil Court was directly and substantially in issue between the parties in the writ petition. Even this will be sufficient to reject the plea of *res judicata* sought to be raised by the learned Counsel for the appellants. However, I do not want to rest my conclusion on this somewhat nar-

row and technical ground, in view of the fact that counsel for both the parties before me relied on the same order as constituting *res judicata* against the opposite party. The question that really falls for determination in these second appeals is whether the statement of this Court while dismissing the writ petition, that the petitioner's proper remedy is to institute a suit "can be said to be a determination of the question regarding the jurisdiction of the Civil Court to entertain a plea whether a land in an estate is a ryoti land or not. For one thing, I am unable to accept the contention of the learned counsel that the statement contained in that order disposing of the writ petition constitutes a determination on the question regarding the jurisdiction of the civil court. No doubt, that statement was the basis on which the writ petition was dismissed. But that will not by itself constitute that statement a determination of the question regarding the jurisdiction of the civil court to go into an issue whether a particular land is a ryoti land or not. Apart from this, the question of jurisdiction is really a matter between a party and a Court and cannot be said to be a matter between the parties before the Court. Whether a particular party raises the question regarding the want of jurisdiction of a Court or not, it is the duty of the Court to take note of the statutory provisions conferring jurisdiction on it or taking away the jurisdiction from it. If, under the law, a Court has no jurisdiction, no amount of consent, acquiescence or assertion on the part of any of the parties can confer jurisdiction on the Court.

In *Raleigh Investment Co Ltd v Governor-General-in-Council*, 74 Ind App 50 at p 61 (AIR 1947 PC 78 at p 79), the Privy Council pointed out that "it is pars judicis to take jurisdiction into consideration and the section has to be considered". Therefore, in the light of this statement of the law, whenever a party comes before the Court and raises the plea that a particular land in an estate is a ryoti land or private land, it is for the Court to consider the provision contained in Section 3-A (4) (b) of the Act and take that into account for determining whether it had jurisdiction to proceed with the matter or not. In *Jwala Debi v Amr Singh*, AIR 1929 All 132, it has been observed thus—

"There can be no doubt that a decision on a point of law is as much binding on the parties, in a subsequent litigation provided other ingredients for a principle of *res judicata* to apply are present, as a decision on a point of fact. The question whether the previous decision was right or wrong is entirely irrelevant; but these considerations do not apply where a question of jurisdiction arises. Look-

ed at closely, a question of jurisdiction although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself. The plaintiff invokes the jurisdiction of the Court. The defendant may or may not appear. If the Court finds that it has no jurisdiction to entertain the plaint, it will order the return of it for presentation to the proper Court. The defendant, if he appears, and if he so chooses, may point out to the Court that it has no jurisdiction. A decision on the question of jurisdiction does not affect in any way the status of the parties or the right of one party to obtain redress against the other. The fact that a decision as to jurisdiction is not binding on the parties in a subsequent litigation will be apparent from this. Suppose instead of instituting the present suit in the Revenue Court, the appellant had gone to the Civil Court and asked for redress. She could not rely on the decision of the Revenue Court in order to induce the Civil Court to exercise jurisdiction in the matter of her suit. She could not say that because the decision was given as between herself and the defendant, the presiding officer of the Civil Court was bound to exercise jurisdiction although he had not got it. She would not be heard if she said that the defendant was precluded from saying that the Revenue Court had no jurisdiction to entertain the suit. As I have said, looked at closely, it will be found that a question of jurisdiction is not a question which may be said to have arisen between the parties'. The principles underlying this decision were followed by a Bench of the same High Court in *Nathan v. Harbans Singh*, AIR 1930 All 254. In *Dt. Board Dharbanga v. Suraj Narain*, AIR 1936 Pat 198 it has been held thus—

"That brings me to the question whether a question of law can be said to be subject to the principle of *res judicata*. Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions, the rights of parties are not the only matter for consideration. The Court and the public have an interest. When a plea of *res judicata* is raised with reference to such matters, it is at least a question whether special considerations do not apply. In the question of jurisdiction, not only parties themselves, but the Court and the public had an interest".

In the light of these principles, to apply the principle of *res judicata* and to contend that the statement contained in the order of this Court dismissing the writ petition conferred jurisdiction on the Civil Court which has been expressly

taken away by the statute will be not only illegal and contrary to law, but also contrary to public policy. Whenever a question of jurisdiction is involved, it will be the duty of the Court to consider the same and decide it. The principle of *res judicata* cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, and a party cannot by his admission, omission or previous conduct or consent confer jurisdiction on a Court, where none exists. Hence I hold that the order of this Court in the writ petition does not operate as to confer jurisdiction on the Civil Court to decide whether the suit lands are *ryoti* lands or not, which jurisdiction has been taken away by the express provision contained in Section 3-A (4) (b) of Madras Act (30 of 1947). No other question arises in these appeals or was argued before me.

9. The result is, I dismiss S. A. 345 of 1963 and S. A. 571 of 1964. S. A. 1357 of 1965 and 1557 of 1965 will stand allowed to the extent indicated already by me, namely, to the extent of vacating the finding of the learned Subordinate Judge that the appellants in S. A. 1357 of 1965 are not tenants, but trespassers, and will stand dismissed in other respects. There will be no order as to costs in any of these appeals. No leave. In view of the above conclusion of mine, C. M. P. 5770 of 1967 and 5771 of 1967 are dismissed.

KSB

Order accordingly.

AIR 1969 MADRAS 177 (V 56 C 39)

KRISHNASWAMY REDDY, J.

C. Bhaktavatsalam, Petitioner v. V. Govindarajulu, Respondent.

Criminal Revn. Case No. 893 of 1967 (Cri. Revn. Petn. No. 880 of 1967), D/-5-3-1968 from order of Sixth Presy. Magistrate, Saidapet, Madras, in M. P. No. 60 of 1967.

Criminal P. C. (1898), Ss. 190 (1) (a), 173 — Order of Commissioner of Police in Madras under S. 173 referring complaint as mistake of fact — Subsequent entertainment of same complaint by Magistrate under S. 190 (1) (a), not barred, nor abuse of process — Madras City Police Act (3 of 1888), S. 7.

The final order of the Commissioner of Police, exercising the powers of a Presidency Magistrate under Sec. 7 of the Madras City Police Act, referring the complaint given to the police as mistake of fact, will not be a bar for a complaint to be filed before a Magistrate having jurisdiction, nor its entertainment by a Magistrate having jurisdiction will be an abuse of process. (Paras 7, 9)

JL/KL/E795/68

The Commissioner of Police exercises the powers of a Presidency Magistrate under S 7 of the Madras City Police Act subject to such orders as may from time to time be issued by the State Government. (Para 6)

The State Government Order 1271 (Judicial) dated 18-8-1898 makes it clear that the Commissioner of Police is prohibited from exercising the power of taking cognizance of offences under S 190, Cr P C. But of course under the same G O the Commissioner of Police can receive occurrence reports under S 157, Cr P C. and finally reports under Section 173 Cr P C. and he can also pass orders under S 173 (3) of the Code. An order passed by the Commissioner of Police under S 173, Cr P C. cannot under any circumstances be a bar for a complaint to be filed by a party before a Magistrate who has jurisdiction to take cognizance of the complaint under S 190, Cr P C. Even in a case where the police investigate a cognizable offence in respect of the information received by them and submit a final report under S 173 Cr P C. of which the Magistrate having jurisdiction takes cognizance by virtue of S 190 (1) (b) Cr P C., there is no bar for the Magistrate taking cognizance of a complaint filed by a party in respect of the same facts under S 190 (1) (a) Cr P C. and proceed with the enquiry or the trial, as the case may be, or the both. The investigation by the police of a cognizable offence has nothing to do with the Magistrate taking cognizance of the same matter on a complaint by a party. AIR 1962 SC 876 & AIR 1946 Mad 167 & AIR 1962 Cal 135 (FB), Distinguished, AIR 1961 SC 966, Explained. (Para 7)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 876 (V 49)=
1962 (1) Cri LJ 770, Pramathanath
v Saroj Ranjan B
(1962) AIR 1962 Cal 135 (V 49)=
1962 (1) Cri LJ 285 (FB) A. K.
Roy v State of West Bengal B
(1961) AIR 1961 SC 986 (V 46)=
1961 (2) Cri LJ 39, Gopaldas v.
State of Assam B
(1946) AIR 1946 Mad 167 (V 33)=
1945 Mad WN Cr 144=47 Cri LJ
595, Kumariah v Chinnna Naicker B

V Ganapathasubramania Iyer for Petitioner V Gopinath, for Respondent, Canvin Jacob, for Public Prosecutor, for the State

ORDER — This petition has been filed by the first accused in C C. 2270 of 1967 against the order of the Sixth Presidency Magistrate overruling certain preliminary objections raised by him. The facts of the case relevant for the purpose of deciding the points raised in this petition are briefly these:—

The respondent, V Govindarajulu, a retired Deputy Administrator-General and Official Trustee Madras, filed a private complaint against the revision petitioner and two others alleging that they had committed the offence of criminal breach of trust and falsification of accounts in respect of certain trust properties of Sadaipet Annadhana Samajam which is a public charitable society of which the petitioner was the secretary and the other two accused were the President and Treasurer, respectively. The Sixth Presidency Magistrate took the case on file. The revision petitioner filed a petition before the learned Magistrate alleging firstly, that the respondent was not a member of the Annadhanam Samajam and as it is not shown that he was interested in the Samajam or the school run by it, he is incompetent to file the complaint, secondly, that the respondent filed a petition before the Deputy Commissioner of Crimes in respect of the same matter and the said complaint was referred as a mistake of fact and that subsequently he appealed to the Commissioner and the same was also dismissed and in those circumstances, the present complaint was not maintainable and its entertainment was barred thirdly, that the complaint did not disclose any offence and so it was liable to be dismissed and lastly that at the instance of the respondent, a civil suit was filed in respect of the same facts alleged against the petitioner and the other accused and that the complaint filed while the suit was pending, without the sanction of the Civil Court was not maintainable.

2. It has to be noted that after the Commissioner of Police disposed of the matter, the revision petitioner filed a complaint under Section 211 I P C. against the respondent and that was dismissed. Subsequently the respondent filed the present complaint and it appears, a revision against that order is pending.

3. Learned Sixth Presidency Magistrate negatived all the contentions raised by the petitioner before him and in my opinion, rightly

4. The learned Counsel appearing for the petitioner pressed before me the second point raised before the Magistrate, namely, that the present complaint is barred as the complaint given by the respondent in respect of the same fact before the police was referred as mistake of fact and the Commissioner of Police on appeal by the respondent, refused to interfere with the order of the police. He further contended that the present complaint is an abuse of process of Court as he had already exhausted his remedy before the police. There is absolutely no force in this contention. The learned Magistrate took cognizance of the case under Section 190 (1) (a) Cr P C.

Under Section 190 (1) (a) Cri. P. C. a Magistrate having jurisdiction may take cognizance of any offence upon receiving a complaint of facts which constitute such offence.

5. "Complaint" is defined under Section 4 (1) (h) of the Cri. P. C. as 'the allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer.'

6. Under Section 200, Cri. P. C., a Magistrate taking cognizance of an offence on complaint shall examine the complainant and the witnesses present, if any, upon oath. Under Section 202, Cri. P. C. a Magistrate on receipt of a complaint of an offence, may either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, for the purpose of ascertaining the truth or falsehood of the complaint. Under Section 203, Cri. P. C. the Magistrate before whom a complaint is made, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the witnesses and the result of the investigation or enquiry (if any) under Section 202, there is in his judgment no sufficient ground for proceeding.

These provisions make it clear that when a complaint is filed before a Magistrate, he may take cognizance of the case on examining the complainant on oath or he may enquire himself or direct any other police officer for the purpose of ascertaining the truth of the case and if he is satisfied from the examination of the complainant on oath and the report of the police officer that there are no sufficient grounds for proceeding with the case he may dismiss it. What was preferred by the respondent before the Sixth Presidency Magistrate was a complaint within the meaning of Section 4 (1) (h) Cri. P. C. The Magistrate took cognizance of the case under Section 190 (1) (a), Cri. P. C. The learned Magistrate is fully competent to take cognizance of a complaint on a cognizable or a non-cognizable offence. There is no prohibition under the Criminal Procedure Code, for a Magistrate taking straightway cognizance of even a cognizable offence on a complaint preferred by the party. If once the Magistrate had exercised his power under Section 203, Cri. P. C., and dismissed such a complaint, whether a second complaint would be a bar is a matter which will very much depend upon the facts of each case.

In the present case, it is not the case of the petitioner that the Magistrate had taken cognizance of the matter already

and dismissed it under Section 203, Cri. P. C. and that the present complaint was a bar. But he contends that inasmuch as the information was laid in respect of the same facts covered by the present complaint to the police officer and it was referred as a mistake of fact and on appeal, the Commissioner confirmed it, it must be deemed as dismissal of complaint by the Commissioner as he exercised the powers of a Presidency Magistrate in the City of Madras. If as contended by the learned Counsel, the Commissioner of Police exercised the powers of a Presidency Magistrate in respect of cognizance of cases under Section 190, Cri. P. C. there may be some force that once in that capacity the Commissioner of Police has dealt with the complaint, that the second complaint may amount at least to abuse of process. But it appears to be clear that the Commissioner of Police has no power to take cognizance of a complaint under Section 190, Cri. P. C. Under Section 7 of the Madras City Police Act, it is provided that the Commissioner shall by virtue of his office be a Presidency Magistrate, but shall exercise his powers as Magistrate subject to such orders as may from time to time be issued by the State Government. The State Government passed G. O. Ms. 1271 (Judicial) dated 13-8-1898 which still seems to be in force is as follows:—

"In exercise of the power conferred upon him by Section 7 of the Madras Police Act, 1888 and in supersession of all previous orders on the subject, the Governor-in-Council is pleased to declare that the Commissioner of Police, Madras, shall not, in his capacity as a Presidency Magistrate, exercise the power of taking cognizance of offences under Section 190, Cri. P. C. except so far as may be necessary to receive 'occurrence reports' under Section 157 and to deal with such reports under Section 159, and also to receive and dispose of reports submitted under Section 173 and to make orders under subsection (3) of that section".

7. The above Government Order makes it clear that the Commissioner of Police in Madras is prohibited from exercising the power of taking cognizance of offence under Section 190, Cri. P. C. But of course, under the same G. O. the Commissioner of Police can receive occurrence reports under Section 157, Cri. P. C. and finally, reports under Section 173, Cri. P. C. and he can also pass orders under Section 173 (3) of the Code. An order passed by the Commissioner of Police under Section 173, Cri. P. C. cannot under any circumstances be a bar for a complaint to be filed by a party before a Magistrate who has jurisdiction to take cognizance of the complaint under Section 190, Cri. P. C. Even in a case where the police investigate a cognizable

offence in respect of the information received by them and submit a final report under Section 173 Cri. P. C. of which the Magistrate having jurisdiction takes cognizance by virtue of Section 190 (1) (b) Cri. P. C., I do not think there will be a bar for the Magistrate taking cognizance of a complaint filed by a party in respect of the same facts under Section 190 (1) (a) Cri. P. C. and proceed with the enquiry or the trial, as the case may be or the both. The investigation by the police of a cognizable offence has nothing to do with the Magistrate taking cognizance of the same matter on a complaint by a party. So I am of the view that the Commissioner of Police who passed the final orders (sic) referring the complaint given to the police as mistake of fact will not be a bar for a complaint to be filed before a Magistrate having jurisdiction. As a matter of fact, it is the practice that when the police give a notice to the party referring the case, such party is requested to file a complaint before a Magistrate, if so advised.

8. The learned Counsel for the petitioner relied upon two decisions of the Supreme Court, namely *Gopalidas v State of Assam*, AIR 1981 SC 936 and *Pramathanath v Saroj Ranjan*, AIR 1962 SC 876. In the earlier decision, the Supreme Court has stated that a complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under Section 156 (3) to the police for investigation and if he does so then he would have to proceed in the manner provided by Chapter XVI Cri. P. C. The Supreme Court pointed out only the discretion given to a Magistrate to direct the police officer to investigate the case under Section 158 (3). But this does not mean that the Magistrate has no power to take cognizance of the case under Section 190 (1) (a) following the procedure laid down in Secs 200, 202 and 203 of the Code. It has been made clear by the Supreme Court that the Magistrate should follow the procedure in taking cognizance of complaints even in cases where the Magistrate had directed the police to investigate under Section 156 (3). In the second case, the Supreme Court has stated as follows—

"An order of dismissal under Section 203 Cri. P. C. is no bar to the entertainment of a second complaint on the same facts and it will be entertained only in exceptional circumstances e. g. where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not with reasonable diligence, have been brought on the record in the previous proceedings have been adduced. It cannot be said to be in the interests of justice that after a

decision has been given against the complaint upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into.

This decision will not at all apply to the facts of this case because there was no prior complaint before a Magistrate which ended in a dismissal under Section 203, Cri. P. C. Similarly, another decision in *Kumariah v Chinna Naicker* 1945 Mad WN Cr 144 = (AIR 1946 Mad 167) is of no help to the petitioner. That was also a case where a complaint filed by the party was dismissed under Section 203 Cri. P. C. after the investigation by the police under Section 202 of the Code and after such dismissal a second complaint was filed. It was held that though a second complaint may not be a bar for its entertainment on the facts of the case, it might be an abuse of process. The learned Counsel for the petitioner relied upon another decision in *A. K. Roy v State of West Bengal*, AIR 1962 Cal 135. Even this decision is of no use in relation to the facts of this case. What is stated in that decision is that when the police upon investigation have submitted a final report under Section 173 Cri. P. C., a Magistrate cannot direct the police to submit a charge-sheet, but he can take cognizance on the statement of facts contained in the final report, if those facts constitute an offence. I am not able to see as to how this observation is relevant for this case.

9. I am, therefore, of the view that the complaint filed by the respondent is neither an abuse of process nor a bar because of the prior investigation by the police.

10. The revision case is dismissed.
GDR/DVC. Revision dismissed.

AIR 1963 MADRAS 180 (V 55 C 40)
ISMAIL, J

T V Gnanavelu and another Appellants v D P Kannayya and others, Respondents.

A. A. O No 35 of 1965 D/- 21 12-1967, against order of M. A. C. T. Madras, in M. A. C. T No 87 of 1962.

(A) Motor Vehicles Act (1930) Ss. 110 and 110 D — Claim for death caused in accident — Determination of damages — Principles — Quantum awarded by Claims Tribunal — Interference in Appellate Court — Conditions for, stated.

In a case of claim for death caused in a motor accident compensation has to be awarded under two heads: (i) for pains and suffering, and (ii) for loss of expectancy of life. In assessing the damages,

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under the second head, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, but objective. The damages are in respect of loss of life, not of loss of future pecuniary prospects. One cannot possibly eliminate some speculation or imaginative thinking. When the Appellate Court is called upon to interfere with the quantum determined by the Claims Tribunal, certain compelling factors, which should make the determination of the quantum shockingly excessive should be brought to the notice of the Court.

Death of a retired man of about 60 years of age was caused in an accident with a motor cycle. The Claims Tribunal finding that the accident was due to the rashness and negligence of the driver, awarded a compensation of Rs. 1000/-, under the head of pain and suffering and another sum of Rs. 4,000/- for loss of expectancy of life and a sum of Rs. 37.48 being the expenses incurred. The deceased had two sons each earning an income of Rs. 300/- p.m.

Held that taking into account the fact that the deceased would have expected to be looked after well and maintained comfortably by his sons, it could not be said that the award of Rs. 4,000/- as compensation for loss of expectancy of life was excessive. AIR 1962 Mad 309 & AIR 1966 Mad 466, Rel. on. (Para 4)

(B) Evidence Act (1872), S. 3 — Discrepancies and contradictions — One witness stating that motor cycle which knocked the deceased was black in colour — Another witness stating that it was of chocolate colour — Similarly, one stating that there was heavy traffic on road — Another stating that there was no heavy traffic — Contradiction because one spoke relating to time of accident while the other spoke of time immediately after accident when there is naturally crowd gathered — Evidence held could not be ignored as contradictory. (Para 2)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Madh Pra 246 (V 54)=1967 A. C. J. 246, State of M. P. v. Saheb Dattamal L. Ramchandra 3
 (1966) AIR 1966 SC 1750 (V 53)= (1966) 3 SCR 649, Municipal Corporation of Delhi v. Subagwanti 3
 (1966) AIR 1966 Mad 466 (V 53)= 79 Mad LW 271, Champalal v. Venkataraman 5
 (1966) 1966 ACJ 366=(1966) 2 Mys LJ 588, Krishnamma v. Alice Veighes 3
 (1962) AIR 1962 SC 1 (V 49)= (1962) 1 SCR 929, Gobald Motor Service v. Velusami 3

- (1962) AIR 1962 Mad 309 (V 49)= 75 Mad LW 156, Krishna Goundar v. Narasihgam 5
 (1941) 1941 AC 157=(1941) 1 All ER 7 (HL), Benham v. Gambling 4, 5
 (1937) 1937 AC 826=106 LJKB 576, Rose v. Ford 4
 V. Subramaniam, for Appellants; V.-V. Ravhagan, for Respondents.

JUDGMENT:— This is an appeal against an order of the Motor Accidents Claims Tribunal, Madras, awarding a compensation of Rs. 5037.48 to the respondents herein in respect of the death of one Doriaswami Pillai involved in an accident on 30-11-1961. On 30-11-1961 at about 9-30 a.m. when the deceased was crossing Ranganathan Chetti Road, Nungambakkam, somewhere opposite to the Indian Bank he was knocked down by the motor cycle driven by the first appellant herein. The Tribunal found that the accident was due to the rashness and negligence of the first appellant and awarded a compensation of Rs. 1,000/-, under the head of pain and suffering and another sum of Rs. 4,000/- for loss of expectancy of life and a sum of Rs. 37.48 being the expenses incurred for taking X-ray totalling a sum of Rs. 5037.48.

2. Mr. V. S. Subramaniam, the learned Counsel for the appellant, contends that rashness and negligence on the part of the first appellant has not been established. In this case, the persons who spoke to the occurrence of the accident are P. Ws. 1 and 2 and R. W. 1 namely the first appellant himself. Obviously, the evidence of the first appellant as R. W. 1 was interested and no reliance could be placed on that. Apart from that, the evidence is also unbelievable for it is inherent improbability.

According to the first appellant on the date in question, he was overtaking a cycle rickshaw going in the same direction and the pedestrian rushed from the west end of platform to the other side. The cycle rickshaw man swerved to left to avoid him and on hearing the noise it made by swerving, he applied brakes; it went 3 or 4 feet and stopped; before it stopped the deceased tripped over to the front wheel of the motor cycle. His knees hit the wheel, and he fell to his right face upwards on the road. It is the admitted case that later in the same day, Doraiswami Pillai died. Therefore, it is obvious that the injury sustained by him must have been serious. But if the version of the first appellant has to be accepted, the injuries could not have been serious because he tripped over only to the front wheel of the motor cycle before it came to a standstill. In such an event, if he had fallen, he could not have sustained such serious injuries as to cause his death.

Apart from that, P Ws. 1 and 2 have spoken to the fact that the deceased was knocked down by the negligence of the first appellant. The learned Counsel asked me to ignore the evidence of P Ws 1 and 2 because of the contradictions as between their versions. The one contradiction pointed out by the learned Counsel was that while P W 1 stated that the motor cycle was black in colour P W 2 stated that the motor cycle was chocolate in colour. I do not attach any significance to this discrepancy. It may also be noted that the parties were not giving evidence in English and admittedly they were giving evidence in Tamil and that has been translated into English. I am not sure whether this discrepancy may not be due to the translation.

The second discrepancy pointed out by the learned Counsel is that according to P W 1 there was no heavy traffic at the time of the accident while according to P W 2, there was a heavy traffic at that time. The answer of P W 2 as to there being heavy traffic comes after the witness had spoken to the accident having taken place and the deceased having been injured. Therefore the reference to the existence of heavy traffic, whether it related to the time of the occurrence of the accident or to the time immediately after the accident had occurred when there will be naturally a crowd and the people going in that direction will stop is not clear. In view of this circumstance, I am unable to accept the contention of the learned Counsel that the evidence of P Ws. 1 and 2 should be ignored with the result, the finding of the Tribunal on the basis of the evidence of P Ws. 1 and 2 that the accident was as a result of the negligence of the first appellant is not liable to be interfered with and is hence sustained.

3. The next argument advanced by the learned Counsel for the appellant is with regard to the quantum of compensation awarded by the tribunal. Mr Subramaniam invited my attention to the decision of the Supreme Court in *Gobald Motor Service v Velusami*, AIR 1962 SC 1 and *Municipal Corporation of Delhi v Subagwanti*, AIR 1966 SC 1750. Those decisions and the decisions of Courts that followed them, such as the decision of the Mysore High Court in *Krishnamma v Alice Veighes*, 1966 ACJ 366 (Mys) and the decision of the High Court of Madhya Pradesh (Indore Bench) in *State of M. P. v Saheb Dattamal L. Ramachandra*, 1967 ACJ 246 (AIR 1967 Madh Pra 246) lay down the general principles that have to be followed in calculating the quantum of damages awardable in such cases.

4. The only question that arises is how that principle has to be applied to the facts of the present case. The Tribunal on the appreciation of the evidence plac-

ed before him came to the conclusion that the deceased was aged 60 at the time of the accident that he had already retired as a Junior Superintendent of the Hindu Religious and Charitable endowments department, and that a portion of his pension of Rs 6715 was commuted and was actually drawing a pension of Rs. 35-15 and under those circumstances, it could not be said that he was giving anything to the respondents so as to warrant the respondents contending that the death of Doraiswami Pillai caused any loss of benefit to them.

On the other hand, as I pointed out already the Tribunal awarded a compensation of Rs 1000/- for pain and suffering and a sum of Rs. 4,000/- for loss of expectancy of life. Mr Subramaniam does not question the proposition that damages are awardable under the said two heads and all that he challenges is the quantum. As far as the award of Rs. 1000/- under the head of pain and suffering is concerned, it cannot be said by any stretch of imagination that the said figure is excessive. With regard to the sum of Rs. 4,000/- awarded for loss of expectancy of life, Mr Subramaniam contended that the deceased was aged 60 and he would not have lived for long and, therefore, the award of Rs. 4,000/- was excessive. I am unable to agree with his contention.

In the modern times, the longevity of the citizens of this country is said to be increasing. To say that a man aged 60 will not live for long is to under-estimate the present position. Several decisions have awarded compensation taking into account the normal life of individuals at 70 or 75. If that be the case, the award of Rs. 4,000/- for the death of a person at the age of 60 cannot be said to be excessive. Mr V V Raghavan, the learned Counsel for the respondents drew my attention to the decision of the House of Lords in *Benham v Gambling*, 1941 AC 157. Mr Raghavan drew my attention to the following passage in the judgment of Viscount Simon, L. C., in the above case:—

"The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an easy or Aristotelian ethics than in the judgment of a Court of law but in view of the earlier authorities we must do our best to contribute to its solution. The Judge observed that the earlier decisions quoted to him assumed 'that human life is, on the whole, good'. I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be

satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. It is significant, that, at any rate in one case of which we were informed, the Jury refused to award any damages under this head at all. As Lord Wright said in *Rose v. Ford* 1937 AC 826, special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or, at any rate, as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on the objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects".

5. This decision and the other decisions of the Courts in England on this matter were elaborately reviewed by Jagadisan, J., in *Krishna Gounder v. Narasigam*, AIR 1962 Mad 309. The learned Judge after referring to those decisions stated as follows:—

"There is now no difficulty in stating the principles that should weigh with the Court in awarding damages under this head of loss of expectation of life, particularly after the classical pronouncement of Viscount Simon in *Benham's case*. 1941 AC 157. But the application of the principles to given set of facts is yet not free from difficulty. The balance of prospective happiness of the individual has first to be ascertained and that has to be computed in money value. Even the best and at least judicial endeavour to discharge this task of ascertainment of damages cannot possibly eliminate some speculation or imaginative thinking". Bearing these principles in mind, and taking the facts of the present case into account can it be said that the award of Rs. 4,000/- on the ground of loss of expectancy of life is excessive? The second claimant as P. W. 4 has stated in his evidence that his father was hale and healthy at the time of the accident. He has further stated in his evidence that he was earning an income of another Rs. 300 per month and his brother was earning

an income of another Rs. 300 per month. Consequently, a man aged about 60 having two sons in that position, would have expected to be looked after well and maintained comfortably by the sons for whose education he spent all that he earned when he was in service. Taking this into account, in my view, it cannot be said that the award of Rs. 4,000/- as compensation for loss of expectancy of life can be said to be excessive.

Apart from this fact, when this Court is called upon to interfere with the quantum of Rs. 4,000/- determined by the Tribunal, certain compelling factors, which should make the determination of the quantum shockingly excessive should be brought to the notice of the Court. The principles that should apply in compelling an appellate court to interfere with the quantum of compensation awarded by the Tribunal have been elaborately set out in the judgment of Venkatadri, J., in *Champalal v. Venkataraman*, AIR 1966 Mad 466. Applying that test and bearing in mind the fact that the determination of such question has necessarily to be conjectural to some extent, it cannot be said that the fixation of Rs. 4,000/- as compensation under this head can be said to be excessive in the circumstances of this case.

6. Under these circumstances, I hold that there are no merits in this appeal and the same is dismissed with costs.

HGP/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 183 (V 56 C 41)

RAMAKRISHNAN, J.

AL. CT. Alagappa Chettiar, Petitioner v. Revenue Divisional Officer, Chidambaram and another, Respondents.

Writ Petn. No. 2301 of 1965, D/- 8-1-1968.

(A) Land Acquisition Act (1894), Ss. 4 (1), 5A — Acquisition of land owned by temple for construction of staff quarters of University — Acquisition was for public purpose — Alteration of procedure for disposal of land by public auction into proceedings for acquisition of land — Religious institution held would not lose — (Madras Hindu Religious and Charitable Endowments Act (22 of 1959), S. 34).

A was hereditary trustee of certain temple owning certain land in close proximity of an University. Under S. 34 of Hindu Religious and Charitable Endowments Act, A got permission of the authorities for dividing said land into 17 plots and selling them in public auction. Government also approved of such a course. A sold those plots in public auction and successful bidders paid one-third of pur-

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chase money At the instance of the University notice under S 4 (1) and S 5A of Land Acquisition Act was issued for acquiring aforesaid land for public purpose namely the construction of staff quarters for University in petition under Article 226 of the Constitution by A.

Beld (1) that the acquisition served a public purpose, namely the purpose of enabling the teaching staff to live in close proximity to the University campus, and afford to them the necessary convenience A purpose of that kind was a public purpose within the meaning of S 4 in the larger and more generic sense of that term. AIR 1965 SC 646 Expld. and Dist. AIR 1952 SC 252 & AIR 1914 PC 20 & AIR 1960 Mad 108 Foll. (Para 7)

(2) that the religious institution would not lose by the alteration of the procedure for disposal of the land by public auction, into proceedings for the acquisition of the land for erecting staff quarters for the University (Paras 4 & 8)

(B) Civil P C (1908) Pre. — Interpretation of Statutes — Meaning of words — Land Acquisition Act (1894), Ss 4 (1), 40 (1) (b) — Words "public purpose" in S 4 (1) — Words to be interpreted from a larger and more comprehensive angle without being narrowed down to restricted words used in S 40 (1) (b) — AIR 1965 SC 995 Rel. on — (Words and phrases — "Public purpose") (Para 6)

Cases Referred Chronological Paras

(1965) AIR 1965 SC 646 (V 52)=
1966 SCD 184 State of W B v

P N Talukdar 5 6

(1965) AIR 1965 SC 995 (V 52)=
(1965) 2 SCWR 33 R. K. Agarwala

v State of W B 6

(1960) AIR 1960 Mad 108 (V 47)=
ILR (1959) Mad 997 Vijrapuri

v N T C Talkies Ltd. 7

(1952) AIR 1952 SC 252 (V 39)=
ILR 31 Pat 565 State of Bihar v

Kameshwar Singh 7

(1925) AIR 1925 Bom 538 (V 12)=
27 Bom LR 1130 Municipal Cor-

poration, Bombay v Ranchodas 7

(1914) AIR 1914 PC 20 (V 1)=42
Ind App 44 Hemabai Framjee v

Secretary of State 7

K. E. Rajagopalachari, for Petitioner
S T Ramalingam, for Government Plea-

der for Respondents.

ORDER — The petitioner is the hereditary trustee of Sri Uchunathaswami Devasthanam, Sivapuri, Chudambaram Taluk, South Arcot District. The respondents are respectively the Revenue Divisional Officer Chudambaram (Land Acquisition Officer) and the State of Madras, represented by the Secretary for Industries, Labour and Co-operation (Housing) Department. The facts that led up to the present writ petition are briefly the following.

The temple of which the petitioner is the hereditary trustee owns several lands which include 1 acre 61 cents comprised in R. S Nos 217/1, and 217/2 in Thiruvetkulam village. The petitioner alleged that following the procedure outlined in the Hindu Religious and Charitable Endowments Act, Section 34, the petitioner on behalf of the temple with a view to augment the income of the temple for meeting its need, applied and got the permission of the authorities under the Act for dividing the said land into 17 plots and selling them in public auction as house sites. The Government also at the instance of the Commissioner appointed under the Hindu Religious and Charitable Endowments Act, accorded such approval by a communication sent on 13-6-1964.

In pursuance of these proceedings under the Hindu Religious and Charitable Endowments Act the petitioner was able to sell in public auction held on 6-1-1964 17 plots for a sum of Rs. 55 000/- and the successful bidders paid one-third of the purchase money. When the petitioner applied to the authorities under the Act for confirming the sale in favour of the respective bidders, some of the members of the staff of the Annamalai University who were not able to bid successfully at the auction sale, became disgruntled and made false representations and thus led the first respondent to issue a notice under Section 4 (1) and Section 5-A of the Land Acquisition Act for the purpose of acquiring the above said extent of land for a public purpose, namely the construction of staff quarters for the Annamalai University. In the meantime some of the purchasers at the auction had paid the balance of the purchase money but the sale deeds have not been executed in their favour by the petitioner because of the pendency of the acquisition proceedings.

2. The petitioner alleged that the construction of staff quarters meant for the occupation of individual members of the staff of the Annamalai University cannot be held to be for a public purpose, as such members of the staff do not constitute a section of the public. This apart, it was urged by the petitioner that after the Commissioner Hindu Religious and Charitable Endowments had accorded sanction for selling the same plots in public auction and after the Government had approved of that course, the resort to the provisions of the Land Acquisition Act for acquiring the very same lands at the instance of the University must be considered to be a misuse of power as well as a fraudulent and colourable exercise of such a power.

3. In the counter affidavit which was filed by the respondents it was alleged that the proposal to initiate land acquisition proceedings in this case was taken

up on the application of the Registrar of the Annamalai University based upon a resolution of the Syndicate of the University in March 1964. The fact that prior to that application, the Department of the Government dealing with religious endowments, had accorded sanction to the trustee to sell the lands in public auction under the provisions of Section 34 of the Hindu Religious and Charitable Endowments Act, would not stand in the way of the Government approaching the question again for the purpose of the Land Acquisition Act and taking a decision to initiate land acquisition proceedings. Such a step cannot be said to be a fraudulent and colourable exercise of power. It was also urged in the counter-affidavit that the construction of staff quarters for a University is a public purpose under the Act falling within the ambit of Section 4 of the Land Acquisition Act.

4. There is no doubt a certain unfortunate feature in the present acquisition proceedings, in so far as the Government, having given sanction to the trustee for selling the land in public auction and thereby augmenting the income of the temple, had to change its mind soon after, at the instance of the University to give approval for the initiation of land acquisition proceedings in respect of the same land for the purpose of building staff quarters for the Annamalai University. But there is this redeeming feature namely, that the people who have bid at the auction and made deposits of large amounts have not obtained sale deeds from the trustees of the temple, and therefore there has been no actual transfer of title from the trustee to these people.

Secondly if at the time of passing the award in the land acquisition proceedings the price realised at the sale at private auction is also taken into consideration for determining the quantum of compensation, it cannot be held that the religious institution of which the petitioner is a trustee will stand to lose by the alteration of the procedure for disposal of the land by public auction, into proceedings for the acquisition of the land for the alleged purpose of erecting staff quarters for the University. There is no basis therefore for the apprehension entertained by the petitioner that by changing the manner of disposal of the land by public auction into land acquisition proceedings at the instance of a body like the University, the petitioner-institution may stand to lose financially.

5. Learned Counsel for the petitioner, Sri K. E. Rajagopalachari referred to a decision of the Supreme Court in State of West Bengal v. P. N. Talukdar, AIR 1965 SC 646 at p. 653 for the view that

acquisition for staff quarters for an institution like the present, will not be a public purpose to which the provisions of the Land Acquisition Act can be applied. He referred in particular to the observations in that judgment in paragraph 13 where the Supreme Court observed that while acquisition of land for putting up a hostel building and a play-ground obviously meant for the students studying at an educational institution run by the Ramakrishna Mission at Calcutta, can be viewed as being directly useful to a section of the public, namely, the students of the institution, as far as staff quarters are concerned, they are meant for occupation by the individual members of the staff. Therefore the Supreme Court declined to accept the argument that an individual member of the staff must also be held to be a section of the public, and that therefore staff quarters will be useful to the public. The Supreme Court also observed that if such a view is to be taken, it would reduce the idea of what is useful to or what is used by a section of the public, to absurdity.

6. The above decision was given in the context of Section 40 (1) (b) of the Land Acquisition Act found in the Land Acquisition Manual, Part VII dealing with acquisition of Land for companies. In that section the Act has used the words "that acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public". The words 'likely to prove useful to the public' found in that section are important, and we have to view the Supreme Court decision cited above as explaining the scope of these specific words, and not as dealing with the interpretation of the words 'public purpose' found in Section 4 (1) of the Act. Admittedly this is not a case falling under Part VII dealing with acquisition of land for companies.

The Annamalai University is not a company. The respondent seeks to support the acquisition only under Section 4 (1) as having been made for a public purpose. It is only when the acquisition is made under Part VII for a company, that one has to resort to the more restricted language used in Section 40 (1) (b) namely, 'likely to prove useful to the public'. It is in this context of the restricted words thus employed in Section 40 (1) (b), that the Supreme Court seems to have expressed the opinion that the use of the quarters proposed to be put up on the acquired land by the staff of the educational institution will not fall within the scope of Section 40 (1) (b), which refers to the acquired land being likely to prove useful to the public. When we have to interpret the words 'public purpose' found in Section 4 (1) of the Act

the approach will have to be from a larger and more comprehensive angle, without being narrowed down to the restricted words used in Sec 40 (i) (b)

That this should be the proper approach has been laid down by the Supreme Court in the decision in *R K Agarwalla v State of West Bengal*, AIR 1965 SC 995 where at p 999 the Supreme Court observed that the expression 'public purpose' has been used in a generic sense including any purpose in which even a fraction of the community may be interested or by which it may be benefited. The same decision observes that when "public purpose" has to be construed for the purpose of Section 8 it has to be read in a restricted sense when the acquisition is for a company. In the latter event the public purpose must be limited according to the restricted language used in Part VII of the Act. Consequently it appears to me that this is a case where the acquisition not being for a company but for an educational institution, namely a University the proper way of construing the expression, 'public purpose' must be to take its meaning in the generic sense and not in the restricted sense applicable to acquisition for companies when the language used in Section 40 (i) (b) may have to be applied in the manner laid down in AIR 1963 SC 646 at p 653

7. On the other hand, there are a series of decisions which deal with the expression 'public purpose' from the broader point of view mentioned above. Instances of such decisions are *State of Bihar v Kameshwar Singh*, AIR 1952 SC 252 where at p 289 the Supreme Court has referred to the observations of the Judicial Committee in *Hemabai Framjee v Secretary of State*, 42 Ind App 44= (AIR 1914 PC 20) where the Privy Council extracted with approval the judgment of Batchelor, J.

"General definitions are, I think, rather to be avoided where the avoidance is possible and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease it is enough to say that in my opinion, the phrase whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

The Supreme Court thereafter added:

"And it is well that no hard and fast definition was laid down, for the concept of 'public purpose' has been rapidly changing in all countries of the world. The reference in the above quotation to 'the general interest of the community', however, clearly indicates that it is the presence of this element in an object or aim

which transforms such object or aim into a public purpose."

A Bench of this Court in *Vijarapur v. N T C Talkies Ltd.*, AIR 1960 Mad 103 at p 113 has referred to several previous decisions including the Supreme Court decision just now referred to and laid down the following broad principles for understanding the scope of the expression, 'public purpose':

"..... an acquisition can be for a public purpose, even though all the members of the public do not take the benefit, but only a section of it takes the benefit, public purpose in an acquisition may be served even though the acquisition is for the benefit of particular members of the public, provided the object of acquisition advances a public purpose. In this category may be included advancement of public prosperity public welfare and the convenience of the public" In the present case in the sale effected by the petitioner about 8 or 9 members of the University staff seem to have taken part and succeeded in making the highest bids for the plots. But the plots thus acquired become their private property and will descend to their heirs and which they can alienate. On the other hand the proposed acquisition will not benefit any specified number of individuals (who may happen to be teachers of the Annamalai University) in the sense that an absolute right is conferred on them to the houses which they can alienate or pass on to their descendants. The benefit thus conferred by the acquisition is on the teaching staff of the University who form a section of the public however small it may be, they are still a defined section of the public, who happen to be at any given moment engaged in teaching the students of University. The object of the acquisition is clearly to provide such teaching staff with quarters which are proximate to the University campus.

The connected file which I perused shows that the Revenue Divisional Officer made a report that the lands in question are in close proximity to the University area and will therefore enable the teaching staff to go conveniently from their residence to the place of teaching. In this sense the acquisition serves a public purpose, namely, the purpose of enabling the teaching staff to live in close proximity to the University campus, and afford to them the necessary convenience. Though the teachers for the time being may be benefited by the acquisition, the benefit to the University by such acquisition as well as the students studying in the institution though remote is nevertheless real. In a decision of the Bombay High Court in *Municipal Corporation, Bombay v Ranchordas*, AIR 1925 Bom 538 it was held that

building of quarters for municipal servants must be held to be a measure likely to promote public convenience and the acquisition of lands for that purpose was held to fall within the scope of the Land Acquisition Act. I am therefore satisfied that the attack made on the present acquisition on the basis of the decision in *State of West Bengal v. P. N. Talukdar*, AIR 1965 SC 646 which was a decision exclusively confined to Part VII of the Act cannot be supported. On the other hand the authorities support the view that a purpose of the present kind can be clearly viewed as a public purpose within the meaning of Section 4 in the larger and more generic sense of that term.

8. I have already indicated that though there is what may appear to be a certain unfortunate feature in the acquisition, namely, giving up an approval given by one Department of the Government dealing with Religious endowments for selling the lands in public auction and adopting the principle of land acquisition after approval to such acquisition by another Department of the Government, in substance this change of procedure may not lead to any loss to the petitioner-institution or loss to the teaching staff of the University who have successfully bid at the auction. If proper principles are borne in mind, when compensation is fixed at the time of passing the award the institution which the petitioner represents may not stand much to lose. So far as the members of the University staff who have purchased at the auction are concerned they also may not stand to lose because they could occupy the quarters as members of the University staff as long as they are members of the staff.

9. With these observations the writ petition is dismissed. No orders as to costs.

SSG/D.V.C.

Petition dismissed.

AIR 1969 MADRAS 187 (V 56 C 42)

ISMAIL, J.

Chinnappa Gounder and another, Appellants v. Valliammal, Respondent.

Second Appeal No. 637 of 1964, D/- 10-4-1968 against decree of Addl Sub. J., Erode, in A. S. No. 178 of 1962.

(A) Hindu Succession Act (1956), Ss. 6 and 8 — Maintenance deed creating life interest in favour of widowed daughter-in-law — Death of father-in-law — Suit by daughter-in-law for partition and possession of share — Father-in-law's interest will devolve by way of succession and not by way of survivorship — Items

given under maintenance deed need not be included in suit property — (Hindu Law — Partition) — (Hindu Women's Rights to Property Act (1937), S. 3) — (Hindu Adoptions and Maintenance Act (1956), S. 19) — (Hindu Law — Gifts).

A Hindu, in discharge of an obligation under Hindu Law to maintain members of the family, executed a maintenance deed in favour of his widowed daughter-in-law giving her life interest in two items out of the joint family property. Upon his death in 1960, the daughter-in-law instituted a suit for partition and possession of her share in the property.

Held (i) that by virtue of the proviso to S. 6 read with S. 8 of the Hindu Succession Act of 1956, the deceased father-in-law's undivided interest in the joint family property would devolve by way of succession and not by way of survivorship. In the instant case the deceased father-in-law's interest was divisible between his own widow, his son, his daughter and the daughter-in-law and the daughter-in-law would be entitled to one-fourth share in that suit properties.

(Para 3)

(ii) that there was no necessity for the daughter-in-law to surrender the items which were given to her for maintenance, and make these items available for partition. In the Hindu Succession Act, which effects a basic and fundamental change in the Hindu Law of Succession, there is no provision either express or implied, which will have the effect of terminating or putting an end to an interest created in an immovable property in favour of a person like the daughter-in-law in discharge of an obligation resting on the father-in-law. Nor did such life interest automatically come to an end as soon as the daughter-in-law instituted a suit for partition. The position under Hindu Women's Rights to Property Act of 1937 could not be imported by way of analogy into that position under Hindu Succession Act. AIR 1954 Mad 307 & AIR 1962 Mad 187, Expl.

(Para 3)

(iii) that it was not a case where the daughter-in-law, having obtained her share pursuant to the Act of 1956 was seeking to obtain maintenance by virtue of the provisions contained in the Hindu Adoptions and Maintenance Act, 1956 with reference to the right which she claims in the partition suit.

(Para 4)

(iv) that the maintenance deed did not constitute a gift which the father-in-law had no right to make.

(Para 6)

(B) Hindu Succession Act (1956), Preamble — Interpretation of the provisions — (Civil P. C. (1908), Preamble — Interpretation of Statutes).

In relation to an Act like the Hindu Succession Act of 1956 which is both an amending and codifying statute, regard

should be had only to the clear language contained in the Act. (Para 3)

Cases Referred. Chronological Paras
(1964) AIR 1964 SC 510 (V 51)=
66 Bom LR 284, Guramma v.
Mallappa 2
(1962) AIR 1962 Mad 187 (V 49)=
ILR (1962) Mad 204, Gajavalli
Ammal v Narayanaswamy 2
(1956) AIR 1956 Bom 129 (V 43),
Mellappa v Guramma 2
(1954) AIR 1954 Mad 307 (V 41)=
(1953) 2 Mad LJ 459, Rathinasaba-
pathy v Saraswathi Ammal 2

N Sivamani, for Appellants; V. S. Rangaswami Iyengar, for Respondent.

JUDGMENT — The two defendants in O S No 357 of 1961 on the file of the Court of the District Munsif of Erode are the appellants before this Court and the plaintiff in the suit is the sole respondent. The respondent's husband, Perianna Gounder and the first appellant were brothers and the second appellant is their sister Perianna Gounder died in 1944. Subsequent to his death on August 16, 1944, Perianthambi Gounder, father-in-law of the respondent and the father of the deceased Perianna Gounder and the appellants, executed a document described as a maintenance deed in favour of the respondent in respect of two items of property

That document recited that when the respondent requested her father-in-law to give her maintenance, at the instance of mediators, he executed the said document. The document also stated that she should reside in one of the items which was a house and should cultivate at her pleasure the other item which was a piece of land and enjoy the income therefrom for her life towards her maintenance without any power of alienation by way of mortgage, gift or sale and on her death, the two items of property should belong to her father-in-law and his heirs. It is stated that the father-in-law himself died in 1960. Thereafter, the respondent instituted the suit out of which the second appeal arises for partition of her one-fourth share in the suit properties and for separate possession of the same. I must straightway mention that the suit properties are one-half of the properties belonging to the joint family. It is conceded before me that the respondent is entitled to one-fourth share of the suit properties by virtue of the proviso to Section 6 read with Section 8 of the Hindu Succession Act of 1956. The reason is that though the father-in-law of the respondent and the first appellant constituted an Hindu undivided family, by virtue of the provision contained in the proviso to Section 6 of the Hindu Succession Act, 1956 his undivided interest in the joint family properties would de-

volve by way of succession and will not go by way of survivorship. If that be the case, his interest in the property was divisible as between the respondent, daughter-in-law, the two appellants, son and the daughter and his own widow.

However, the appellants herein contended that she cannot ask for a partition of her one-fourth share of the properties and at the same time retain the properties covered by the maintenance deed of August 16, 1944, and she must make the properties got by the said document available for partition in the suit, since the appellants also have a share in the said properties. The Courts below rejected this contention and decreed the suit of the respondent. Hence the present second appeal by defendants 1 and 2 in the suit.

2. Mr. N. Sivamani, learned Counsel, for the appellants, contended that the respondent herein cannot retain the properties covered by the maintenance deed and also ask for partition of her one-fourth share in the suit properties and if she wants partition of one-fourth share, she must surrender those properties and make the same available for partition in the suit itself. Mr. Sivamani frankly concedes that there is no direct authority with reference to the position after the coming into force of the Hindu Succession Act of 1956, nor is there any specific provision in the said Act which will have the effect he contends for. At the same time, the learned Counsel submits that on the analogy of the position prevailing under the Hindu Women's Rights to Property Act, 1937, under the Hindu Succession Act also, the respondent can have either the properties given to her for maintenance or have a share in the properties granted to her by the provisions contained in the Act of 1956 and she cannot have both.

I may point out here that the position as it stood prior to the Hindu Succession Act of 1956 is clear and does not admit of any doubt. A Bench of this Court in Rathinasabapathy v. Saraswathi Ammal, AIR 1954 Mad 307 pointed out that there is nothing in the Hindu Women's Rights to Property Act, 1937, which has the effect of compelling the three widows for whom provision was made under that Act to sue for a partition at the risk of losing the right to maintenance which they had under the Hindu Law and stated that the option was with the widows either to claim maintenance to which they were entitled under the Hindu Law or to ask for partition under the provisions of the Hindu Women's Rights to Property Act, 1937, but not to have both.

The principles enunciated by that decision were approved by another Bench of this Court in Gajavalli Ammal v. Nara-

yanaswami, AIR 1962 Mad 187. The appellants in that case were the widow and daughter of one Govindaswami Mudaliar who had left a son by his first wife who was the respondent to the appeal. The said Govindaswami Mudaliar died on November 21, 1953 and at the time of his death he and his son Narayanaswami (respondent) were members of a joint Hindu Family. The suit was brought for partition and possession of a half-share in the family properties as the share due to the first appellant who claimed her husband's share under the Hindu Women's Rights to Property Act, 1937. On behalf of the second appellant a maintenance provision was claimed and marriage expenses also were asked for. The claim of the appellants was resisted on the strength of a settlement deed dated December 17, 1953. It was pleaded by the respondent that the said settlement was effected in full settlement of all the claims against her husband's joint family properties and consequently she could not sue for partition. The learned Judges of this Court came to the conclusion, on the basis of the evidence and the circumstances of the case, that by arrangement embodied in the settlement deed and by the acceptance of the properties given in the settlement deed, the widow had given up her right to claim half-share in the joint family properties under the Act of 1937. In this view, they accepted the case of the respondent and rejected the claim of the appellants for partition of a half-share in the properties. In dealing with this question the learned Judges observed as follows:— at page 189.

"What the position would be by reason of the enactment of the Hindu Succession Act, 1956 is not a matter arising for our consideration now. The limited question we are called upon to decide is whether the settlement deed was the result of a claim for maintenance alone and consequently we would be justified in concluding that the acceptance of the settlement deed did not imply the giving up of the right to partition and to claim a share under the Act of 1937".

Mr. Sivamani, learned Counsel for the appellants, relies on the first sentence quoted above and states that the learned Judge left open the question as to what would be the position under the Hindu Succession Act, 1956, and the position under the Act will be the same, that is, the widow (in this case, the daughter-in-law) will be entitled either to a share in the properties or to maintenance but not to both.

3. In my opinion, the sentence relied on by the learned counsel for the appellants does not lend support to any such contention. On the other hand, the said sentence may lead to a contrary inference. As far as the provisions of the

Hindu Succession Act are concerned, there is no provision either express or implied which will have the effect of terminating or putting an end to an interest created in an immovable property in favour of a person like the respondent herein in discharge of an obligation resting on the father-in-law of the respondent. A reading of Ex. B-1, namely, the document styled as maintenance deed of August 16, 1944, makes it clear that a life interest was created in favour of the respondent.

Under the Hindu Law, prior to the enactment of the statutory provisions, a manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children; on the death of any one of the male members, he is bound to maintain his widow and his children, the obligation to maintain these persons arises from the fact that the manager is in possession of the family property. The maintenance deed of August 16, 1944, was executed by the father-in-law of the respondent in discharge of this obligation imposed upon him under the Hindu Law. It may be that if the Hindu Succession Act had not been passed, the respondent might not have any right to file a suit for partition of a share in the properties retaining at the same time the properties obtained by her by virtue of this maintenance deed.

However, the position is not the same with reference to the provisions contained under the Hindu Succession Act, 1956. The said enactment effects a basic and fundamental change in the Hindu Law of Succession and the right to succession conferred on the various persons mentioned in the schedule to the Act are not subject to any qualification such as the one contended for before me. As a matter of fact, in relation to an Act like the Hindu Succession Act of 1956, which is both an amending and codifying statute, regard should be had only to the clear language contained in the Act. Mr. Sivamani himself frankly conceded that he is not able to lay his hands on any particular provision contained in the statute in support of his contention.

In the absence of any express provision contained in the Act providing for the termination of the interest created in favour of a person like the respondent by way of maintenance due to her under the law then in force, I am unable to accept the contention of the learned Counsel that the necessary consequence of the respondent filing a suit for partition to claim her right under the provisions of the Hindu Succession Act, 1956, is to bring about a termination of the life interest created in her favour under the document dated August 16, 1944. If such

an interest has not been created by the time when the Hindu Succession Act, 1956, came into force and the respondent was merely receiving maintenance from her father-in-law out of the joint family properties, the position may be different. But, when the right to receive maintenance which the respondent undoubtedly had, has crystallised in the form of creation of a life interest in her favour, I am unable to find any principle or authority for holding that that interest automatically comes to an end as soon as she files a suit for partition for recovering her share of the properties under the provisions of the Hindu Succession Act, 1956.

I must also point out that it is not the case of the learned Counsel that the Act itself has got the effect of terminating the interest created in favour of the respondent and it is only her conduct in filing the suit for recovering her share which has got such an effect. The learned Counsel bases this contention on the analogy of the position that resulted from the provisions contained in the Hindu Women's Rights to Property Act, 1937. In my opinion, there is no comparison whatever and there can be no analogy between the rights which the three widows had under the Hindu Women's Rights to Property Act, 1937, and the right which the various heirs get under the Hindu Succession Act 1956 and therefore there is no justification whatever for importing the position under the earlier Act by way of analogy into the position under the 1956 Act.

4. Mr Sivamani, drew my attention to the provisions contained in the Hindu Adoptions and Maintenance Act, 1956 and particularly to Sections 19, 21 and 22. Section 19 of that Act deals with the right of a daughter-in-law to obtain maintenance from her father-in-law and the circumstances and the extent to which such a right can be enforced. As far as the present case is concerned, such a question does not directly arise. It is not a case where the respondent, having obtained her share pursuant to the Act of 1956 is seeking to obtain maintenance by virtue of the provisions contained in the Hindu Adoptions and Maintenance Act, 1956 with reference to the right which the respondent claims in the present suit.

5. Mr Sivamani, relied on a decision of the Bombay High Court in *Mellappa v Guramma*, AIR 1956 Bom 129 at p 138. In that case, a number of alienations were challenged and two of them were alienations effected in favour of two female members. In a suit for partition, the learned Judges took the view that they cannot retain the property covered by the said alienations and at the same time seek to recover a share under the provisions of the Hindu Women's Rights

to Property Act, 1937. The learned Judges stated as follows:—

"The result is that although defendant 3 cannot challenge the deeds Exs. 363 and 372 in the sense mentioned above, since defendants 1 and 2 are now given a share in the family property, defendants 1 and 2 cannot retain the property under the two deeds, Exs. 363 and 372 and, at the time, claim a share in the family property."

No reasons have been given for the said conclusion. Probably the reason was the same as has been referred to by the two Bench decisions of this Court already mentioned by me. However, that being a decision prior to the Hindu Succession Act, 1956, Mr Sivamani cannot derive any assistance from that decision in support of his present contention. Mr Sivamani also drew my attention to the fact that this decision of the Bombay High Court has been affirmed in the appeal by the Supreme Court in *Guramma v Mallappa*, AIR 1964 SC 510, there again the view of the Judges of the Bombay High Court referred to by me already was not challenged and as a matter of fact the correctness of that position was conceded. In view of this, independent of the judgment of the High Court, the decision of the Supreme Court does not afford any guidance or lend any support to the argument of the learned Counsel.

6. Mr Sivamani wanted to argue that the properties covered by the deed dated August 16, 1944 being the joint family properties, the father-in-law of the respondent has no right to make a gift of the same to the respondent. Mr Sivamani, however, frankly stated that such a point was not raised before the Courts below nor even in the grounds of appeal before this Court, but contended that as a point arising on the face of the document it could be urged by him before this Court. Apart from the fact that such a point was never put forward before the Courts below, I am of the opinion that there is no substance in the said contention also.

In the first place, the transaction evidenced by the document dated August 16, 1944, cannot be said to be a gift. I have already mentioned the legal position that a manager of a Hindu joint family is bound to maintain all the members of the coparcenary as well as their wives and their children. Therefore, on the date when the said document was executed, the respondent had a right to be maintained out of the family properties and only in discharge of the corresponding obligation, the said document was executed. Therefore, in my opinion, the document did not constitute a gift and consequently it is not open to the objection put forward by the learned counsel. Mr V S Rangaswami Iyengar, learned counsel for the respondent, points

out that it is not open to the appellants to put forward such a contention because they themselves have affirmed the transaction evidenced by the document in the written statement filed in this case and their only case was that while the respondent claims a share in the properties, she should surrender the properties obtained by her under the said document and that it was not their case that the document itself was void or inoperative. I see considerable force in this argument also. In any event, as I have already indicated, the transaction evidenced by the document dated August 16, 1944, cannot be said to be a gift and therefore is not open to the challenge put forward by the learned Counsel for the appellants.

7. No other question has been urged in this appeal.

8. Under the circumstances, the second appeal fails and is dismissed. There will be no order as to costs.

HGP/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 191 (V 56 C 43)

RAMAPRASADA RAO, J.

Chinna Pillai, Petitioner v. N. Govindaswami Naidu and another, Respondents.

Civil Revn. Petn. Nos. 1944 of 1965 and 816 of 1966, D/- 31-3-1967, against order of Sub. J., Madurai, D/- 3-8-1965.

(A) Transfer of Property Act (1882), S. 105 — Lease or licence — Determination of.

The criterion to determine whether a particular person is a lessee or a licensee mainly depends upon the intention of the parties and if such a relationship is reduced to writing it is not by itself the sole guide. If, however, one party has the exclusive right of possession over the property and if an interest in the property is created, it ought to be construed as a lease. AIR 1965 SC 610 (614) & AIR 1959 SC 1262, Foll. (Para 6)

(B) Civil P. C. (1908), S. 115 — Lower Court deciding a question within its jurisdiction — It is binding on High Court in revision. AIR 1964 SC 1336, Foll. (Para 7)

(C) Specific Relief Act (1877), S. 9 — Scope — Tenant holding over after expiry of lease — Has a possessory title.

A tenant who holds over after the expiry of the lease by efflux of time is not to be characterised as a trespasser and as a person who has no possessory title in him enabling the landlord to take law into his own hands and disturb such juridical possession of the property to which such tenant holding over the demised property is entitled in law. (Para 9)

Notoriety in the act of dispossession without lawful authority, is the very negation of common law rights vested in a tenant to continue in possession and it is this which is relieved against expressly by the Legislature making a substantial provision in Section 9 of the Specific Relief Act. Though self-help is the best help, it is not so in the eye of law when a landlord attempts to take law into his own hands to evict his tenant without due process of law. AIR 1965 Mad 122, Foll. (Para 10)

(D) Civil P. C. (1908), S. 9 — Exclusion of jurisdiction of Civil Court — When can be inferred.

Exclusion of jurisdiction of Civil Courts in matters concerning civil rights ought not to be lightly inferred. Unless the Court is compelled to do so by an express provision or by one to be inferred by necessary implication, such ouster cannot be assumed. (Para 11)

(E) Specific Relief Act (1877), S. 9 — Words "due process of law" — Not equivalent to word legally — Whether power can be claimed to disturb quiet possession by force relying on terms in lease deed drawn in conformity with statutory provisions.

Once the lease deed is entered into, that is the sheet anchor which governs the rights and the correlative duties between the lessor and the lessee and such mutual contractual obligations are governed by the common law. By adopting the form prescribed, by following the various substantial sections under an enactment and ultimately entering into what is known as a contract of lease, such a deed cannot in any sense be understood to be as the very substitution of common law rights to which one or the other party is entitled to and such a contract cannot be immune or free from the impact of common law or any other special law and its provisions. The deed by itself cannot be understood as being synonymous to statute law or, for the matter of that, "law". Anything done under such a contract may be sought to be sustained as legal, but it is not the same thing to say that it was under due process of law. (Para 12)

Held in absence of any special power explicitly provided for in Madras District Municipalities Act, 1920, or the Rules made thereunder, it could not be said that the defendant acted under due process of law to evict forcibly the plaintiff from the two stalls in question. Under the garb of certain recitals in the contracts embodied in the lease deeds in question, it could not be assumed that due process of law was set in motion by the defendant when the plaintiff was driven out of the stalls. Case law ref. (Para 15)

(F) Specific Relief Act (1877), S. 9 — Person inducted into possession without his transferor having right in law to do so — Such person cannot claim benefit of S. 53A of T. P. Act. (Para 18)

(G) Civil P. C. (1908), S. 115 — Specific Relief Act (1877), S. 9 — Judgment and decree under S. 9 — Revision is maintainable. AIR 1965 Mad 122, Foll.; (1959) 72 Mad LW 361 & AIR 1926 Mad 18 & AIR 1934 All 541, Not foll.

(Para 19)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 610 (V 52)=
(1964) 6 SCR 642, M. N. Clubwala v Fida Hussain Saheb 6, 8
(1965) AIR 1965 Mad 122 (V 52)=
ILR (1964) 1 Mad 676, N. L. Corporation v Narayana 9, 10, 15, 19
(1964) AIR 1964 SC 358 (V 51)=
1964 (1) Cr LJ 263 (2), State of U P v Singhara Singh 11
(1964) AIR 1964 SC 1336 (V 51)=
(1964) 3 SCR 495, M. L. & B. Corporation v Bhutnath 7
(1964) AIR 1964 Madh Pra 42 (V 51)=1963 Jab LJ 783, United Collieries v Engineer-in-Chief, South Eastern Railway 15
(1962) AIR 1962 SC 413 (V 49)=
(1962) 3 SCR 876, Shivayogeswara Cotton Press v Panchaksharappa 9
(1959) AIR 1959 SC 1262 (V 46)=
(1960) 1 SCR 368, Associated Hotels of India Ltd. v R. N. Kapoor 6
(1959) 72 Mad LW 361, Amirthalangam v. Lakshmanaswami Mudaliar 19
(1959) AIR 1959 Tripura 47 (V 46), Kali Mohan v. Agartala Municipality 15
(1958) AIR 1958 Punj 325 (V 45)=
59 Pun LR 509, Patnala State v Mohinder Singh 15
(1957) AIR 1957 Mad 309 (V 44)=
ILR (1957) Mad 383, Firm AL. AR. Arunachalam Chettiar v. Kaleeswarar Mills Ltd. 15
(1952) 1952-1 All ER 149=(1952) 1 KB 290 Errington v Errington 6
(1934) AIR 1934 All 541 (V 21)=
1934 All LR 712, Badri Das v Mt. Dhanni 19
(1926) AIR 1926 Mad 18 (V 13)=
50 Mad LJ 102, Veerasami Mudali v Venkatachala Mudali 19
(1905) ILR 29 Bom 213=7 Bom LR 12, Rudrappa v Narasingarao 15
R. Gopalaswami Iyengar for Petitioner, N. A. Subramanian, K. S. Sundaram, K. N. Ramasubramani Iyer and Lakshmi Sundaram, for Respondents.

JUDGMENT — The 1st defendant in O S No 82 of 1953 on the file of the Court of the Subordinate Judge of Madurai is the petitioner in C. R. P. No 816 of 1966 and the 2nd defendant is the Peti-

tioner in C. R. P. No 1944 of 1965. The plaintiff filed the suit in the Court of the Subordinate Judge of Madurai under Section 9 of the Specific Relief Act, 1877. The plaintiff's case is that he was a lessee under the 1st defendant and from the year 1953-54 the plaintiff as such lessee was in occupation of the vegetarian and the non-vegetarian stalls belonging to the 1st defendant and situate in the Central Bus Stand, Madurai. The plaintiff also avers that during 1954-55 he carried out extensive improvements to both the stalls at a cost of about Rs 30,000/- and the stalls as they exist to-day were not constructed by the municipality. The lease deeds Exs. B-13 and B-14 were executed both between the plaintiff and the 1st defendant and they cover the period commencing from 1-4-1960 and expiring with 31-3-1963. The plaintiff is said to have applied for a renewal of the Lease on 14-2-1963 after having paid the licence fee for running the respective hotels for the year 1963-64 under Exs. A. 61 and A.62. On 14-3-1963 the 1st defendant passed a resolution stating that the leasehold interest in the two stalls in question would be auctioned on 22-3-63. The plaintiff petitioned on 21-3-1963 asking for a renewal of the lease and indicating therein that he has practically reconstructed the stalls at a heavy cost and that the lease should therefore be renewed in his favour. On 23-3-1963, the plaintiff was directed to produce the records in his possession to show that he constructed the buildings and effected the improvements. It is therefore not denied that the constructions were so put up as claimed by the plaintiff. It is the plaintiff's case that he went to the office of the Commissioner of the municipality, but as he was not available, the accounts were not scrutinised. As resolved, the auction was held on 22-3-1963 and the leasehold interest of the vegetarian stall was auctioned and purchased by the 2nd defendant in the suit. This was also confirmed later. The plaintiff again requested for a renewal of the lease in spite of the auction and on 2-5-1963 the plaintiff sent three separate cheques, one for Rs. 2,100/-, the second for Rs. 700/- and the third for Rs. 400/-, representing respectively the advance, the rent for April, 1963 and the caution deposit for the occupation of the stalls. It is in evidence that these cheques were cashed but the 1st defendant would have it that the amounts were kept in deposit register and were not adjusted towards the rent for April, 1963. D W 2 who was examined on behalf of the 1st defendant however, admits that as per the entry in Ex. B-18 the amount of Rs 700/- was received as rent. The Lower Court also finds that this was adjusted as and by way of rent. I shall revert to this aspect at a later stage.

having been made by the competent authority, the vacancy caused by the closure of business would still remain to be filled up and that the appellants in the case would have a chance of having their application considered by the competent authority.

But, in the present case, as the petitioner committed breach of some of the conditions of the licence, the Court cannot hold that he is entitled to get his licence renewed. At any rate, under Section 32 of the Act, he is not entitled to claim as a matter of right that his licence should be renewed in his favour. This is a matter purely in the discretion of the respondents and the Court cannot compel them to exercise their discretion in favour of the petitioner. The writ will be infructuous.

11. In the result, the petition fails and is accordingly dismissed, but, under the circumstances, without costs.

SSG/D.V.C. Petition dismissed.

AIR 1969 MANIPUR 33 (V 56 C 13)

C. JAGANNADHACHARYULU, J. C.

Laisangbam Patrik, Petitioner v. Laisangbam Jhulon and others, Respondents.

Civil Revn. Case No. 26 of 1966, D/- 29-11-1968, against order of Addl. Munsiff (II), Manipur D/- 11-4-1966.

(A) Civil P. C. (1908), O. 6, R. 17 — Scope — Amendment introducing new case altogether to the prejudice of other side — Amendment cannot be allowed.

Order 6, Rule 17, C. P. C. gives ample power to a Court to permit any party to alter or amend his pleading in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

All rules of Courts are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has been given to enable one distinct cause of action to be substituted for another, nor to change by amendment, the subject-matter of the suit. No amendment can be allowed if it introduces a new case altogether to the prejudice of the other side. Case law discussed. (Para 10)

B, C, D and father of E were sons of A and governed by Dayabhaga School of Hindu Law. B filed suit for possession of certain land or in alternative for declaration of his title in respect of other lands

against C, impleading D and E as pro forma defendants. B alleged in his plaint in unmistakable terms that his father A distributed the lands among his four sons. B filed application under O. 6, R. 17. The amendment sought by him was that A's properties were liable to be repartitioned into four equal shares.

Held that the amendment sought not only involved a new case but was also inconsistent with his definite pleading. The character of suit was sought to be changed by bringing into dispute the lands of pro forma defendants D and E. The Court could not permit introduction of fresh plaint in place of original one by way of an amendment. (1880-81) ILR 5 Bom 496 and AIR 1963 Andh Pra 78, Distinguished. AIR 1957 SC 357, Explained. (Paras 10, 11)

(B) Hindu Law — Dayabhaga School — Father — Alienation — Father has absolute power to dispose of not only his own properties but also even his ancestral properties during his lifetime. (Para 10)

Cases Referred: Chronological Paras

(1967) Civil Revn. No. 9 of 1967

(Mani.), State Bank of India v. Yumnam Gourmani Singh 10

(1968) AIR 1968 Andh Pra 78 (V 50) = (1962) 1 Andh LT 425, P. Narasimham v. P. Venkata Narasimha Rao 11

(1961) AIR 1961 Bom 136 (V 48) = 62 Bom LR 336, Shriram Sardarmal Didwani v. Gourishankar 10

(1958) AIR 1958 Cal 105 (V 45), Kunja Behari v. Gourhari 10

(1957) AIR 1957 SC 357 (V 44) = 1957 SCR 438, L. J. Leach and Co. Ltd. v. Jardine Skinner and Co. 11

(1956) AIR 1956 Mad 679 (V 48), State of Madras v. Muniyappa Chetty 10

(1950) AIR 1950 PC 68 (V 37) = 77 Ind App 15, Kanda v. Waghu 10

(1927) AIR 1927 PC 18 (V 14) = ILR 6 Pat 323, Ramsaran Mandar v. Mahabir Sahu 10

(1922) AIR 1922 PC 249 (V 9) = ILR 48 Cal 832, Ma Shwe Mya v. Maung Mo Hnaung 10

(1880-81) ILR 5 Bom 496, Krishnaji Lakshman Rajvade v. Sitaram Murarrav Jakhi 11

L. Nandakumar Singh, for Petitioner; S. Somorendra Singh, for Respondents (Nos. 1 and 2).

ORDER: This revision under Section 115 C. P. C. read with Section 84 of the Manipur (Courts) Act of 1955 is directed against the order dated 11-4-1966 passed by the Additional Munsiff (II) in his Judicial Misc. Case No. 4 of 1966 in Title Suit No. 101 of 1964 on his file refusing to permit the petitioner (plaintiff in the suit) to amend the plaint.

2. The petitioner filed T. S. No. 101 of 1964 on the file of the lower Court for recovery of possession of the suit land covered by patta No. 86/709-I.E.T. mentioned in schedule "B" and in the alternative a decree for declaration that he is entitled to half of the paddy lands covered by pattas No. 86/21 and 86/942-I.E.T. mentioned in schedule "A" and for mesne profits etc.

3. The case of the petitioner in para 1 of the plaint is that late Laisangbam Angou Singh father of the petitioner, first respondent, pro forma second respondent and pro forma third respondent's father acquired certain immovable properties during his lifetime as his absolute properties and that he died in 1958. In para 2 of the plaint he alleged that his father distributed his lands among his four sons, namely, the petitioner, the respondents 1 and 2 and Ahanba Singh, father of the third respondent. Late Angouba Singh gave the lands covered by old patta No. 86/702, 86/746 and 86/22 to his first son Ahanba Singh. He gave the petitioner (who is his second son) half the paddy lands covered by old patta No. 86/21 and 86/942 described in the plaint "A" schedule. He gave his third son viz., the second respondent the paddy lands covered by old patta No. 86/688. He gave his fourth son (by his second wife) viz., the first respondent the remaining half of each of the paddy lands under old patta No. 86/21, 86/942, the entire ingkhol under patta No. 81/21 and the entire paddy field under old patta, No. 86/709. The last item of land covered by old patta No. 86/709 was described in the plaint "B" schedule, which is the suit land.

4. It is the further case of the petitioner, (as alleged in para 3 of the plaint) that the four sons of Angouba Singh enjoyed their respective shares, that in 1940-41 the first respondent at the instance of late Angouba Singh made a request to the petitioner to exchange the petitioner's half share of land covered by patta No. 86/21, and 86/942 with the plaint "B" schedule land as the petitioner's and the first respondent's shares are in one bloc and as the plaint "B" schedule land and the petitioner's paddy land under patta No. 86/696 are in another bloc. The petitioner agreed to the proposal. So, he took possession of the plaint "B" schedule land in 1940-41 and gave up possession of his half share of paddy lands in the plaint "A" schedule 86 to the first respondent. The petitioner was in possession and enjoyment of the suit land till 1962.

5. The petitioner alleges in para 4 of his plaint that the first respondent dispossessed him of the plaint "B" schedule land in 1963 taking advantage of the fact that his name was recorded in the record of rights with respect to the said land. Then, the petitioner demanded the first respondent to deliver back the possession of his

half share in the land described in the plaint "A" schedule. But, the first respondent refused to do so. In para 5 of the plaint the petitioner alleged that his name was recorded as co-pattadar of the first respondent in respect of the plaint "A" schedule land.

6. The petitioner prayed in para 8 of his plaint for a decree for recovery of possession of the plaint "B" schedule land by evicting the first respondent therefrom or, in the alternative, for declaration that he is entitled to half of the paddy lands mentioned in the plaint "A" schedule towards his share, for recovery of possession of the same and for mesne profits etc.

7. The contesting respondent denied the plaint allegations.

8. The petitioner filed Judicial Misc. Case No. 4 of 1966 under Order 6, Rule 17, read with Section 151, C. P. C. to permit him to amend his plaint. The amendments sought for are as follows:

(i) The petitioner wants to delete schedule "A" and make it as schedule "B" and to mention the various items of lands owned by late Angou Singh as items 1 to 8 in schedule "A" and schedule "B" to be marked as schedule "C" and to delete the description of the respondents 2 and 8 as mere pro forma parties. (ii) The entire para 1 of the plaint has to be deleted and the petitioner wants to add fresh paras 1 and 1(A), wherein he wants to allege that he and the respondents 1 and 2 and the third respondent (son of Ahanba Singh) are each entitled to $\frac{1}{4}$ th share in the properties of late Angouba Singh and that the respondents 1 to 8 are only benamidars for the deceased Angouba Singh with respect to the lands standing to their names mentioned in the items 1 to 8 in schedule A. (iii) He wants to add in para 5 of the plaint that on the objection raised by the first respondent the name of the petitioner was deleted from the record of rights by an order dated 31-7-1964 by the A. S. and S. O. (C) in Objection Case No. 65 of 1964 and that the petitioner's title to the suit land is shrouded by the hostile assertion of title by the first respondent. (iv) Then, he wants to amend para 8 of the plaint by praying for declaration that the petitioner is entitled to half of the paddy lands i.e. items 4 and 5 described in Schedule "A".

He wants a further amendment of para 8 regarding relief that, in the alternative, a decree should be passed for partition of all the properties described in Schedule "A" by metes and bounds according to the respective shares of the parties and for allotment of the same to them, in case the Court finds that there was no distribution of the properties left by late Angou Singh as alleged in para 2 of the plaint and that there was no exchange of lands between the petitioner and the first respondent as alleged in para 3 of the plaint.

9. The learned Munsiff rejected the petition on the ground that the amendment introduces a new case, which is inconsistent with the original pleadings of the petitioner. Hence, the present revision petition.

10. The original plaint filed by the petitioner contains a definite averment that late Angouba Singh distributed his properties among his four sons, namely, the petitioner, the respondents 1 and 2 and the 3rd respondent's father late Ahanba Singh. Again, the petitioner definitely pleaded that he was given the plaint "A" schedule land, which is half of the paddy lands covered by old pattas Nos. 88/21 and 86/942. He further pleaded that the first respondent was given certain lands besides the plaint "B" schedule suit land covered by old patta No. 86/709. His original prayer was for a decree for recovery of possession of the plaint "B" schedule land to which he was entitled under an oral arrangement, said to have been entered into by him with the first respondent, under which the petitioner gave his half share of the paddy lands covered by the plaint "A" schedule to the first respondent in lieu of first respondent's "B" schedule land by way of exchange. Alternatively, he prayed for a decree for declaration of his title to half of the plaint "A" schedule lands and for delivery of his half share to him.

Now, he wants to amend his pleas by giving a go-by to his main plaint allegation that late Angou himself distributed his properties among his four sons and he wants to introduce a prayer for partition of Angou's lands into 4 equal shares and wants to allege that the respondents 1 to 3 were benamidars of Angou with respect to the lands which stand now in their names. According to Dayabhaga School of Hindu Law, which governs the parties herein, the father has absolute power to dispose of not only his own properties but also even his ancestral properties during his lifetime. Vide paragraph 274 of Mulla's Hindu Law Vol. I 13th edition, and also Kunja Behari v. Gourhari, AIR 1958 Cal 105. The petitioner alleged in his plaint in unmistakable terms that his father Angou distributed the lands as mentioned in para 2 of his plaint among his four sons.

His prayer for an amendment that Angou's properties are now liable to be re-partitioned into 4 equal shares not only involves a new case but is inconsistent with his definite pleading in para 2 of the plaint. Only 3 items of land are in dispute and are covered by schedules "A" and "B". The respondents 2 and 3 were described as pro forma parties and their lands were not the subject matter of suit. But, now, the petitioner seeks to bring them into the dispute. The character of the suit is sought to be changed and the cause of action also changes. The application is also belated. No doubt, Order 6, Rule 17, C. P. C. gives ample

power to a Court to permit any party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. I had occasion to discuss the scope of Order 6, Rule 17, C. P. C. very recently in another case, State Bank of India v. Yunnam Gourmani Singh, Civil Revn. No. 9 of 1967 (Mani). When leave to amend a pleading should be refused is clearly stated in Note 4 at page 728 of Mulla's C. P. C. 13th edition, Vol 1.

"4. Leave to amend should be refused:

(1) Where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties, as where it is-

(i) merely technical, or

(ii) useless and of no substance.

(2) Where the plaintiff's suit would be wholly displaced by the proposed amendment.

(3) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time.

(4) Where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings.

(5) Where the application for amendment is not made in good faith".

In *Ma Shwe Mya v. Maung Mo Hnaung*, AIR 1922 PC 249 the Privy Council held that all rules of Courts are nothing but provisions intended to secure the proper administration of justice and that it was therefore essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has been given to enable one distinct cause of action to be substituted for another, nor to change, by amendment, the subject-matter of the suit. Vide also *Ramsaran Mandar v. Mahabir Sahu*, AIR 1927 PC 18; *Kanda v. Waghu*, AIR 1950 PC 68, *State of Madras v. Muniyappa Chetty*, AIR 1956 Mad 679 and *Shriram Sardarmal Didwani v. Gourishankar*, AIR 1961 Bom 136, which lay down that no amendment can be allowed if it introduces a new case altogether to the prejudice of the other side.

11. The learned counsel for the petitioner however argued that the amendment sought for does not introduce any new cause of action, that it does not change the character of the suit, that a suit for possession can be converted into a suit for partition and that in the interests of justice the amendment should be allowed. He relied on the following 3 rulings. In *Krishnaji Lakshman Rajvade v. Sitaram Murarrav Jakhi*, (1880-81) ILR 5 Bom 496 the petitioner wrongly framed his plaint for possession,

though there was no prior partition of the joint family property. It was held that his suit was not maintainable and that, however, permission could be given to him to amend his plaint. In *L. J. Leach and Co., Ltd. v. Jardine Skinner and Co.*, AIR 1957 SC 857 it was held that it is no doubt true that the Court would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application but that it is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered and does not affect the power of the Court to order it, if that is required in the interests of justice. But, when it causes prejudice to the other side and when a totally new case is set out, no amendment can be allowed.

The petitioner strongly relied on *P. Narasimham v. P. Venkata Narasimha Rao* AIR 1963 Andh Pra 78 in support of his contention that a suit for possession can be converted into a suit for partition. In that case the plaintiff filed a suit for recovery of possession and certain properties by avoiding some alienations made by the first defendant and for an account of the first defendant's management of the properties. The trial Court found that the plaintiff was entitled to half the properties and not all the properties as claimed by him and passed a decree for partition of the properties into two equal shares and for delivery of one share to the plaintiff. The High Court of Andhra Pradesh discussed the various rulings on this subject and held that when a party claims certain property on the score of exclusive title thereto residing in him, there is no reason why he should not be permitted to ask for a portion thereof if it is based on the same title and if the ground on which he is entitled to a lesser relief is not inconsistent with the case set up by him in the original plaint or would lead to the determination of the issues which would embarrass him.

In that case the basis of the plaintiff's claim, namely his adoption remained the same. There was no change of cause of action or variation in the nature of the suit. All the necessary allegations for partition were contained in the original plaint and all the parties who were interested in the partition action were also before the Court. So the Court held that a decree for partition could be passed by way of amendment of the plaint. The case before me stands on altogether a different footing. The petitioner wants to set at naught the admitted distribution of properties made by his father and wants a re-partition of all the lands including the lands of the pro forma respondents 2 and 3 also which he is not entitled to. The petitioner wants to allege that the respondents are benamidars of his father. His allegations are totally inconsistent with the original case set up by him. The amend-

ment, if allowed, introduces a new plant altogether with a different cause of action. The Court cannot permit introduction of a fresh plant in the place of the original one by way of an amendment.

12. Thus the learned Munsiff is correct in disallowing the petition and the revision petition is accordingly dismissed with costs. SSG/D V C. Petition dismissed.

AIR 1969 MANIPUR 36 (V 56 C 14)

G JAGANNADHACHARYULU, J C.

Khumukcham Chitrasen Singh, Petitioner v Director of Industries, Manipur and others Respondents

Civil Writ Appln. Case No 1 of 1965, D/ 23-11 1968

(A) Constitution of India, Arts 311 and 226 — Departmental enquiry — Natural justice — Rules to be observed by Tribunal.

A departmental enquiry is a solemn one. But, the law only requires that tribunals should observe rules of natural justice such as that a party should have the opportunity of adducing all relevant evidence on which he relies that the evidence of the opponent should be taken in his presence, that he should be given the opportunity of cross-examining the witnesses and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, then the enquiry is not open to attack. Case law discussed. (Para 13)

(B) Civil Services — Fundamental Rules, R. 57 — Granting leave is purely in the discretion of the granting authority — No Government servant is entitled to claim it as a matter of right. (Para 15)

(C) Constitution of India, Arts. 226 and 311 — Departmental enquiry — Jurisdiction of High Court — Appreciation of evidence.

The High Court has no jurisdiction to sift the evidence and to find out whether the Enquiring Officer had sufficient evidence before him to pass the impugned order. It is not the function of the High Court, exercising its jurisdiction under Article 226 to review the evidence and to arrive at an independent finding. If proper enquiry had been held, the question of adequacy and reliability of the evidence cannot be canvassed before the High Court. AIR 1963 SC 1723 Rel. on. (Para 18)

(D) Constitution of India, Arts. 226, 311 — Domestic Tribunal — Appointment of enquiring officer — Officer orally hearing parties and giving findings without recording any evidence — Government setting aside his report and appointing another officer unconnected with the office of the

AM/AM/A6/69

delinquent servant — Findings accepted — Order of Government held was within its powers and no mala fides could be attributed. AIR 1964 SC 72, Rel. on.

(Para 20)

(E) Civil Services — Central Civil Services (Classification, Control and Appeal) Rules 1957, Rr. 20 (2) (ii), 13 (vi) — Applicability — Transfer of servant from one department to another — Lien kept in parent department — Transferee department not competent to dismiss him — Procedure indicated.

Rule 20 of the Rules not only applies to a Government servant whose services had been borrowed from a State Government or an authority subordinate thereto but also to a local or other authority in which he had a lien. Thus where an employee of the Manipur State Transport is taken temporarily in the Industries Department where he was working with a lien on his permanent post in the State Transport and the authorities of the Industries department are of the opinion that penalty of removal from service should be imposed upon him they cannot directly remove him from the service. The procedure is that the services of such employee should be replaced at the disposal of the lending authority viz. the Manipur State Transport and all proceedings should be transmitted to it for such action as deemed necessary. AIR 1963 Manipur 25, Foll.

(Para 21)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 72 (V 51) =	
(1965) 1 SCA 259, Partap Singh v. State of Punjab	20
(1964) AIR 1964 SC 364 (V 51) =	
(1964) 1 SCWR 28, Union of India v. H. C. Goel	13
(1963) AIR 1963 SC 1723 (V 50) =	
1964-3 SCR 25, State of Andhra Pradesh v. Sree Rama Rao	18
(1963) AIR 1963 Mani 25 (V 50), Konsam Joykumar Singh v. Union Territory of Manipur	21
(1961) AIR 1961 SC 1070 (V 48) =	
1961 Jab LJ 414, Jagdish Prasad Saxena v. State of Madhya Bharat (Now M. P.)	13
(1958) AIR 1958 SC 300 (V 45) =	
1958 SCR 1080, Khem Chand v. Union of India	13
(1957) AIR 1957 SC 882 (V 44) =	
1958 SCR 499, Union of India v. T. R. Varma	13
(1957) AIR 1957 Pat 100 (V 44) =	
1957 BLJR 81, Raghu Bans Ahir v. State of Bihar	13
(1953) AIR 1953 Nag 138 (V 40) =	
ILR (1953) Nag 522, Tribhuwannath Pandey v. Govt. of the Union of India	13
(1951) AIR 1951 SC 270 (V 38) =	
1951 SCR 451 = 52 Cri LJ 904, Ram Singh v. State of Delhi	16

R. K. Manisana Singh, for Petitioner; N. Ibotombi Singh - Govt. Advocate, for Respondents.

ORDER: Shri Khumukcham Chitrasen Singh, Extension Officer, Industries, Manipur, obtained rule nisi from this Court under Article 226 of the Constitution of India against the respondents (1) the Director of Industries, Manipur, (2) the Chief Commissioner of Manipur and (3) the Union Territory of Manipur to show cause why a writ of certiorari should not be issued quashing the order of the first respondent dated 9-1-1964 removing the petitioner from service.

2. The respondents showed cause.

3. The petitioner was first appointed temporarily as Lower Division Clerk in the Office of the Manipur State Transport in Imphal by the Officer on Special Duty, Manipur State Transport on 31-3-1955 with effect from 1-9-1955. Vide Ext. A/1. He was confirmed as Lower Division Assistant with effect from 20-11-1958. Vide Ext. A/2.

4. Subsequently, he was appointed temporarily as Upper Division Assistant in the Industries Department, by an order of the first respondent—Director of Industries, Manipur on 24-8-1959. Vide Ext. A/3. Again, the first respondent appointed the petitioner as Extension Officer temporarily in the Industries Department on 7-10-1961. He was directed to undergo training of Block Level Extension Officer for one year in the Small Industries Service Institute in Calcutta, as can be seen from Ext. A/4. After he returned from training, he was temporarily attached to the Small Scale Industries Section to study block programmes. Vide Ext. A/5 dated 6-11-1962 issued by the first respondent.

5. On his return from training, the petitioner applied for leave on 19-11-1962 for 1½ months with effect from 1-12-1962 on the ground that his house required repairs, vide Ext. A/6. But, a discussion was held by the first respondent Director of Industries with the Additional Development Commissioner on 23-11-1962 regarding the petitioner's posting to a development block. In view of the exigency of the Government work and the fact that the petitioner underwent special training, the first respondent posted him to Thanlon Development Block on 24-11-1962. Vide Ext. A/7. The petitioner sent a reminder Ext. A/8 dated 26-11-1962 to the first respondent requesting him to grant him earned leave for 1½ months according to Ext. A/6 his previous application. But, the first respondent sent a reply Ext. A/9 dated 28-11-1962 that his application for leave could not be considered at that stage. The first respondent also directed the petitioner to report himself for duty in Thanlon Block on or before 7-12-1962. But, the petitioner did not report himself for duty in Thanlon Block. He

sent another application Ext. A/10 dated 8-12-1962 to the first respondent to defer the order of his transfer until 15-1-1963 to enable him to repair the house. The first respondent again issued a further memorandum Ext. A/11 dated 7-12-1962 to the petitioner informing him that he had discussion with the Additional Development Commissioner on 23-11-1962, that according to the then existing immediate need of E O (I) Block, an order transferring the petitioner to Thanlon Development Block was issued on 24-11-1962 and enmmunacated to him on the same day, that his application for leave was not considered and that he was asked to report for duty at Thanlon Development Block on or before 7-12-1962 but that the petitioner was indulging in delaying tactics. The petitioner was given an ultimatum for the second time to report for duty in Thanlon Development Block on or before 13-12-1962 at the latest and that, if he failed to do so, he would be charge-sheeted for insubordination and for playing delaying tactics in carrying out the orders of Head of the Department. Therefore, the petitioner sent a representation Ext. A/12 dated 10-12-1962 to stay the operation of the order of his transfer pending disposal of his petition for leave. The petitioner stated in Ext. A/12 that, unless his application for leave was disposed of, the order of the first respondent transferring him to Thanlon Development Block was quite "meaningless", that it would be to the "credit of the office of the first respondent" if Departmental E Os belonging to Thanlon locality were posted to Thanlon Development Block as they would be acquainted with the local conditions, that sending a person like the petitioner who was not acquainted with the facts and conditions of the locality amounted to "waste of administrative machinery", that the first respondent was not free "to exercise his power according to his sweet will and arbitrarily and to the prejudice of the petitioner's interest", that, the petitioner ~~should be given leave and that his transfer should be kept in abeyance.~~

6. The first respondent thereupon issued Ext. A/13 memorandum to the petitioner accompanied by Ext. A/14 charges. The first respondent charged him, firstly, that the petitioner was disobedient and insubordinate during the period from 9-10-1961 to 10-12-1962, secondly, that he was playing delaying tactics in carrying out the order of the first respondent and, thirdly, that the petitioner violated Rule 3 of the Central Civil Services (Conduct) Rules, 1955. The petitioner was asked to file his written statement within 21 days. He was also directed to inspect the documents, if necessary, within 7 days from the date of the receipt of the memorandum. The petitioner applied under Exts A/15 and A/16 dated 24-12-1962 and 28-12-1962 respectively for

certain copies of documents mentioned therein. But, as he did not get the copies, the petitioner prepared written statement and filed it on 31-12-1962. The first respondent placed the petitioner under suspension as seen from Ext. A/17 dated 18-1-1963 with effect from that date.

7. The first respondent framed further charges, as can be seen from Ext. A/19, firstly that the petitioner was found to have willfully absented himself from duty without any permission from 26-11-1962 and secondly that the petitioner violated Rule 3 of the Central Civil Services (Conduct) Rules, 1955. The first respondent issued a memorandum Ext. A/18 along with Ext. A/19 charges, to the petitioner on 19-1-1963. The petitioner filed his written statement Ext. A/20 on 5-2-1963.

8. The first respondent appointed Shri Iboyalma Singh, Development Officer, Khadi and Village Industries as Inquiring Officer to enquire into the charges framed against the petitioner under the Central Civil Services (Classification, Control and Appeal) Rules, 1957 (hereinafter called as the Rules of 1957). Vide Ext. A/21 dated 2-3-1963. The Inquiring Officer made some enquiry and submitted his report to the first respondent. The first respondent set aside his report and appointed Shri S. Singora, E. A. C. Departmental Enquiries, as Inquiring Officer under Ext. A/22 dated 18-7-1963.

9. The first respondent permitted the petitioner to inspect the documents mentioned in his applications Exts A/15 and A/16. Vide Ext. A/23 dated 30-8-1963. The petitioner inspected the documents and filed supplementary written statement.

10. After enquiry, the Inquiring Officer sent up Ext. A/25 report to the first respondent on 21-9-1963 stating that the charges were proved. The first respondent considered the report and issued Ext. A/24 order dated 1-10-1963 stating that he agreed with the report and provisionally came to the conclusion that the petitioner should be removed from service and directed him to show cause why he should not be removed from service. After considering the representation made by the petitioner, the first respondent removed the petitioner from service with effect from 19-11-1963. Vide Ext. A/26.

11. As there were mistakes regarding the dates of "26-11-1962" and "27-11-1962", which were wrongly typed as "28-12-1962" and "27-12-1962" in the report of the Inquiring Officer and which were adopted by the first respondent, the latter issued a memorandum Ext. A/27 dated 28-11-1963 that the said dates "28-12-1962" and "27-12-1962" should be read as "26-11-1962" and "27-11-1962" respectively and directed the petitioner to submit his representation, if any, showing cause against the correction.

After the petitioner submitted his representation, the first respondent passed the impugned order Ext. A/29 dated 9-1-1964 that the order of removal of the petitioner from service should take effect from 9-1-1964 and made some modifications with regard to the period for pay and allowances to be paid to the petitioner.

12. The petitioner filed an appeal before the second respondent against Ext. A/29 (order of dismissal). The second respondent dismissed the appeal on 3-8-1964, vide Ext. A/30. Hence the present writ petition.

13. The petitioner's counsel formulated his contentions on 3 grounds. His first contention is that a departmental enquiry is a solemn one, that the charges must be definite, but that they were very vague in this case and that the petitioner was not given reasonable opportunity to defend himself. He relied on *Tribhuwannath Pandey v. Government of the Union of India*, AIR 1953 Nag 138, *Raghu Bans Ahir v. State of Bihar*, AIR 1957 Pat 100; *Khem Chand v. Union of India*, AIR 1958 SC 300; *Jagdish Prasad Saxena v. State of Madhya Bharat* (now Madhya Pradesh), AIR 1961 SC 1070 and *Union of India v. H. C. Goel*, AIR 1964 SC 364. No doubt, even a departmental enquiry is a solemn one. But, the law only requires that tribunals should observe rules of natural justice such as that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, that he should be given the opportunity of cross-examining the witnesses and that no materials should be relied on against him without being given an opportunity of explaining them. If these rules are satisfied, then the enquiry is not open to attack. Vide also *Union of India v. T. R. Varma*, 1958 SCR 499 = (AIR 1957 SC 882).

14. The charges framed against the petitioner on 14-12-1962 are as follows:

Charge I.

"That the said Sri Kh. Chitrasen Singh, while functioning as E. O. (Industries) of Industries Department, Manipur during the period from 9-10-61 to 10-12-62 is found guilty of disobedience and insubordination".

Charge II.

"That during the aforesaid period while functioning in the aforesaid office Sri Kh. Chitrasen Singh is found guilty of playing delaying tactics in carrying out the orders of the Head of Department and also for use of arrogant and offending language to his superior authority".

Charge III.

"That during the aforesaid period and while functioning in the aforesaid office the said Shri Kh. Chitrasen Singh is found guilty of violation of Rule 3 of Central Civil Services (Conduct) Rules, 1955."

15. The charges framed subsequently on 19-1-1963 as seen from Ext. A/19 are as follows:

Charge I.

"That the said Shri Kh. Chitrasen Singh while functioning as Extension Officer (Industries) of Industries Department, Manipur during the period from 26-11-62 is found guilty of wilful absence from duty without authority".

Charge II.

"That during the aforesaid period and while functioning in the aforesaid Department the said Shri Kh. Chitrasen Singh is found guilty of violation of Rule 3 of Central Civil Services (Conduct) Rules, 1955."

16. Regarding the earlier charge I, the contention of the petitioner's counsel is that, as the petitioner was given time to join in Thanlon Block Development Office till 7-12-1962, as can be seen from Exts. A/9 and A/11, he could not be said to be guilty of disobedience or insubordination upto 10-12-1962. The petitioner never joined in Thanlon Block Development Office even before 13-12-1962, the date fixed in Ext. A/11 by the first respondent for his joining. So, charge 1, under which the petitioner was charged that he was guilty of disobedience and insubordination upto 10-12-1962, is not incorrect. Again, it was pointed out that charge 2 is vague because the alleged arrogant and offending language was not mentioned in it. The alleged arrogant and offending language used by the petitioner is found in Ext. A/12, representation made by him on 10-12-1962. The statement of allegations attached to the charges in Ext. A/14 contained the allegations against the petitioner and gave him sufficient notice of the same and also of the objectionable remarks made by the petitioner in his representation dated 10-12-1962. So, it cannot be said that the second charge as per Ext. A/14 is vague. In *Ram Singh v. State of Delhi*, 1951 SCR 451 = (AIR 1951 SC 270), the time and place at which the speeches were alleged to have been made and their general nature and effect, namely, that they were such as to excite disaffection between Hindus and Muslims were also stated in the grounds communicated to the petitioners, who were detained under the Preventive Detention Act of 1950. It was held that the allegations were not too vague or indefinite to enable the petitioners to make an effective representation and that the detention was not illegal. In view of the statement of allegations mentioned in Ext. A/14, I do not consider that the charges are vague.

17. But, the petitioner's counsel contended that in Ext. A/13 it was stated that the petitioner should file his written statement within 21 days but that it was not mentioned from what date the period of 21 days was to be counted. Evidently, it

meant that he was asked to file his written statement within 21 days from the date of the receipt of Ext A/13 (memorandum) and he filed the same accordingly. By Ext. A/13 he was informed that he could take copies of documents within 7 days from the date of receipt of Ext A/13. He did so accordingly. He was also permitted to inspect the other documents mentioned in Exts A/15 and A/16 (vide Ext A/23) and after inspection he filed additional written statement. Thus the petitioner was not at all prejudiced by any alleged vagueness in the charges. He was also given reasonable opportunity to defend himself.

18 The second contention of the petitioner's learned counsel is that the first respondent was actuated by malice and mala fides and that though the petitioner applied for leave on 19-11-1962, the first respondent did not grant it but that, on the other hand, he transferred him to Thanlon Block Development Office on 24-11-1962. The contention of the petitioner's counsel that the first respondent did not pass any order on Ext. A/6 (application for leave) is not correct. The first respondent informed the petitioner under Ext. A/9 dated 28-11-1962 that his application for leave could not be considered at that stage. This meant that his leave was refused. Under F.R. 57 no Government servant is entitled to claim leave as a matter of right. It is purely in the discretion of the granting authority. The petitioner's counsel brought to my notice a recommendation of the Pay Committee that generally leave must be granted to enable the Government servants to work more efficiently after their return from leave and that there must be a phased programme for granting leave to them. But, this depends upon the exigencies of the service. Exhibit A/11 shows that the first respondent had a discussion with the Additional Development Commissioner Manipur that according to the then pressing need an Extern on Officer had to be posted to the Thanlon Block Development Office and that, therefore, the petitioner was posted to work at Thanlon. But the petitioner was more worried about the alleged repairs of his house than his official duties that was only a pretext on the part of the petitioner to evade the transfer. There was sufficient evidence on record before the Inquiring Officer to prove the charges. The High Court has no jurisdiction to sift the evidence and to find out whether the first respondent had sufficient evidence before him to pass the impugned order. It is not the function of the High Court, exercising its jurisdiction under Article 226 of the Constitution of India to review the evidence and to arrive at an independent finding. If proper enquiry had been held, the question of adequacy and reliability of the evidence cannot be canvassed before the High Court. Vide also State of Andhra Pradesh v S Sree Rama

Rao 1964-3 SCR 25 = (AIR 1963 SC 1723)

19 It was next stated by the petitioner's counsel that the first respondent had at first appointed Shri Iboyama Singh as the Inquiring Officer that after he submitted his report, the first respondent did not accept it as it went against him that thereafter he appointed Shri S Singson E A C. Departmental Enquiries as Inquiring Officer and that therefore, the first respondent acted mala fide. I perused the report of Shri Th. Iboyama Singh. It shows that he did not record any evidence but that he orally heard the first respondent and the petitioner and gave his findings against the petitioner. So the first respondent was justified in setting aside his report, which was illegal, and appointing Shri S Singson as Inquiring Officer.

20 The subsequent enquiry was held by an independent Officer namely Shri S Singson, E A C Departmental Enquiries who had nothing to do with the Industries Department and the first respondent accepted his findings and the report. The impugned order is well within the power of the first respondent and no mala fides can be attributed to him as the enquiry was conducted according to the provisions of law. Vide also S Partap Singh v State of Punjab AIR 1964 SC 72.

21 The third contention of the petitioner's counsel is that the petitioner was a permanent employee of the State Transport at Imphal, that his services were lent to the Industries Department, that he has a lien in the former Department, that his dismissal by the first respondent Director of Industries without reference to the Manipur State Transport is contrary to Rule 20 of the Rules of 1957 and that, therefore, it is illegal and liable to be set aside.

Rule 20 runs as follows

"20 (1) Where an order of suspension is made or a disciplinary proceeding is taken against a Government servant whose services have been borrowed from a State Government or an authority subordinate thereto or a local or other authority the authority lending his services (hereinafter in this rule referred to as "the lending authority") shall forthwith be informed of the circumstances leading to the order of his suspension or the commencement of the disciplinary proceeding, as the case may be.

(2) In the light of the findings in the disciplinary proceeding taken against the Government servant

(i) if the Disciplinary Authority is of the opinion that any of the penalties specified in Clauses (i) to (m) of Rule 13 should be imposed on him, it may subject to the provisions of sub-rule (11) of Rule 15 and except in regard to a Government servant serving in the Intelligence Bureau or on the Delhi Special Police Establishment, of or

below the rank of Assistant Central Intelligence Officer or Inspector of Police, after consultation with the lending authority, pass such orders on the case as it deems necessary:

Provided that in the event of a difference of opinion between the borrowing authority and the lending authority the services of the Government servant shall be replaced at the disposal of the lending authority;

(ii) if the Disciplinary Authority is of the opinion that any of the penalties specified in Clauses (iv) to (vii) of Rule 13 should be imposed on him, it shall replace his services at the disposal of the lending authority and transmit to it the proceedings of the inquiry for such action as it deems necessary".

In the present case, the services of the petitioner were borrowed by the Industries Department from the Manipur State Transport. For, the first respondent advertised on 23-7-1959 calling for applications from suitable candidates, including those already in service in other Departments, to fill up the vacancy of two temporary posts of U. D. Cs. Evidently, on the application of the petitioner, the first respondent temporarily appointed him on 24-8-1959 as seen from Ext. A/3 as U. D. C. Though R. 20 uses the expression "whose services have been borrowed" the appointment of the petitioner, who was then working in the Manipur State Transport, amounts to "borrowing his services" from the Manipur State Transport by the Industries Department and is covered by Rule 20 of the Rules of 1957. But, that Rule 20 of the Rules of 1957 applied to the case of a Government servant whose services had been borrowed from another Department under the same Government is made clear by the corresponding Rule 20 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, which is more clear on this point. Therefore, the first respondent should have replaced his services at the disposal of the Manipur State Transport as soon as he came to the conclusion provisionally as per Ext. A/26 that the petitioner must be discharged from service and should have transmitted the proceedings of the inquiry to it for such action as it would deem necessary under Clause (ii) of sub-rule (2) of Rule 20. Evidently, the first respondent lost sight of this provision, which applies to the case of the petitioner who was only temporarily working in the Industries Department having his permanent lien in the Manipur State Transport as a permanent L. D. C. The contention of the learned Government Advocate that Rule 20 of the Rules of 1957 applied to the Government servant whose services had been "borrowed" from a State Government or an authority subordinate thereto is not correct.

It not only applied to a Government servant whose services had been borrowed from a State Government or an authority

subordinate thereto, but also to a local or other authority, in which he had lien. There is also a direct ruling of this Court reported in *Konsam Joykumar Singh v. Union Territory of Manipur*, AIR 1963 Mani 25. In that case the services of the petitioner, who was holding the permanent post of L. D. C. of the Judicial Department, were lent to the Police Department. The I. G. of Police after enquiry removed him from the services of the Police Department. It was held that the petitioner should be deemed to have been reverted to his parent Department from the date of his removal from service. But, Rule 20 (2) (ii) of the Rules of 1957 would show that the services of the petitioner should be replaced at the disposal of the lending authority and that all the proceedings should be transmitted to it for such action as deemed necessary, because the first respondent was of the opinion that the penalty of removal from service under Clause (vi) of Rule 13 of the Rules of 1957 should be imposed upon the petitioner. So, the impugned order of the first respondent is liable to be modified to this extent.

22. In the result, the findings and the order of the first respondent dated 19-11-1963 as per Ext. A/26 are confirmed and the writ petition is dismissed to that extent. The order of removal of the petitioner from service is however set aside. The first respondent is directed to replace the services of the petitioner at the disposal of the Manipur State Transport, the lending authority and to transmit the proceedings of enquiry to it for such action as the Manipur State Transport may deem necessary under R. 20 (2) (ii) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957. I direct the parties to bear their respective costs in this petition.

MVJ/D.V.C.

Order accordingly.

AIR 1969 MANIPUR 41 (V 56 C 15)

C. JAGANNADHACHARYULU, J. C.

Imphal Sporting Club, Imphal by its Secretary Arambam Santosh Kumar Singh, Petitioner v. All Manipur Sports Association, Imphal and another, Respondents.

Civil Writ Appln. Case No. 21 of 1968, D/- 22-11-1968.

(A) Constitution of India, Art. 226 — Domestic tribunal — Meaning of — Statutory and non-statutory tribunals — Distinction between — Writ of certiorari does not lie against non-statutory tribunal — (Words and Phrases — Domestic Tribunal).

The phrase "domestic tribunal" is used to refer to committees or associations like trade unions, social clubs, professional bodies, who have a right to adjudicate upon the rights of or disputes between their mem-

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bers. Sometimes such tribunals are also set up by a statute, e.g. the Medical Council, Bar Council or the like. When created by statute or under statutory authority, they should strictly be called "statutory tribunals" rather than "domestic tribunals."

(Para 9)

In the case of a "statutory tribunal", the jurisdiction of the tribunal rests on the statute or the rules framed thereunder. But the jurisdiction of a "domestic tribunal" is founded on the contract of its members, express or implied. The Rules of the association, subscribed by all the members, constitute the contract between the members and create the jurisdiction of the tribunal.

A material difference follows from this (a) in the case of a non-statutory "domestic tribunal", certiorari cannot lie, though other remedies, such as declaration, injunction or damages may be available in proper cases, (b) where, however, a "domestic tribunal" is created by statute, certiorari would lie against it. 1952-2 QB 329 and AIR 1954 Pat 297 and AIR 1959 SC 107, Ref. to.

(Para 9)

(B) Constitution of India, Art. 226 — Statutory domestic tribunals — Certiorari will lie to quasi-judicial tribunals and not to administrative ones — Requisites of quasi-judicial bodies.

It is now well settled that a writ of certiorari will lie to control such a "statutory body" which can be said to be quasi-judicial, entrusted with quasi-judicial functions and that it will not lie to correct the errors of a statutory body which is entrusted with purely administrative functions.

(Para 10)

There are three requisites to be satisfied in order that the act of a body can be said to be quasi-judicial. Firstly, the body of persons must have legal authority; secondly, they must have legal authority to determine the questions affecting the legal rights of parties and thirdly, they must have the duty to act judicially. Thus, the real and determining test to ascertain whether an act authorised by a statute is a quasi-judicial act or an administrative act is whether the statute has expressly or impliedly imposed upon the statutory body the duty to act judicially as required by the third condition.

(Para 10)

(C) Constitution of India, Art. 226 — Societies Registration Act (1860), S. 3 — All Manipur Sports Association registered under the Act — Association is purely domestic tribunal — Certiorari does not lie against it.

Though the All Manipur Sports Association at Imphal which organises and conducts football tournaments every year is registered under the Societies Registration Act, 1860, the Association is purely a "domestic tribunal". It was not constituted under any statute. Nor do any statutory rules apply to the Association. The mere registration

of an Association under the said Act does not make it a statutory one. Even the terms under which the various clubs join the annual tournaments are styled as "conditions" of the match and not "rules". This association is thus a purely domestic tribunal, which is beyond the purview of the high prerogative writ jurisdiction of the High Court. (Paras 9, 10)

Where, therefore, the Association while conducting the tournament decides in its meeting of the Governing body that the petitioner's team has no right to play in the semi-final, no certiorari lies against the Association to quash the proceedings. Both the parties are governed by the terms of the contract governing the tournament and the petitioner has got an alternative remedy to seek its redress in Civil Courts. But, it has no remedy by way of writ under Art. 226 of the Constitution against the Association which is private and 'domestic' tribunal. Case law referred to. (Para 12)

(D) Civil P. C. (1908), S. 9 — Foot-ball matches — Decisions of referee are final — Not justiciable in courts.

According to Federation Internationale De Foot-ball Association and its laws, the Referee has got supreme power to decide such disputes. These disputes are not justiciable in a court of law. (Para 14)

Cases Referred: Chronological Paras

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| (1962) AIR 1962 SC 1044 (V 49) = | |
| (1963) 1 SCJ 106, Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal | 12 |
| (1962) AIR 1962 Mad 169 (V 49) = | |
| (1961) 2 Mad LJ 279, C. Lakshmiiah Reddiar v. Perumbadur Taluk Co-operative Marketing Society Ltd. | 19 |
| (1959) AIR 1959 SC 107 (V 46) = | |
| 1959 SCJ 6, Radheshyam Khare v. State of Madhya Pradesh | 10 |
| (1959) AIR 1959 Mani 1 (V 46), Oynam Birahari Singh v. Inspector of Schools, Manipur | 12 |
| (1954) AIR 1954 SC 220 (V 41) = | |
| 1954 SCR 673, Cooverji B. Bharucha v. Excise Commr. and the Chief Commr., Ajmer | 11 |
| (1954) AIR 1954 Pat 297 (V 41) = | |
| ILR 33 Pat 157, Jamalpur Arya Samaj v. Dr. D. Ram | 10 |
| (1952) 1952-2 QB 329 = 1952-1 All ER 1175, Lee v. Showmen's Guild of Great Britain | 10 |
| (1951) AIR 1951 All 257 (V 38) = | |
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(1918) AIR 1918 Mad 763 (V 5) =

ILR 40 Mad 125, In re, G. A.

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L. Nandakumar Singh, for Petitioner; R. K. Manisana Singh, (for No. 1) and A. Nilamani Singh, (for No. 2), for Respondents.

ORDER: This is an application filed by the Imphal Sporting Club, under Article 226 of the Constitution of India against (i) All Manipur Sports Association, Imphal, and (ii) Tiddim Road Athletic Union Manipur, for a writ of certiorari and other appropriate directions quashing the proceedings of the meeting of the Governing Body of the first respondent held on 17-11-1968 which decided against the protest lodged by the petitioner and which held that the second respondent won "Sir Churachand Singh, K. C. S. I., C. B. E. Memorial Gold Centered Shield Football Tournament" quarter final game on 17-11-1968 and for restraining the second respondent from playing the semi-final of the said tournament and for further restraining the first respondent from conducting the semi-final match.

2. The petitioner and the respondents 1 and 2 are associations registered under the Societies Registration Act (Act XXI of 1860) (hereinafter called as the Act) functioning in Imphal. The object of the petitioner's and second respondent's Association is to promote game and sports among the youngsters. The first respondent is organising and conducting every year a football tournament known as "Sir Churachand Singh K. C. S. I., C. B. E. Memorial Gold Centered Shield Football Tournament" since 1950. The first respondent printed the conditions of the play for 1968 in Ext. A/1.

3. The petitioner and the second respondent entered into the tournament on payment of entry fee of Rs. 40/- each. The tournament was to be played on the knock-out basis till the semi-final rounds as prescribed by condition No. 9 in Ext. A/1. After winning two plays against its rival teams, the petitioner entered into quarter final play. It played against the second respondent on 8-11-1968. But, the game ended goalless on either side and in a draw.

4. The first respondent fixed 17-11-1968 as the next date on which both the teams should replay. At about 8-00 A. M. the Governing Body of the first respondent passed a resolution (Vide Ext. B/1) that, in case the match to be replayed again ended in a draw, then the match should be decided by lot. The Governing Body further resolved that the Referee who would supervise the replay on 17-11-1968 should be informed of this decision of the Governing Body, so that he might issue necessary instructions to the Captains of the two teams and that the decision might be announced before the start or during the half time of the match through the microphone fixed at the Pavilion.

5. It is the case of the petitioner that while replaying the game on 17-11-1968, the Referee gave his long whistle declaring that the petitioner's team scored the goal, but that the second respondent's captain protested, that the game continued, that the Referee awarded a "penalty kick" to the petitioner's team against the second respondent and that the game ended in a goalless draw.

6. The petitioner further alleges that it lodged a protest within one hour of the conclusion of the match challenging the decision of the Referee by depositing a sum of Rs. 50/- in accordance with the condition No. 15 of Ext. A/1 (vide Ext. A/2), that it requested the first respondent to withhold the lot for deciding the match as provided in condition No. 8 (b) in Ext. A/1, until the final decision on the protest was given by the first respondent, but that, without considering the protest, the first respondent proceeded with the lot as can be seen from Ext. A/3 and declared the second respondent as having won the game on the ground that the petitioner refused to join in drawing the lot. The petitioner avers that the first respondent should have at first considered the protest and then should have actually drawn the lot subsequently, even though the petitioner might not have been present. The petitioner, therefore, challenges Ext. A/3 resolution of the first respondent, under which the first respondent declared the second respondent as having won the game.

7. According to the first respondent, immediately after the match ended in goalless draw at about 4-30 P. M. the Captains of both the teams were called on to join in the draw of lot according to condition No. 8 (b) of Ext. A/1. But, the petitioner's team did not take part in the drawing of the lot, while the Captain of the second respondent was present. The first respondent declared that the second respondent won the lot, as the petitioner did not take part in the toss. The first respondent also alleges that its Governing Body considered the protest lodged by the petitioner and upheld the decision of the Referee that no writ petition lies against a "domestic tribunal", like the first respondent, that its decisions are final under condition No. 17 of Ext. A/1 and that the writ petition is liable to be dismissed.

8. The first contention, which was raised and which arises for determination, is whether the present writ petition is maintainable under Article 226 of the Constitution of India. The preamble of the Societies Registration Act, (Act XXI of 1860) under which the Associations of the petitioner and the respondents 1 and 2 were registered reads that the Act was intended to provide for improving the legal condition of societies established for the promotion of literature, science, or the fine arts or for the diffusion of useful knowledge, the

diffusion of political education or for charitable purposes. Section 6 of the Act lays down that every society registered under the Act may sue or be sued in the name of the president, chairman, or principal secretary or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the Governing Body for the occasion. Section 20 of the Act shows that the provisions of the Act are applicable to the Associations of the petitioner and the respondents 1 and 2.

9. Though the petitioner and the respondents 1 and 2 got their societies registered under the said Act, the first respondent is purely a "domestic tribunal". It was not constituted under any statute. Nor do any statutory rules apply to the first respondent. The mere registration of an Association under the said Act does not make it a statutory one. In this connection, the passages about "domestic tribunals" contained at pages 559 and 560 of Basu's Commentary on the Constitution of India, 4th edition Vol. III of 1963 are very pertinent. The phrase "domestic tribunal" is used to refer to committees of associations like trade unions, social clubs, professional bodies, who have a right to adjudicate upon the rights of or disputes between their members. Sometimes such tribunals are also set up by a statute, i.e., the Medical Council, Bar Council or the like. When created by statute or under statutory authority, they should strictly be called "statutory tribunals" rather than "domestic tribunals". In the case of a "statutory tribunals", the jurisdiction of the tribunal rests on the statute or the rules framed thereunder. But, the jurisdiction of a "domestic tribunal" is founded on the contract of its members, express or implied. The Rules of the association, subscribed by all the members, constitute the contract between the members and create the jurisdiction of the tribunal. A material difference follows from this: (a) In the case of a non-statutory "domestic tribunal", certiorari cannot lie, though other remedies, such as declaration, injunction or damages may be available in proper cases. (b) Where, however, a "domestic tribunal" is created by statute certiorari would lie against it in the same manner as in the case of other statutory tribunals e.g., (i) on the ground of defect of jurisdiction or (ii) on the ground of violation of the principles of natural justice. In the absence of a statutory provision, it is free to adopt any procedure, but it cannot use any material which was not disclosed to a party and to rebut which he was given no opportunity. But apart from observing the rules of natural justice a "domestic tribunal", even when statutory, is not bound by the rules of evidence.

10. Article 226 (1) of the Constitution of India runs thus

"Notwithstanding anything in Article 82, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purposes."

All these writs are known in English law as prerogative writs, the reason being that they were specially associated with the King's name. The theory of the English law is that the King himself superintended the due course of justice through his own Court preventing cases of usurpation of jurisdiction and insisting on vindication of public rights and personal freedom of his own subjects. As our Constitution makers borrowed the conception of prerogative writs from the English law, the interpretation of Article 226 must, therefore, be considered in the background of English law. In the case of "statutory tribunals", the injured party has a remedy by certiorari and also a remedy by declaration and injunction. The remedy by certiorari does not lie to "domestic tribunals". But, the remedy by declaration or injunction does lie. These remedies are more effective, because they are not subject to the limitation that the error must appear on the face of the record. Vide the judgment of Lord Justice Denning in *Lee v Showmen's Guild of Great Britain*, (1952) 2 QB 329. Vide also *Jamalpur Arya Samaj v Dr D Ram*, AIR 1954 Pat 297. In *Radheshyam Khare v State of Madhya Pradesh*, AIR 1959 SG 107 also the scope of the writ of certiorari was well explained.

"It is a well known ancient high prerogative writ, which was issued by the Courts of King's Bench to correct the errors of the inferior courts strictly so-called. Gradually, the scope of the writs came to be enlarged so as to enable Superior Courts to exercise control over various bodies which were not really speaking courts at all but which were by statute vested with powers and duties, that resembled those which were vested in the ordinary inferior Courts."

The law is now well settled that a writ of certiorari will lie to control such a "statutory body" as it can be said to be quasi-judicial, entrusted with quasi-judicial functions. It is equally well settled that certiorari will not lie to correct the errors of a "statutory body" which is entrusted with purely administrative functions. Thus, there are three requisites to be satisfied in order that the act of a body can be said to be quasi-judicial. Firstly, the body of persons must have legal authority, secondly they must have legal authority to determine the questions affecting the legal rights of parties and thirdly, they must have the duty to act judicially. Thus, the real and deter-

mining test to ascertain whether an act authorised by a statute is a quasi-judicial act or an administrative act is whether the statute has expressly or impliedly imposed upon the statutory body the duty to act judicially as required by the third condition. Vide also *C. Lakshmiah Reddiar v. Perumbadur Taluk Co-operative Marketing Society Ltd.*, AIR 1962 Mad 169, wherein the Board of Directors of a Co-operative Society had to consider the objections to the nominations of the members for election to the Board of Directors. The Board of Directors was not a statutory tribunal with any authority to determine the rights of parties. The Directors discharged their functions under regulations framed by the Society itself, which had no statutory force. It was held that under Art. 226 of the Constitution of India no writ could be issued quashing the proceedings of the Board of Directors, but that the petitioner had an alternative remedy to seek redress under the Madras Co-operative Societies Act of 1922. In the present case, the first respondent was not constituted under any Act or statutory rules. It is purely a private domestic body or collection of some persons. Even Ext. A/1 contains only "conditions" of the match, which were not even styled as "rules." It is a purely domestic tribunal, which is beyond the purview of the high prerogative writ jurisdiction of this Court.

11. The various decisions relied on by the petitioner's counsel are all distinguishable and relate to cases filed against the Governments or "statutory bodies" as opposed to private "domestic tribunals." In *re G. A. Natesan*, AIR 1918 Mad 763, it was held that in the case of "statutory bodies" which have to perform public duties a writ of mandamus could be issued directing them to perform their duties. The case related to the Syndicate of the University of Madras, constituted under the Universities Act of 1904 and Regulations framed under the Act. In *Sheeshankar v. State Govt. of Madhya Pradesh*, AIR 1951 Nag 58 (FB), the matter related to a petition filed for writ of mandamus directing the Madhya Pradesh State Government not to enforce the Central Provinces and Berar Prohibition Act (Act VII of 1938) and the notifications issued thereunder. In *Bangalore District Hotel Owners' Association v. The District Magistrate*, Bangalore, AIR 1951 Mys 14, an application was filed under Article 226 of the Constitution of India by the Bangalore District Hotel Owners' Association against the District Magistrate, Bangalore and the Government of Mysore for the issue of a writ of certiorari or any other appropriate writ to cancel the order of the District Magistrate, Bangalore District directing that all the hotels, restaurants, milk bars and coffee clubs, etc. in Bangalore district should be closed. It was held that, though the application by the Association itself was

maintainable, it was not maintainable by it with regard to the individual grievances of some of its members. So, the rule was sought for against the District Magistrate and the Mysore Government and not against any "domestic tribunal." In *Motilal v. Government of the State of Uttar Pradesh*, AIR 1951 All 257 (FB), it was held that where no order under the Motor Vehicles Act of 1939 was passed or where no reasons were given for refusal to grant permanent permits, a writ of mandamus would lie against the Government or the Road Transport Authority. In *Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer*, AIR 1954 SC 220, the petitioner challenged the auction held by Collector of Excise, Ajmer in pursuance of the rules framed under the Excise Regulation I of 1915.

12. There are only two decisions, strongly relied upon by the learned counsel for the petitioner in support of his contention that a writ lies even against a "domestic tribunal". In *Oynam Birahari Singh v. Inspector of Schools, Manipur*, AIR 1959 Mani 1, the Managing Committee of a private School called Raja Dumbra Singh High School, Imphal dismissed one of its teachers. The teacher filed a petition for the issue of a writ of mandamus or any other suitable writ for his reinstatement and promotion etc. The judgment shows that the School, which was managed by a private Committee, was a public institution. It was a recognised School, affiliated to the University of Gauhati. It received aid from the Government of Manipur. One of the conditions of the grant-in-aid was that the appointments, confirmations and dismissals of teachers must be approved by the Inspector of Schools. Another condition was that the grant-in-aid was liable to be withdrawn for breach of any of the conditions. But, there were no rules with regard to the promotion or punishment of teachers. It was held that the Managing Committee was in the position of a "domestic tribunal" and that its decision could be interfered with by the Court under Article 226 of the Constitution of India, when the tribunal acted without jurisdiction or when it did not follow the principles of natural justice or did not act in good faith or did not act according to its own rules. Thus, Raja Dumbra Singh School was a public institution affiliated to the University of Gauhati receiving grant-in-aid from the Government of Manipur, though it was managed by a private Committee. As such, this decision cannot be applied to a purely "domestic tribunal" consisting of a few individuals as in the case of the first respondent.

In *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal*, AIR 1962 SC 1044, a company by name the Oriental Gas Company was originally constituted by a deed of settlement and registered in

England under the provisions of the English Joint Stock Companies Act of 1862. By the Act V of 1857 passed by the Legislative Council of India, it was empowered to lay pipes in Calcutta and other places. By Acts of the Legislative Council of India passed from time to time, special power was conferred upon the Company. Subsequent to Messrs Sooramull Nagarmull, a firm in India purchased 98 per cent of the shares but floated a limited liability Company called Calcutta Gas Co (Proprietary) Limited. It was registered in India. The Calcutta Gas Company was in charge of the general management of the Oriental Gas Company under an arrangement for 20 years for remuneration. The West Bengal Legislature passed the impugned Act under which the State Government wanted to take over for a period of 5 years the management and control of the undertaking of the Oriental Gas Company according to the Act. It was held that the Calcutta Gas Company was deprived of certain legal rights, that it possessed under the agreement right to manage the Oriental Gas Company for a period of 20 years and to receive remuneration, but that by virtue of section 4 of the impugned Act, the rights of the Calcutta Gas Company were infringed. It was also held that Article 226 of the Constitution of India conferred a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purposes and that persons other than those claiming fundamental rights can also approach the High Court seeking relief thereunder. No doubt, the petitioners' team is deprived of their alleged right to play in semi final. But, it was deprived of this alleged right by the first respondent which is a purely private and domestic body. Both the parties are governed by the terms of the contract mentioned in Ext. A/1 and the petitioner has got an alternative remedy to seek its redress in a Civil Court. But, it has no remedy by way of writ against the first respondent, private and "domestic tribunal" under Article 226 of the Constitution of India.

13 As such, the writ petition is not maintainable.

14. The learned counsel for both the parties advanced their arguments on the merits of the case also. It appears that in the course of the second match, the Referee gave a long whistle, that on the protest of the Captain of the second respondent's team, the Referee awarded a penalty kick in lieu of the goal to the petitioners' team against the second respondent, that the petitioner's team missed the penalty kick and that, therefore, the game ended in a draw. These allegations of the petitioner are denied by the respondents. According to Federation Internationale De Football As-

sociation" and its laws the Referee has got supreme power to decide such disputes. These disputes are not justiciable in a Court of law.

15. Another contention of the learned counsel for the petitioner is that, within one hour after the match ended, the petitioner filed a petition as per Ext. A/2 under condition No 15 in Ext. A/1 accompanied by a fee of Rs 50/- protesting against the decision of the Referee and requesting the first respondent to stop the toss. The petitioner alleges that the first respondent did not decide the protest but mala fide proceeded with the toss and decided against the petitioner on the ground that the petitioner did not take part in drawing the lot. Ext. A/2 shows that the protest was filed at 5-15 p.m. The resolution book shows that the first respondent's Managing Committee passed the resolution as per Ext. A/3 at 6-00 p.m. The contention of the respondents is that immediately after the match was drawn at about 4-30 P.M., the Managing Committee wanted to hold the toss according to its resolution passed in the morning of 17.11.1968 as per Ext. B/1, that it called upon the petitioner's representatives to take part in the toss but that they did not take part in it and that, therefore, the first respondent declared the second respondent, who was present at the toss to have won the game and that subsequently the petitioner filed protest petition as per Ext. A/2. Exhibit A/3 shows that the contentions of the respondents appear to be more reliable. For, the first paragraph of resolution No 1 reads that the parties were called to attend the drawing of the lot immediately after the game ended in draw. The second paragraph of Ext. A/3 shows that as the petitioner's representatives failed to turn up for the lot, the first respondent declared the second respondent having won the lot. Then, para 3 of Ext. A/3 shows that the protest lodged by the petitioner was considered and that the first respondent heard the reports of the Referee and the line Referees concerned and upheld the decision of the Referee. So the sequence of the events narrated in Ext. A/3 shows that they must have occurred in the manner mentioned therein, though these events were reduced to writing in the resolution at 6 P.M. Condition No 15 of Ext. A/1 entitles any team to lodge a protest within one hour of the conclusion of the match. Condition No 8 (b) of Ext. A/1 lays down that if "the first replay of a drawn game till the semi final round is drawn again, the Committee will have the option to decide by lot." Naturally this decision by lot should follow the decision given on protest, of course, the conditions in Ext. A/1 do not lay down that the first respondent should wait for one hour after the drawn match ends, before lots are cast, for none can foresee whether any protest would be lodged or

not. Even otherwise, the first respondent could review the decision taken by lot after considering the protest, in case the first respondent considered that the protest was a valid one. In the present case, it is likely that the first respondent would have called upon both the parties to take part in the lot in view of its earlier resolution evidenced by Ext. B/1. Still, the first respondent could proceed with the lot even though the petitioner was not present and decide the match. But, it did not decide by lot. In this regard, the first respondent committed an irregularity and breach of condition No. 8 (b). However, this cannot be gone into in the present writ petition, as the same is not maintainable under Article 226 of the Constitution of India.

16. In the result the petition fails and it is accordingly dismissed, but, under the circumstance of the case without costs.

DRR Petition dismissed.

AIR 1969 MANIPUR 47 (V 56 C 16)

C. JAGANNADHACHARYULU, J. C.

Binode Behari, Petitioner v. Union Territory of Manipur and others, Respondents.

Civil Writ Appln. Case No. 14 of 1967, D/- 30-11-1968.

Constitution of India, Article 226 — Writ against educational authorities — Domestic tribunal — Petitioner, teacher of a private institution, managed by a Managing Committee — Dismissal of petitioner in violation of instructions contained in Government Aided Private School Teachers (Discipline, Punishment and Appeal) Rules (1959) — Instructions not in the nature of a statutory rules — Institution being private one was a domestic tribunal — Domestic tribunal governed by its own rules is not amenable to writ jurisdiction of High Court — Institution taken over by Government — No resolution or contract under which petitioner's liabilities were also taken over — Writ against Government and its officials held also not maintainable.

(Paras 9, 10)

Cases Referred: Chronological Paras

(1969) AIR 1969 Mani 41 (V 56) = Civil Writ Appln. No. 21 of 1968, D/- 22-11-1968, Imphal Sporting Club v. All Manipur Sports Association

(1959) AIR 1959 SC 896 (V 46), R. Abdulla Rowther v. State Transport Appellate Tribunal, Madras

(1958) AIR 1958 Pat 653 (V 45) = ILR 37 Pat 462, Bishwaranjan Bose v. Ram Krishna Mission, Vivekanand Society, Jamshedpur

(1955) AIR 1955 SC 233 (V 42) = 1955 SCR 1104, Hari Vishnu Kamath v. Ahmad Ishaque

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A. K. Roy, for Petitioner; N. Ibotombi Singh, Government Advocate, for Respondents (Nos. 1 to 7).

ORDER: Shri Binode Behari, the applicant, who was the Head Pandit of Kalinagar Aided L. P. School at Jiribam, obtained rule nisi under Article 226 read with Article 311 of the Constitution of India against the 12 respondents to show cause why the order of dismissal dated 2-12-1964 from service passed by the School Committee should not be quashed.

2. Kalinagar aided School in Jiribam was a private institution being managed by a Managing Committee which was formed from among the public interested in the cause of education and teachers of the School. It became a Government aided private School by receiving grant-in-aid from the Government of Manipur with effect from 1-12-1962 under the conditions laid down by the Government governing the Government aided private institutions (vide Ext. B/1). One of the conditions of Ext. B/1 is that the appointment of teachers of the private schools receiving grants-in-aid from the Government requires the approval of the Deputy Inspector of Schools. The respondents 7 to 12 were the members of the Managing Committee. They appointed the petitioner as Head Pandit of the School with the approval of the Deputy Inspector of School on 4-8-1963 on the scale of pay of Rs. 40-1-60 (vide Ext. A/1).

3. Subsequently, there were a number of charges against the petitioner. The first charge related to the hunger strike which he undertook as a protest for non-payment of his salary. The second charge was in respect of the harsh treatment to some School boys and girls by assaulting them with a cane severely. The third charge was that the petitioner flouted the direction of the Managing Committee to hold classes in the morning as in the case of other Government aided L. P. Private Schools. The fourth charge was in respect of his having made a representation direct to the second respondent (Chief Commissioner of Manipur), the Minister and the third respondent (Director of Education, Manipur) about his pay. The Managing Committee held a meeting on 2-12-1964 and heard the petitioner. It passed a resolution on that date that the explanation of the petitioner was not satisfactory and that he should tender his resignation on 31-1-1965, failing which his services would stand terminated with effect from 1-2-1965. Vide Ext. B/3.

4. As the charges were discussed orally in the presence of the petitioner in the meeting held on 2-12-1964, a copy of the charges was furnished to him on 21-12-1964, vide Ext. B/4. The petitioner did not tender his resignation on 31-1-1965. So, the Managing Committee passed another resolution on 1-2-1965 terminating the services of

the petitioner with effect from 1-2-1965. A copy of the resolution was communicated to the petitioner. The Secretary of the Managing Committee submitted a report of the proceedings to the Deputy Inspector of Schools, Jiribam. The latter called for a statement from the petitioner on 10-2-1965. The petitioner submitted a statement on 13-2-1965 in which he stated that all the matters mentioned in the charges were settled amicably in a general meeting held on 11-2-1965 and that he was dismissed illegally. But, the Deputy Inspector of Schools approved the action of the Managing Committee (vide Exts B/5 and B/6).

5 The Government took over the institution on 1-2-1965. The petitioner issued notices of demand (vide Ext. A/5) on 12-8-1965 to all the respondents and filed the writ petition as his request for re-instatement was not complied with.

6 The respondents 1 to 6 allege that Kalinagar Lower Primary School, Jiribam was purely a private institution, the management of which was vested with its Managing Committee and that no writ lies against it. They further contend that the Government did not take over the liabilities of the School on 1-2-1965 and that, therefore, the petition is not maintainable against the respondents 1 to 6 who represent the Administration of Manipur and the Education Department thereof.

7 The point for determination is whether any writ can be issued against the respondents under Article 226 of the Constitution of India.

8 As can be seen from Ext. B/1 Kalinagar Lower Primary School, Jiribam was purely a private institution, the management of which was vested with the Managing Committee, of which respondents 7 to 12 were members. Exhibit B/1 further shows that the Government issued certain instructions laying down the conditions for giving grants in aid to private Schools. One of the conditions was that every appointment made by the School Committee should be approved by the Deputy Inspector of Schools, the breach of which would only entail the withholding of the grant of the Government. The School was not affiliated to any University.

The Government also issued instruction, as can be seen from Ext. B/3 called "Government Aided Private School Teachers (Discipline, Punishment and Appeal) Rules of 1959" under which the private management of the School was directed to follow the rules mentioned therein with regard to disciplinary proceedings against its staff. But from the facts narrated above it is seen that the Managing Committee did not follow the rules contained in Ext. B/3. It simply held a meeting on 2-12-1964 and heard the petitioner regarding the oral charges and asked him to resign on or before 31-1-1965 and resolved that in case he

refused to resign, his services would stand terminated with effect from 1-2-1965. So, admittedly the Managing Committee did not follow the instructions contained in Ext. B/3. As such, his dismissal from service is not in accordance with the said instructions.

9 But, the institution was a private one. It was a domestic tribunal. The only penalty with which it could be visited in case of non-compliance with the instructions of the Government, would be withholding of the grant. Recently, I had occasion to deal with the scope of Article 226 of the Constitution of India with respect to domestic tribunals. Vide *Imphal Sporting Club v All Manipur Sports Association*, Civil Writ Appln No. 21 of 1968 = (AIR 1969 Mani 41) disposed of by me on 22-11-1968. In the case of a domestic tribunal, which is governed by its own rules, it is not amenable to the writ jurisdiction of the High Court. But, in the case of a statutory tribunal or any other tribunal formed under any statutory rules, it is amenable to the writ jurisdiction of the High Court. There are two decisions relied on by the learned Government Advocate, which are directly to the point.

In *Bishwaranjan Bose v Ram Krishna Mission, Vivekanand Society, Jamshedpur*, AIR 1958 Pat 653 the Court had to consider the effect of the Bihar Education Code in the case of a private teacher of Vivekanand High School at Sakchi, who was dismissed by the Managing Committee of the School, as in the present case. The Court held that the Bihar Education Code is a mere compilation of executive orders issued from time to time by the State Government for the guidance of the Director of Public Instruction and his subordinates, and, for efficient administration of the educational institutions in accordance with the educational policy of the State Government and that it is not a collection of statutory rules. It was further held that it was manifest that the rules have got no statutory value and that, therefore, no writ could be issued if there was any violation of the Rules.

In *R Abdulla Rowther v The State Transport Appellate Tribunal, Madras*, AIR 1959 SC 896 the Supreme Court had to consider the administrative or executive directions and orders issued under S 43A of the Motor Vehicles Act by the Government of Madras. It was held that the instructions were issued by the Government of Madras not for the information of the applicants for permits but for the information and guidance of the authorities that the instructions were not in the nature of statutory rules having the force of law, that their breach, if any, was not a justification for the issue of a writ of certiorari, though their breach might expose the officers to disciplinary or other appropriate action. As such, no writ can be issued against the de-

ground that a suit must fail by reason of some formal defect, the latter was specifically mentioned in cl. (a) by way of an illustration. The fact that it is mentioned in a separate clause by itself does not indicate that it absolutely restricts the following clause to be considered sufficient in a general way. The "grounds" though not ejusdem generis with the ground mentioned in cl. (a), must at least be analogous to it. In the Code of 1908, the only change made in the wording of cl. (b) was the addition of "other" before the words "sufficient grounds".

15. After holding as above, as to what grounds would be analogous to formal defects, it is observed in the same judgment at page 160 (of Bom LR) : (at p. 125 of AIR) as follows placing reliance on the decision reported in (1869-70) 13 M. I. A. 160 (PC).

"... The instances of defects 'of form' cited by the Privy Council in (1869-70) 13 M I A 160 (PC) include misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject matter of the suit. This shows that the expression "formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not."

16. It is necessary at this stage to refer briefly to the case reported in (1869-70) 13 MIA 160 (PC). The facts of that case were that in a suit brought to set aside the sale of a Putnee Talook, an order of dismissal was made with a reservation in favour of the plaintiff that the Order made would not be a bar to the plaintiff or any other person, who might substantiate their rights, from proceeding to recover. The said order was confirmed in appeal before the High Court. Subsequently a fresh suit was brought by the same parties in regard to the same matter. In the course of the second suit, a question arose whether the reservation made in favour of the plaintiff in the same earlier suit was of no effect in the context of a plea of *res judicata* raised by the defendants in the later suit. In the course of the judgment, their Lordships referred to the proceeding in Indian Courts technically known as 'non suit'.

It was in that context the Privy Council observed thus in (1869-70) 13 MIA 160 at page 170 (PC):

"... There is a proceeding in those Courts (Courts of India) called a 'non suit', which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh

suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject-matter of the suit. In all those cases the suit falls by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them.

17. What is also significant from the above Privy Council case is that it was not interpreting section 97 of the Code of 1859. The reference therein was with regard to powers of Courts of Equity in England and proceeding in Indian Courts at the relevant time. It was in these circumstances that, by way of illustration, they referred to certain defects of a formal character which would enable a plaintiff to withdraw from a suit.

18. It is to be noted that Section 97 of the Code of 1859 was couched in language which seemed to confer a very wide discretion on Courts in the matter of withdrawal of suits by plaintiffs. Judicial decisions, having due regard to the general principles of law such as avoidance of harassment and multiplicity of proceedings, seemed to restrict the scope of that section in practice. It is especially relevant to observe that in Section 97 of the Code of 1859 there was no reference to formal defect or a condition relating to failure of suit, which was envisaged for the first time in section 373 of the Code of 1877, and, re-enacted in the Codes of 1882 and 1908. In view of the fact that the latter Codes were enacted subsequent to the Privy Council case of *Watson & Co.* (13 M. I. A. 160) it seems to have been concluded that the reference to "formal defect" and the condition regarding failure of suit were intended to restrict the wide scope of Section 97 of the Code of 1859.

19. In my view from this background it cannot be inferred with any degree of certainty that what the Legislature intended by enacting section 373 of the Code of 1877 and the subsequent Code was only to make provision for "formal defects" and those analogous to it. The effect of such an interpretation is to almost totally efface the legislative intention as expressed in the earlier Section 97, which conferred a very wide discretion on Courts in regard to permission for withdrawal from suits by plaintiffs. Such a serious change as regards the intention of the Legislation is not to be

readily inferred, unless there is something in the language of the statute which warrants it. In my view, such a result can be avoided if the words in clause (a) of Order 23 Rule 1 (2) can be possibly read as making additional provision in the light of the principles set out in the Privy Council case in point and not as illustrative of the defects followed by general words of the same nature as in clause (b). If the intention of the Legislature was to merely illustrate the defects, it would have been easier for it to have enacted them in one clause as in the case of Order 47 Rule 1 C. P. C. It is also not apparent as to how the mere use of the words 'formal defects' is illustrative of any class of defects, without a further explanation that they are relatable at least to the class of defects illustrated in the Privy Council case of *Watson & Co.*, (1869-70) 12 MIA 160. I do not, therefore, feel persuaded to hold that the 'formal defects' in clause (a) are referable to only those specified by the Privy Council in the case of *Watson & Co.*, (1869-70) 12 MIA 160. It is also to be seen that the defects enumerated in that case refer to misjoinder or non-joinder of parties in such a case, having regard to Order 1, Rule 9 of C. P. C. the chance of a failure of a suit on that ground is remote, if not possible. From this it follows that even the defects enumerated in the Privy Council case are merely illustrative of 'formal defects' and those words occurring in the rule in question must be given a very liberal meaning thus embracing within it all defects of a formal character. That such is the case is to be seen from the Bombay Full Bench case in question. But once this position is reached, I fail to see how those words do not cover cases of "defects" analogous to "formal defects". It follows, therefore, that the need or necessity for enacting clause (b) if it was intended only to provide for 'defects' analogous to 'formal defects', disappears. In other words, it would appear that clause (b) is redundant. Such redundancy ought not to be readily attributed to the Legislature. I am, therefore, of the opinion that the legislative intent was to widen the grounds rather than limit the grounds to 'formal defects' and those analogous to it.

20 In my humble view, therefore, and with all respect to the learned Judges constituting the Bench, I am not persuaded to accept the interpretation placed on the rule in the Full Bench case of the Bombay High Court, which was strongly relied by Sri H. F. M. Reddy.

21. It remains for me to consider one other aspect of the matter. It was contended, and held in several of the decisions cited, that though the principle of interpretation of statutes, namely

ejusdem generis, was inapplicable, yet if general words follow specific words, the general words should take their meaning from the specific words preceding it. In Maxwell on Interpretation of Statutes (11th Edn.) at page 326 it is stated thus:

"But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended as for instance, a proviso specifically excepting certain classes clearly not within the suggested genus."

22. It is clear from this statement of the principle that the general words following must be of the same nature as the specific words in order to attract its application. In the case on hand, for reasons already set out by me it is not possible to predicate that "sufficient grounds" are of the same nature as "formal defects" occurring in clauses (b) and (a) respectively of Order 23, Rule 1(2) C. P. C.

Further, this principle is not an unqualified one. To quote Maxwell again, at page 331 of his book he states the position thus:

"Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey."

23. In the light of the foregoing discussion and enunciations, I am unable to agree with the contention of Sri Reddy on the interpretation to be placed on clause (b) of Order XXIII, Rule 1(2), C. P. C.

24. The next decision relied on by Sri Reddy is the one reported in AIR 1951 All 845 (FB) *Abdul Ghafoor v. Abdul Rahman*, which is also a Full Bench decision. In this case, Misra, J. speaking for the Full Bench, following the Bombay Full Bench case, observed thus:— (at para 12 page 848)

"Having regard to the context in which Cl. (b) has been placed and to the preponderance of authority which favours the placing of restrictions on the language of Cl. (b), I have no hesitation in accepting if I may say so with respect the view of the Full Bench of the Bombay

High Court and in holding that the words "other sufficient grounds" in CL (b) are confined only to the grounds analogous to those mentioned in clause (a)."

25. In view of my earlier discussion in regard to the Bombay Full Bench case, I do not consider it necessary to examine this decision in detail.

26. In the decision reported in AIR 1956 Orissa 77, Atul Krushna Roy v. Raukishore Mohanty on which reliance is placed on behalf of the respondent, Panigrahi C. J. in dissenting from the ratio of the decision in the above Full Bench ruling, has observed thus at page 78:

"I do not therefore see any justification for restricting the meaning of that expression only to formal defects or those analogous thereto. This doctrine of ejusdem generis has been pushed too far in some cases.

In my humble opinion it should be restricted only to cases where the generic words follow specific words in the very same clause or sentence. But where the object of the Legislature has been clearly expressed and the intention is to extend the scope of the general words a wider meaning should be given to the succeeding words.

It may be seen that the word "other" before "sufficient grounds" is capable of the interpretation "other than a formal defect". As at present advised, therefore, I am inclined to the view that the expression "other sufficient grounds" need not necessarily be restricted to defects of a formal character and that the words are wide enough to embrace other defects as well."

27. In the same decision, the learned Chief Justice after referring to the decision of the Privy Council reported in AIR 1922 PC 112, in which it was held that the expression "any other sufficient reason" occurring in Order 47, Rule 1, C. P. C. should be construed ejusdem generis with "mistake or other error apparent on the face of the record", has observed, as regards the interpretation to be placed on Order 23 Rule 1 (2), as follows:

"It was, therefore, held by the Privy Council in the context of that rule that "any other sufficient reason" must be read ejusdem generis with "mistake or error apparent on the face of the record". I do not see any justification for importing that construction into the language of O. 23, R. 1. It will be noticed that the expression "other sufficient grounds" used in clause (b) of R. 1(2) of O. 23 is not enacted as a part of, or as a continuation of, CL (a) so as to connote a formal defect, but is separately classified and mentioned under a separate rule."

28. The next decision relied upon by Sri Chouta is the decision reported in AIR 1957 Mad 207, S. Naicker v. R. Ammal. In interpreting Order 23, Rule 1(2), the learned Judge has observed as follows at page 208:

"Sub-clauses (a) and (b) seem to deal with two different situations, and not with similar or analogous situations. Otherwise, there seems to be no need for having introduced the terms "other and sufficient" in sub-cl. (b) in contradistinction from the terms contained in sub-cl. (a). Some meaning and significance should be attached to the terms "other and sufficient" in the context in which they appear. The first ground is stated to be the possibility of a failure of the suit by reason of formal defect. If it was the case that any other ground shown for withdrawal of the suit with liberty to file a fresh suit should also be more or less the same or analogous to the formal defect, then the terms "other and sufficient" lose all meaning and significance in the context.

The clause seems to read and convey sufficient meaning even if it is read without the words "other and sufficient". Therefore it will not be doing any violence to the language or to the spirit and object underlying the same, if we were to hold that a wider discretion is sought to be given to the Courts under sub-cl. (b) than under sub-cl. (a). I do not see any justification to restrict the scope of sub-cl. (b) when the Court is satisfied on other and sufficient grounds to give leave to withdraw than those contained in sub-cl. (a)."

29. While referring to section 97 of the Civil Procedure Code of 1859 and the legislative intendment in that regard, it is further observed as follows at page 208:

"This old provision appears to me to have been much more liberal and gave a wider discretion to the Court to allow a suit to be withdrawn on any grounds that were considered sufficient by the Court, where liberty was asked to bring a fresh suit on the same cause of action. But this old section was amended later on and it took the form in which it is now found. In the amended form a distinction is made between a plaintiff withdrawing a suit, and a plaintiff withdrawing from a suit. Whatever that distinction be, it is not clear what exactly was the intention of the legislature when the amendment was made."

30. The last decision relied upon by Sri Chouta is the one reported in AIR 1964 J. & K. 18, Fateh Shah v. Mst. Bega. In the said decision, Murtaza Fazl Ali, J. has observed thus as regards the interpretation of the Rule in question at page 20 :—

'In the first place, the very fact that the legislature has given two different grounds for allowing withdrawal of the suit, indicates that the grounds are separate and independent and not allied or analogous. Indeed, if the intention of the Legislature would have been that the words "sufficient grounds" should be read as ejusdem generis with formal defect, there was nothing to prevent the Legislature from incorporating these words even in sub-clause (a)

Secondly the word 'other' before 'sufficient grounds' clearly indicates that the sufficient grounds contemplated by the legislature would be grounds other than those mentioned in sub-clause (a) of O 23, R 1(2) Civil P C. Finally we find that where the Legislature intended that the words should be used and read as ejusdem generis they have been incorporated in the same sentence or in the same clause. For instance, in Order 47, Rule 1 C P C, which is the provision for review the words "any other sufficient reasons" have been used in the same sentence in which the words "mistake or error apparent on the face of the record" have been used. This would clearly mean that the words "any other sufficient reasons" would have to be read ejusdem generis with the words "mistake or error on the face of the record". On the other hand, the Legislature in its wisdom thought it fit in Order 23 Rule 1 C. P. C. to incorporate the grounds for leave to withdraw the suit in two separate and independent clauses. The rule of ejusdem generis in our opinion, would apply only if the general words follow the specific words in the same sentence or in the same clause. But it would not apply if the words are employed in a different sub-clause altogether and are not associated or coupled together."

31 From the above discussion, it is clear that there are two conflicting views on the question of interpretation of the expression 'other sufficient grounds' occurring in Order 23 Rule 1(2)(b) C. P. C. The decisions relied upon by Sri Chouda the learned Counsel appearing on behalf of the respondents in support of the view that both the clauses of that Rule should not be read ejusdem generis have been rendered subsequent to the Full Bench rulings relied on by Sri Reddy. In the said rulings, the Full Bench decisions have been referred to and not followed and therefore a question arises as to which view is more in consonance with the intention of the Legislature in enacting Order 23 Rule 1(2)(b) C P C. The preponderance of authority is, if I may say so, slightly in favour of the view that the expression "other sufficient grounds" means 'grounds' analogous to 'formal defects'. I may, however,

mention that no decision of this Court bearing on this question has been brought to my notice at the Bar

32. With all respect to the learned Judges composing the Full Benches of the High Courts of Bombay and Allahabad, whose decisions have been strongly relied upon by Sri H. F. M. Reddy, the view as expressed in the three decisions of the High Court of Orissa Madras and Jammu and Kashmir, appeals to me I would, therefore, prefer, with respect the view followed by those High Courts. It is also to be seen from those decisions that the views of the High Courts of Calcutta and Lahore are also in accord with them.

33 I have earlier set forth some of my views as regards the Full Bench decisions of Bombay and Allahabad. There may be cases in which a plaintiff may have to fail on account of an excusable failure on his part or some unavoidable misfortune. In such an eventuality grave and irreparable injury would be caused, if such a plaintiff is not allowed to withdraw from the suit with liberty to file a fresh suit on the same cause of action. It may even be possible that on account of a mistake of the Counsel of his choice his case may be seriously jeopardised. Such a case appears to have arisen for consideration in a case reported in AIR 1946 Lah 429.

That was a case in which the plaintiff was bound to fail on account of the appellant's case having been mishandled by his Advocate. In such a case Din Mohamed, J speaking for the Division Bench held that the matter was fully covered by the words "other sufficient grounds". In making a reference to this case I do not wish to be understood as subscribing to a proposition that the Court has absolute discretion while exercising jurisdiction under O 23 R 1(2)(b). The discretion involved in the exercise of this jurisdiction is judicial depending on the facts and circumstances of each case.

34. In my opinion, the interpretation placed on the expression "other sufficient grounds", occurring in the sub-rule in question, that the 'grounds' referred to should be analogous to 'formal defect', in clause (a) of Order 23 Rule 1(2) would also give rise to a curious result. On a plain reading of clause (a) it would be clear that for a plaintiff to withdraw from the suit with liberty it would not be sufficient for him to show that the suit suffers from a formal defect such as any of those specified in the Privy Council case reported in 13 MIA 160. He should also satisfy the condition that the suit would fail on account of such 'formal defect'. This latter condition, to my mind, is stringent one. The Legislature has not thought fit to impose this condition in so far as 'other sufficient grounds' in clause (b) are concerned. If the view

that the "grounds" in clause (b) should be analogous to "formal defects" in clause (a) is accepted it would mean that the Legislature had done away with that condition in the case of a "ground" which is merely analogous to it. In other words, it would be sufficient for a plaintiff to make out a ground which merely bears resemblance to a "formal defect" to withdraw from the suit, provided the Court finds it sufficient, whereas if a "formal defect", in the real sense of the term, is made out he has further to fulfil the condition that the suit would fail on that account.

To put it in yet another way, a defect which is something less than a "formal defect" in clause (a), but is merely analogous to it, will enable a plaintiff to withdraw from a suit, without further fulfilling the condition regarding failure of suit as envisaged in clause (a). Such an anomaly cannot reasonably be attributed to a Legislature.

35. The words "other" and "sufficient" appearing in clause (b) cannot be said to be without significance. Given its plain meaning in the context in which the word "other" appears, it refers to something other than a "formal defect". The word "sufficient" makes it obligatory on the part of the Court, to come to a conclusion as to the existence of grounds and the sufficiency or otherwise thereof, before allowing a plaintiff to withdraw from a suit. The words "formal defects" obviously are referable to only defects in form as distinguished from defects of substance. As observed earlier, it is possible to think of cases failing on account of unavoidable events, and not attributable to the merits of the case. It is reasonable therefore to conclude that the Legislature intended to make provision not merely for "formal defects" but also for more serious defects, while allowing a plaintiff to withdraw from a suit.

36. For these reasons also, I am not persuaded to agree with Sri H. F. M. Reddy that the defects envisaged in clause (b) of the Rule in question should be analogous to "formal defects" as laid down in clause (a) of the same Rule.

37. In the light of the above discussion, I hold that the words "other sufficient grounds" occurring in Clause (b) of sub-rule (2) of R. 1 of Order 23, C. P. C. should be read independently of the words "formal defects" occurring in clause (a) of that Rule. I am further of the view that the meaning to be given to the words "other sufficient grounds" should not be limited to the grounds afforded by the defects which are analogous to formal defects referred to in clause (a), as it would be unnecessarily restricting the provisions of Order 23, Rule 1 C. P. C. which has invested the Court with powers to allow with-

drawal from the suit *ex debito justitiae* in cases where such a prayer is not covered by clause (a) of that Rule.

38. In the result, the petition deserves to fail and is dismissed.

39. In the circumstances of the case, there will be no order as to costs.
MVJ/D.V.C. Petition dismissed.

AIR 1969 MYSORE 149 (V 56 C 28) FULL BENCH

M. SADASIVAYYA, G. K. GOVINDA BHAT & D. M. CHANDRASHEKHAR, JJ.

Thyavanige Village Panchayat, Petitioners v. Divisional Commissioner, Bangalore Division, Respondent.

Writ Petns. Nos. 278, 290, 273, 307, 316, 348, 295, 387, 112, 114, 219 & 305 of 1968, D/- 4-4-1968, decided by Full Bench on Order of Reference made by Govinda Bhat and M. Sadanandaswamy, JJ., D/- 6-3-1968.

(A) Panchayats—Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 3(2) — Mysore Village Panchayats Declaration of Villages (Procedure) Rules (1959) — Action under S. 3(2) — Consultation with Taluka Board is not mandatory but only directory. (1963) 1 Mys LJ 150, Overruled.

Per Full Bench :—

Consultation with the Taluk Board provided under Section 3(2) of the Act is not mandatory but directory and failure to so consult does not render the action taken under Section 3(2) invalid or inoperative. (1963) 1 Mys LJ 150, Overruled. Case law discussed. (1966) 1 Mys LJ 444, Approved. (Para 40)

Whether the requirement of consultation with another body is mandatory or directory, depends upon several factors — the object of such consultation, and the status and the character of the body required to be consulted. Where consultation is required with an authority which may merely provide useful information, such consultation is generally of less importance than when consultation is required with an authority which represents interests whose public or private rights may be affected by the action proposed by the consulting authority. As the Taluk Board is not an authority representing the villages likely to be affected by any alteration of area under Section 3(2), the requirement of consultation with the Taluk Board under Section 3(2) is for the general guidance of the Government or its delegate, rather than for safeguarding the rights or interests affected. (Paras 22, 31)

(B) Constitution of India, Art. 226 — Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 3(2) — Action
IL/L/E983/68

taken under S 3(2) is not a quasi-judicial but an administrative act — It is however amenable to judicial review under Art. 226 AIR 1950 SC 222 & AIR 1967 SC 293 Foll. (Per Full Bench)

(Para 44)

(C) Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), S 3(1)(2) — Notification under S 3(1) constituting two villages out of existing one — No prior declaration under S 3 (2) that existing village has ceased to exist — Notification is illegal. (Per Division Bench)

Where the area of a village as defined under the Act comprises of certain revenue villages the Government cannot change the status of one or more of such revenue villages to the status of "village" as defined under the Act without first declaring that the existing village comprising of the revenue villages has ceased to exist. (Para 47)

Cases Referred Chronological Paras

- (1967) AIR 1967 SC 295 (V 54) =
(1966) Supp SCR 311 Barium Chemicals Ltd. v Company Law Board 43
(1967) AIR 1967 SC 1048 (V 54) =
(1967) 2 SCR 631 Khambalia Municipality v State of Gujarat 33
(1968) AIR 1966 SC 81 (V 53) =
(1965) 3 SCR 536 Dwarkanath v Income Tax Officer 42
(1966) AIR 1966 SC 1987 (V 53) =
(1967) 1 SCR 27 Chandra Mohan v State of U P 20
(1966) 1966-1 Mys LJ 444 =
(1966) 6 Law Rep 350 Town Panchayat Committee Konnur v State of Mysore 2, 15
(1963) 1963-1 Mys LJ 150 =
ILR (1963) Mys. 326 K. Venkateswara v State of Mysore 2, 15
(1962) AIR 1962 SC 1344 (V 49) =
(1962) 1 Lab LJ 656 U R. Bhatt v Union of India 15 16
(1961) AIR 1961 SC 849 (V 48) =
1961 (2) Cri LJ 12, Banwari Lal Agarwal v State of Bihar 10 12, 21
(1960) AIR 1960 SC 444 (V 47) =
(1960) 2 SCR 260 Ram Durgaj Kuar v Raja Sri Amar Krishna Narain Singh 11, 37
(1959) AIR 1959 SC 107 (V 46) =
1959 SCR 1440 Radheshyam v State of M P 43
(1957) AIR 1957 SC 912 (V 44) =
1958 SCR 533 State of U P v Manbodhanlal Srivastava 13 16
(1950) AIR 1950 SC 222 (V 37) =
1950 SCR 621 Province of Bombay v Khushaldas 43
(1945) AIR 1945 FC 67 (V 32) =
ILR (1945) KFC 98 Biswanath Khemka v King Emperor 18
(1917) AIR 1917 PC 142 (V 4),
Montreal Street Railway Co. v. Normandin 57

C. Lakshminarayana Rao M. Rama Jai, Kadidal Manjappa, Mohandas N Hegde, for Petitioners— E. S Venkataramiah, High Court Special Govt. Pleader and S G Doddakale Gowda, for Respondent No 1

CHANDRASHEKHAR J — A Division Bench of this court has referred to this Full Bench the following two questions of law

(1) Whether consultation with the Taluk Board provided under Sec. 3(2) of the Act (The Mysore Village Panchayats & Local Boards Act 1959) is mandatory and the failure to consult renders the action taken invalid and inoperative?

(2) Whether action taken under Sec. 3(2) of the Act is not amenable to review under Article 226 of the Constitution of India?

2 The reference of the first of these two questions was necessitated by the conflict between decisions of two Division Benches of this Court. In K Venkateswara v State of Mysore (1963) 1 Mys LJ 150 the Bench consisting of Somnath Iyer and Mr Iqbal Hussain, JJ., held that the notification impugned in that case, made under Sec. 3(2) of the Mysore Village Panchayats and Local Boards Act, 1959 (hereinafter referred to as the Act) could not be sustained as it was not made after consultation with the Taluk Board. In Town Panchayat Committee Konnur v State of Mysore, (1966) 1 Mys LJ 444 another Bench consisting of Tukol and Bhumiash, JJ held that consultation with the Taluk Board under Section 3(2) of the Act is not mandatory and failure or absence of such consultation, does not invalidate such Notification. The earlier Bench decision does not appear to have been brought to the notice of the later Bench which has taken a contrary view

3. It is convenient to set out the relevant provisions of the Act and of the Mysore Village Panchayats Declaration of Villages (Procedure) Rules 1959 (hereinafter referred to as the Rules) These Rules were made by the Government in exercise of the powers conferred by Sec. 210 read with Sec. 3 of the Act.

4. The word 'village' has been defined by Sec. 2(45) of the Act as an area comprising a revenue village or group of revenue villages, which is declared to be a village under the Act.

5 Section 3 of the Act reads—

3 Declaration of village — (1) Whenever the Govt. after making such inquiry as may be prescribed, is satisfied, that any area comprising a revenue village or a group of revenue villages has a population of not less than one thousand and five hundred, but not more than ten thousand, it shall, by notification in the official gazette, declare such area to be a village

Provided that the Government may, for special reasons and by notification in the official gazette, declare any area comprising a revenue village having a population of less than one thousand and five hundred, or more than ten thousand, to be a village under this Section.

(2) The Government may, after consultation with the Taluk Board, by notification, at any time —

(a) include within any village or exclude from any village, any revenue village, or

(b) declare that any area shall cease to be a village.

(3) A village having a population of not less than five thousand and an annual income estimated at not less than ten thousand rupees may be declared by the Government by Notification to be a Panchayat town.

Explanation :— For purposes of the Section 'population' means the population determined in such manner as may be prescribed.

Rule 4(2) of the Rules reads:

(2) The group of revenue villages shall, as far as may be practicable, be made with due regard to geographical contiguity and facility of communications between the different revenue villages in the group.

Rule 5 reads:

The lists prepared under Rule 3 along with such other particulars as the Government may require shall be sent to the Commissioner who shall with his remarks thereon forward them to the Government.

6. Rule 6 provides that on receipt of the lists and the particulars under R. 5, the Government shall consider the suitability of the proposals made, and subject to such modifications as it deems fit, publish a notification specifying the areas comprising single revenue villages or groups of revenue villages proposed to be declared as village under sub-section (1) of Section 3 and also the villages proposed to be declared as Panchayat Towns under sub-section (3) of Section 3.

7. Sub-rule (2) of Rule 6 provides that a notification under sub-rule (1) shall require all persons likely to be affected by the declaration, to send their objections or suggestions before the date to be specified in such notification.

8. Rule 7 provides that the Government shall consider the objections and suggestions, if any, received by it, and after ascertaining such further particulars from the Deputy Commissioner, as the Government may deem necessary and it deems fit, after giving an opportunity to be heard to any person who has sent his objections or suggestions, determine the revenue villages and groups of revenue

villages to be declared as villages under sub-section (1) of Section 3 and the villages to be declared as Panchayat Towns under sub-section (3) of Sec. 3.

9. Sub-section (2) of Section 3 of the Act confers on the Government a discretionary power to include or to exclude any revenue village from a Panchayat village or to declare that any area has ceased to be a village. But the question is if the Govt. chooses to exercise that power whether consultation with the Taluk Board before exercise of such power, is mandatory or directory.

10. The distinction between the terms 'mandatory' and 'directory' was explained thus in *Banwarilal Agarwala v. State of Bihar*, AIR 1961 SC 849 at p. 851:

"The non-observance of a mandatory provision involves the consequence of invalidity of the action purported to be done under that provision. While non-observance of a statutory provision which is directory does not entail the consequence of such invalidity whatever other consequences may occur."

11. The Supreme Court has made it clear in *Rani Drigraj Kuar v. Raja Sri Amar Krishna Narain Singh*, AIR 1960 SC 444 that a directory provision is not the same thing as a discretionary provision. A provision giving discretionary power leaves the donee of the power free to use or not to use it at his discretion. A directory provision, however, gives no discretionary power to do or not to do the thing directed. A directory provision is intended to be obeyed but a failure to obey it does not render a thing otherwise duly done a nullity.

12. As stated by the Supreme Court in *Banawarilal's case*, AIR 1961 SC 849 it has been recognised again and again by the courts that no general rule can be laid down for deciding whether any particular provision in a statute is mandatory or only directory. In each case the Court has to decide the legislative intent. Did the Legislature intend in making the statutory provision that non-observance of it would entail invalidity or did it not? To decide this we have to consider not only the actual words used but the scheme of the statute, the intended benefit to public or what is enjoined by the provisions, and the material danger to the public by the contravention of the same.

13. The use of the word 'shall' in a statute, as has been pointed by the Supreme Court in *State of U. P. v. Manbodhan Lal Srivastava*, AIR 1957 SC 912 at p. 917, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. In

this context, the Supreme Court quoted with approval the following passage in Crawford's Statutory Construction, Art. 261 at page 516 (1940 Edition)

"The question as to whether a statute is mandatory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and the intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature its design and the consequence which would follow from construing it the one way or the other "

14 In Section 3(2) of the Act, the word shall has not been used, nor has the word, 'may' been used to govern the words consultation with the Taluk Board though the word 'may' immediately precedes the words 'after consultation with the Taluk Board' it seems to us that that word governs only clauses (a) and (b) of that sub-section and not the words after consultation with the Taluk Board. Even though the word shall has not been used with reference to the words 'after consultation with the Taluk Board', it appears to us that the sub-section enjoins consultation with the Taluk Board before the powers conferred by that sub-section are exercised by the Government. It is not left to the discretion of the Government to consult or not to consult the Taluk Board. But the question is still whether the requirement of consultation with the Taluk Board is mandatory or only directory

15 In (1963) 1 Mys. LJ 150 while holding that non-consultation with the Taluk Board rendered the notification under Section 3(2) invalid, the Division Bench has not considered the question whether the requirement of Sec. 3(2) is mandatory or directory. In the later case, (1966) 1 Mys LJ 444, this question has been considered and Tukol, J who spoke for the Bench, said thus at p 448

"In support of his argument (that consultation with Taluk Board was only discretionary) he (the learned counsel appearing for respondent 3) has drawn our attention to the decision of the Supreme Court in U R Bhatt v Union of India, AIR 1962 SC 1344 in which it has been laid down that Art 320(3)(c) of the Constitution of India is not mandatory and that the absence of consultation with the Public Service Commission does not afford the Government servant a cause of action in a Court of law. According to Art. 320(3)(c) the Public Service Commission 'shall be consulted on all disciplinary matters affecting a person serving in a civil capacity' " The wording of S 3(2) of the Panchayats Act is that the 'Government may after consultation with the Taluk Board "

considering the wording of this sub-section, we are clear in our mind that consultation with the Taluk Board is not mandatory "

16 In U R Bhatt's case AIR 1962 SC 1344 the Supreme Court followed its earlier decision in AIR 1957 SC 912 which sets out the reasons for holding that the requirement of consultation with the Public Service Commission under Art. 320(3)(c) is only directory and not mandatory. Sinha J (as he then was) speaking for the Court in that earlier case said thus at page 917

"Does the Constitution provide for the contingency as to what is to happen in the event of non-compliance with the requirements of Art. 320(3)(c)? It does not either in express terms or by implication, provide that the result of such a non-compliance is to invalidate the proceedings ending with the final order of the Government."

17 The Supreme Court relied on the decision of the Judicial Committee of the Privy Council in Montreal Street Railway Company v Normandin, AIR 1917 PC 142, in which the question mooted was whether the omission to revise the jury lists as directed by the statute, had the effect of nullifying the verdict given by a jury. Holding that the irregularities in the due revision of the jury lists will not ipso facto avoid the verdict of a jury. Their Lordships of the Privy Council observed.

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable not affecting the validity of the acts done

18. The Supreme Court also referred to the decision of the Federal Court in Biswanath Khemka v The King Emperor AIR 1945 FC 67 in which the Federal Court held that non-compliance with the provisions of Section 256 of the Government of India Act, 1935 requiring consultation between public authorities before the conferment of magisterial powers or of enhanced magisterial powers would not render invalid or inoperative the appointment of Magistrates otherwise regularly and validly made.

19 Following the aforesaid decisions of the Privy Council and the Federal Court, the Supreme Court said that Art. 320(3)(c) is not in the nature of a rider or proviso to Art. 311 and does not confer any rights on a public servant, and that the absence of consultation or any

irregularity in consultation cannot afford him a cause of action in a court of law.

20. In *Chandra Mohan v. State of U. P.*, AIR 1966 SC 1987 the question that arose before the Supreme Court was whether the failure to consult the High Court under Art. 233 before making the appointment of District Judges, would render such appointment invalid. Subba Rao, C. J., who spoke for the court said at page 1990:

"... The Constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the 'judicial service' or to the Bar, to be appointed as a District Judge. Therefore a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. These provisions (of the Constitution) indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated there"

21. In AIR 1961 SC 849, the question that arose for decision by the Supreme Court, was whether the requirement of consultation with the Mining Board before framing regulations under Sec. 59 of the Mines Act, 1952, was mandatory or only directory. Under Section 12 of the Mines Act the Mining Board is constituted consisting of two persons representing owners of mines, two persons representing miners and three officers appointed by the Government. The Supreme Court gave the following reasons for holding that the consultation with the Mining Board was mandatory; the consultation is calculated to ensure that all aspects including the need for securing the safety and welfare of labour on one hand and the practicability of the proposed regulation and the likely expenses it may entail on the other hand. It is to the public benefit that the Mining Board should have an opportunity of examining the proposed regulations in the first place. Even though the law does not require concurrence of the Board and even where the opinion expressed by the Board is not accepted, the very fact that there has been such an examination by the Board, and a consequent re-examination by the defendant, is likely to minimise the risk to public welfare.

22. Thus it is seen that the Supreme Court has held that the requirement of

consultation with the Public Service Commission under Art. 320(3)(c) of the Constitution is only directory while consultation with the High Court under Art. 233 of the Constitution and the requirement to consult the Mining Board under Section 59 of the Mines Act, are mandatory. The principle that can be gathered from these three decisions of the Supreme Court, appears to be that whether the requirement of consultation with another body is mandatory or directory, depends upon several factors—the object of such consultation, and the status and the character of the body required to be consulted.

23. In regard to the consultation with the High Court under Art. 233 of the Constitution, the Supreme Court considered that the purpose of consultation with the High Court is so important that the duty of consulting the High Court should be regarded as being integrated with the power of the Government to make the appointment of Dist. Judges. In regard to consultation with the Mining Board, the composition of that Board (which consists of representatives of the persons affected by the intended regulations) and the public benefit likely to result from consultation with such an important body in complex problems of the mining industry, render such consultation mandatory. In regard to consultation with the Public Service Commission, the Supreme Court felt that having regard to the valuable safeguard given to a civil servant under the provisions of Art. 311 of the Constitution, failure to consult the Public Service Commission, before imposing a punishment merely amounts to an irregularity not affecting the validity of the exercise of the power by the Government to inflict a penalty on a civil servant.

24. The legal position as to when a provision is mandatory or directory, is succinctly summed up thus in *Crawford's Statutory Construction* in Art. 266 at page 529:

"As a general rule, a statute which regulates the manner in which public officials shall exercise the power vested in them will be constructed as directory rather than mandatory, especially where such regulation pertains to uniformity, order and convenience and neither public nor private rights will be injured or impaired thereby."

25. To determine to which of the two categories, consultation with the Taluk Board (required under Section 3 (2) of the Act) falls, we have to ascertain the object of such consultation, the status and composition of that body which is required to be consulted.

26. In the Monograph, "Delegated Legislation in India" prepared under the

aspects of the Indian Law Institute, consultation before exercising the rule making power under a statute, has been divided into two broad categories (i) official consultation and (ii) consultation with statutory boards and advisory bodies. Examples of official consultation are consultation with the Reserve Bank before making rules under the Banking Companies Act, consultation with the Election Commission before making rules under the Representation of the People Act, and consultation with the High Court before making rules under Section 10 of the Merchants Seamen (Litigation) Act, 1946.

27. The object underlying the first category of consultation, is not so much to afford opportunity to affected interests to participate in rule-making as to place an obligation on the Government Department to seek assistance from some other agency in framing rules. The object underlying consultation with Statutory Boards and Advisory Committees which are generally composed of nominated officials and persons representing affected interests appears to be to afford some opportunity to the affected interests to canvass their views and suggestions before the Government.

28. The learned counsel for the petitioners argued that under Section 3(2) of the Act the duty to consult the Taluk Board is so integrated with the exercise of the power under clauses (a) and (b) of that sub-section, that the power can be exercised only in consultation with the Taluk Board and not otherwise.

29. Rules have not been made in regard to the consultation under Section 3(2) of the Act. The authority required to be consulted under Section 3(2) is the Taluk Board and not the Panchayat of the village which may be affected by the proposed inclusion or exclusion of a revenue village or by the proposed cessation of any area being a village. The interest of the Taluk Board will not be affected by any such inclusion or exclusion of a revenue village from a Panchayat village nor by cessation of any Panchayat village. The object underlying consultation with the Taluk Board appears to be that the Government or its delegate may inform itself or himself better by taking the assistance of the Taluk Board, the local authority which is likely to have knowledge and information of the local conditions about the village and in particular about the working of the Village Panchayats within its local jurisdiction.

30. Mr B S Patil, learned counsel, whom we permitted to intervene and to address arguments on the questions before us, contended that alteration of the area of a Panchayat Village by inclusion or exclusion of revenue villages,

will affect the electoral rights of people and that the legislative intent in Sec. 3 (2) is to ascertain the views of the people likely to be affected, through their elected body, the Taluk Board. We are unable to see how the right to vote, of the residents of any revenue village which is proposed to be included or excluded from a Panchayat Village will be affected by such inclusion or exclusion. Even after such inclusion or exclusion, those residents will have the right to vote though that right to vote may have to be exercised in an election to a different village Panchayat. If the legislative intent in sub-section (2) of Section 3 was to ascertain the view of the people, the procedure provided in sub-section (1) would have been provided in sub-section (2) also.

31. Where consultation is required with an authority which may merely provide useful information, we think such consultation is generally of less importance than when consultation is required with an authority which represents interests whose public or private rights may be affected by the action proposed by the consulting authority. As the Taluk Board is not an authority representing the villages likely to be affected by any alteration of area under Section 3(2) we think the requirement of consultation with the Taluk Board under Section 3(2) is for the general guidance of the Government or its delegate rather than for safeguarding the rights or interests affected. Further, the Government or the Divisional Commissioner (to whom the Government may delegate its powers under Section 3(2)) will have other official channels besides the Taluk Boards, through which it or he can gather information or knowledge relevant to alteration of the area of a Panchayat Village.

32. In the circumstances, we think any invalidation of a notification under Section 3(2) on the ground only of absence of consultation with the Taluk Board, will create uncertainty, confusion and inconvenience among the Village Panchayats whose areas are purported to be altered by such notification. Such village Panchayats have no control over the Government or the Divisional Commissioner entrusted with the duty of altering the areas of such Panchayat Villages. Such invalidation of the action of the Government or the Divisional Commissioner will not promote the essential legislative aim that alteration of the areas of the Panchayat Villages should bring about more convenient grouping of revenue villages for the purpose of Panchayat administration. Hence the requirement of consultation with the Taluk Board which regulates the manner of exercise of the power under Section 3(2)

by the Government or its delegate, should, in our opinion, be construed as directory rather than mandatory.

33. But the learned counsel for the petitioners contended that certain observations of the Supreme Court in *Khambalia Municipality v. State of Gujarat*, AIR 1967 SC 1048 while considering analogous provisions of the Gujarat Panchayats Act, 1961, would show that the requirement of consultation under Section 3(2) is mandatory.

34. Section 9(2) of the Gujarat Panchayats Act, 1961 reads:

"(2) After consultation with the Taluka Panchayat, the District Panchayat and the Nagar or Gram Panchayat concerned (if already constituted) the State Govt. may, by like notification, at any time —

(a) include within, or exclude, from, any Nagar or Gram, any local area or otherwise alter the limits of any Nagar or Gram; or

(b) declare that any local area shall cease to be a Nagar or Gram; and thereupon the local area shall be so included or excluded, or the limits of the Nagar or Gram so altered or, as the case may be, the local area shall cease to be a Nagar or Gram."

There, the question that arose before the Supreme Court was whether Section 9(2) suffers from excessive delegation. The majority of the Bench that decided that case, took the view that there is no excessive delegation while the minority view was that that sub-section is invalid on account of the vice of excessive delegation. One of the reasons given by the majority for holding that there is no excessive delegation is that action under Section 9(2) can be taken only after consultation with the Taluka Panchayat, the District Panchayat and the Nagar or Gram Panchayat concerned (if already constituted). According to the minority view, the only restriction on the power conferred by sub-section (2) of Section 9 is the necessity to consult the District Panchayat, the Taluka Panchayat, and the Nagar or the Gram Panchayat, as the case may be.

35. From the observations in the majority as well as the minority judgments of the Supreme Court, the learned counsel for the petitioners sought to infer that the requirement of consultation under Section 3(2) of the Act is mandatory.

36. In the first place, there is a material distinction between Section 3(2) of the Mysore Act and Sec. 9(2) of the Gujarat Act. While the former requires consultation only with the Taluk Board but not the village Panchayat or Panchayats which may be affected by the alteration of the area, the latter requires consultation not only with the Taluka

Panchayat and the District Panchayat but also with the Nagar or Gram Panchayat which may be affected by alteration of the area.

37. The observation in the majority judgment that action under Section 9(2) can be taken only after consultation with the three categories of Panchayats, would in our opinion, only mean that the provision regarding consultation is not a discretionary one leaving it to the option of Government to consult or not to consult those bodies, but is intended to be obeyed. As stated by the Supreme Court in AIR 1960 SC 444 even a directory provision is intended to be obeyed; though a failure to obey it does not render a thing done in disobedience of it a nullity. Hence the observation that action under Section 9(2) of the Gujarat Panchayats Act can be taken only after consultation with Panchayats, does not necessarily mean that that provision is mandatory and not directory.

38. Even the observation in the minority judgment that consultation with the three Panchayats is a restriction imposed on the exercise of the power under Section 9(2) of the Gujarat Panchayats Act does not mean that non-compliance with the requirement of such consultation which operates as a restriction, necessarily invalidates the thing done in disobedience of that restriction.

39. Thus the observations in both the majority and the minority judgments of the Supreme Court, or at any rate, the observations in the majority judgment in *Khambalia Municipality's* case, do not in any way detract from the conclusion we have reached that the requirement of consultation with the Taluk Board under Sec. 3(2) of the Act, is only directory and not mandatory.

40. Our answer to the first question referred is: Consultation with the Taluk Board provided under Section 3(2) of the Mysore Village Panchayats and Local Boards Act, 1959, is not mandatory but directory and failure to so consult does not render the action taken under Section 3(2) invalid or inoperative.

41. Regarding the second question referred to this Full Bench the learned Special Government Pleader who appeared for the State, fairly conceded that an action taken under Section 3(2) of the Act is not outside the purview of judicial review under Art. 226 of the Constitution. Even apart for any concession made by him, the question is well settled by several pronouncements of the Supreme Court.

42. In *Dwarakanath v. Income Tax Officer*, AIR 1966 SC 81 Subba Rao, J., (as he then was) elucidated the scope of Art. 226 thus at pages 84 & 85:

"This article is couched in comprehensive phraseology and it ex facie con-

fers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England, but the scope of those writs also is widened by the use of the expression 'nature' for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Art 226 of Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself."

43 It is true that an action taken under Section 3(2) of the Act is not a quasi-judicial but an administrative act, and the Supreme Court has laid down in *Radheshyam v State of M. P.* AIR 1959 SC 107 that it is well settled that certiorari will not lie to correct the errors of a statutory body which is entrusted with purely administrative functions. (See also *Province of Bombay v Khushaldas*, AIR 1950 SC 222) But an administrative act is also amenable to judicial review under Art. 226. Explaining the scope of judicial review of administrative acts, this is what Shelat, J said in his separate judgment concurring with the majority decision in *Barium Chemicals Ltd v Company Law Board*, AIR 1967 SC 295 at p 323

'Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did

not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts.'

44. Our answer to the second question is

Action taken under Section 3(2) of the Mysore Village Panchayats and Local Boards Act, 1959 is amenable to judicial review under Article 226 of the Constitution of India.

(After receipt of the answers on the questions referred to the Full Bench the final order of the Division Bench consisting of Govinda Bhat and M. Sadanand-swamy JJ was delivered on 27-6-68 by—

45 **GOVINDA BHAT J** — This matter was heard again to-day after the Full Bench had answered the two questions of law referred by us. The petitioner is the Thyavanige Village Panchayat in Channaguri Taluk, Shimoga District. The respondent is the Divisional Commissioner, Bangalore Division. The petitioner has challenged the Notifications issued by the respondent under Section 3(1) of the Mysore Village Panchayats and Local Boards Act, 1959 hereinafter called the Act. Though in the writ petition the petitioner has challenged several notifications, their learned counsel restricted the relief against Exhibits 'H' and 'J' only. The ground on which the said two notifications were challenged is that they contravened the provisions of Section 3 of the Act.

46 In order to appreciate the contention urged by the learned counsel for the petitioner it is necessary to set out briefly the relevant facts in their chronological order. The Act came into force on 1-11-1959. The object of the Act as stated in its preamble among others, was to consolidate and amend the laws relating to Panchayats. Chapter II of the Act, inter alia, provides for establishment and constitution of Panchayats. The petitioner-panchayat was constituted in the year 1960. The area of the Panchayat consisted of the following three revenue villages:

- 1 Thyavanige
- 2 Miyapura
- 3 Nalkundare.

The said three revenue villages were declared to be a 'village' as defined under the Act, by a Notification published in the official Gazette dated 25-1-1960, issued under sub-section (1) of Section 3 of the Act. The Panchayat was constituted on the basis of the said Notification for the village and elections were held. The respondent published a Notification in the Official Gazette dated 15-11-1967 in exercise of the powers conferred under sub-section (2) of Section 3 declaring that the petitioner-village has ceased to be a village. That was followed by a Notification dated 18th November 1967

published in the Official Gazette dated 20-11-1967 proposing to re-group the said three revenue villages as follows:—

(a) Thyavanige Panchayat to consist of Thyavanige Village

(b) Nalkudare Panchayat to consist of (1) Nalakudare (2) Miyapura.

The Petitioner has stated that objections were preferred by the Petitioner Panchayat and also the villagers concerned. After the said objections were received, the respondent published a Notification in the Official Gazette dated 14-12-1967 declaring the area comprised in the revenue villages of Thyavanige, Miyapura and Nalakudare to be 'village' as defined under the Act. That Notification was issued under sub-section (1) of Section 3 of the Act. Thereafter, the impugned Notifications Exhibits 'H' and 'J' dated 18-12-1967 were published in the Official Gazette dated 20-12-1967. By the Notification Exhibit 'H' the revenue village of Thyavanige was declared to be a 'village' and by the impugned Notification Exhibit 'J', the revenue villages of Miyapura and Nalkudare were declared to be a 'village'. The Notification published in the Official Gazette dated 14-12-1967 is dated 21-9-1967, and therefore anterior to the Notification published in the Official Gazette dated 15-11-1967 under sub-section (2) of Section 3 but was published on 14-12-1967 subsequent to the Notification under section 3(2) declaring that the village has ceased to be a 'village'. The terms 'Notification', 'revenue village' and 'village' have been defined in Section 2 as follows:—

Sec. 2(20). 'Notification' means a notification published in the official gazette;

Section 2(35): 'revenue village' means any local area which is recognised by Govt. as a village for the purpose of revenue administration.

Explanation: (omitted as unnecessary)

Section 2(45): 'Village' means any area comprising a revenue village or group of revenue villages, which is declared to be a village under this Act.

Section 3 which is the material Section for the purpose of this Writ Petition, reads thus:—

"3. Declaration of village. —

(1) Whenever the Government, after making such inquiry as may be prescribed, is satisfied, that that area comprising a revenue village or a group of revenue villages has a population of not less than one thousand and five hundred but not more than ten thousand, it shall, by notification in the official gazette, declare such area to be a village;

Provided that the Government may, for special reasons and by notification in the official gazette, declare, any area comprising a revenue village or group of revenue villages having a population of

less than one thousand and five hundred, or more than ten thousand, to be a village under this Section.

(2) The Government may, after consultation with the Taluk Board, by notification at any time —

(a) include within any village or exclude from any village any revenue village, or

(b) declare that any area shall cease to be a village.

(3) (omitted as unnecessary)."

Sub-section (1) of Section 3 provides for the declaration of any area to be a 'village' as defined under the Act. Such a declaration can be made only by notification in the official gazette. Where an area is declared to be a village as defined, sub-section (2) of Section 3 empowers the Govt. which power has been delegated to the respondent to include within any village or exclude from any village any revenue village or declare that any area shall cease to be a village. The inclusion or exclusion of any revenue village from a village as defined or declaration that any area shall cease to be a village can be made only by a notification which means notification published in the Official Gazette.

47. By the Notification published in the official gazette dated 25-1-1960, the three revenue villages of Thyavanige, Miyapura and Nalkudare having been declared to be a village under the Act, any revenue village included in the petitioner village can be excluded therefrom only by notification under sub-section (2) of Section 3. The respondent has not excluded any revenue village from the petitioner-village. By the Notification published in the Official Gazette dated 15-11-1967 made in exercise of the power under sub-section (2) of Section 3, the petitioner-village was declared to have ceased to be a 'village'. Thereafter, it was within the power of the respondent to declare any area to be a 'village' under sub-section (1) of Section 3. Proposals thereto were made by the Notification published in the Official Gazette dated 20-11-1967 proposing to constitute two villages. After the objections were received, a Notification was issued in the Official Gazette dated 14-12-1967 declaring the aforesaid three revenue villages to be a 'village' under the Act. The result of the said Notification was that the status quo as before 15-11-1967 was restored. Subsequent to 14-12-1967, no notification was issued in respect of the petitioner village declaring it to have ceased to be a village. The action as contemplated in the impugned Notifications could not have been taken without declaring that the area has ceased to be a 'village' under

sub-section (2) of section 3 The impugned Notifications are clearly illegal and consequently we quash the said Notifications Exhibits 'H' and 'J' in so far as the Petitioner-Panchayat is concerned.

48. No costs.

MVJ/DVC

Order accordingly

AIR 1969 MYSORE 158 (V 56 C 29)

A R SOMNATH IYER J

Gambli, Plaintiff-Appellant v K. Ramakrishnappa and others, Defendants-Respondents.

Second Appeal No 823 of 1963 D/- 12-6-1968 against judgment and decree of second Addl. Dist J, Shumoga, D/- 22-6-1963

Tort — Negligence — Vicarious liability — Relationship of master and servant — Not dependent on instrumentality through which selection of servant is made — Suit for compensation for negligence of driver — Not invalid for non-joinder of authority selecting him for appointment — Civil P. C. (1908), O 1, R. 9

The relationship of master and servant to no extent depends upon the instrumentality through which the selection of the servant is made. That relationship comes into existence when the person selected as servant becomes the servant of the master, and the master then becomes liable for negligence in a case where, the negligence of the servant was in the course of his employment.

(Para 11)

Where the driver of the bus of Company A was negligent in driving in the course of employment, the fact that he was selected for appointment by Company B under the agreement between the two companies, could not absolve the Company A from liability for negligence of the driver. The suit for recovery of compensation against the Company A by the wife of the person killed in the accident due to negligence of the driver, therefore was not unsustainable on the ground that the Company B had not been impleaded as defendant.

(Para 11)

V Tarakaram and Chandrasekhar for V Krishna Murthy, for Petitioner; K. S. Puttaswamy (for Nos 1 to 3) and N. Bheemacharya (for No 4), for Respondents.

JUDGMENT — On August 26 1952, a Motor vehicle belonging to a company affording transport facilities known as the Chikkamagalur Public Conveyance Motor Service, Chikkamagalur, which will be referred to as C. P. C. M. S. and which has been referred to as C. P. C.

M. S. in both the Courts below dashed against a culvert and during that accident one of the passengers Putta Naika was killed. His wife brought a suit against the three partners of the C. P. C. M. S., the driver of the bus defendant 4 and the Canara Motor and General Insurance Co Ltd. which was defendant 5, for the recovery of a sum of Rs. 8000/- as compensation on behalf of herself and on behalf of her daughter Devali Bai and also Putta Naika's mother Ammanibai. She also claimed a sum of Rs 10/- as notice charges. She charged defendant 4 with rash and negligent driving.

2 In their defence the defendants repudiated the allegation that defendant 4 drove the motor vehicle rashly or negligently. They contended that the compensation claimed was excessive and although defendants 1 to 3 did not raise any such plea, defendant 5 which is an insurance company, very curiously urged that the suit was defective for non-joinder. It was stated that since under an agreement between C. P. C. M. S. and another company called the C. P. C. Company executed on August 31, 1932, the management of the C. P. C. M. S. had been entrusted to the C. P. C. Company, the suit which was brought without impleading the C. P. C. Company as a party was not maintainable.

3 The Civil Judge upheld the plea of actionable negligence and repelled the contention that the C. P. C. Company was a necessary party. He made a decree in favour of the plaintiff for the amount claimed by her.

4 There was an appeal by the three partners of the C. P. C. M. S. and the insurance company and, the District Judge who heard that appeal accepted the contention that the C. P. C. Company was a necessary party and dismissed the suit on the ground that it was not maintainable. The plaintiff appeals.

5 It should be observed that the finding of the Civil Judge on negligence was not assailed before the District Judge. Similarly the assessment of the compensation made by the Civil Judge was also not questioned and the limited contention urged before the District Judge was that the compensation claimed on behalf of the daughter was not payable. This contention rested on the argument that she was not the daughter of Putta Naika.

6 The relevant part of the District Judge's judgment which refers to the restricted argument advanced before him reads.

"The learned counsel for the appellants at the outset submitted that he was not urging anything about the rash and negligent driving of the bus by defendant 4 and conceded that position. In

regard to issue No. 2, he stated that the only point that he would urge was that the daughter who is now according to the amended plaint made to appear as a dependant of the deceased was not at all even in the womb of the plaintiff at the time of the accident and as such proportionate quantum of the damages would have to be reduced."

But it is clear that the reference to issue 2 is a mistake since issue 2 refers to the maintainability of the suit and misjoinder and non-joinder of parties and the issue which refers to the amount of damages is the fourth issue.

7. So, on behalf of the appellant only two submissions were made. The first was, that the suit was not maintainable since the C. P. C. Company was not made a party and the second was, that no damages could be claimed on behalf of the daughter and there should be a proportionate abatement in regard to damages. The quantification of the damages made by the Civil Judge was not questioned.

8. But the District Judge did not consider the second submission concerning the claim on behalf of the daughter. His judgment only rested on the first and his finding on that matter was that the omission on the part of the plaintiff to make the C. P. C. Company a defendant made her suit unsustainable.

9. It is clear that that view taken by the District Judge is plainly unsupportable. His own finding was that defendant 4 who was the driver who drove the motor vehicle in a rash and negligent manner was a servant of the C. P. C. M. S. and that all that was done by the C. P. C. Company which was entrusted with the management of the business of the C. P. C. M. S. was to select defendant 4 to work as a driver under the C. P. C. M. S. Defendant 4 gave evidence as D. W. 5 and, his evidence was to the effect that he was a servant of the C. P. C. M. S. After referring to this evidence, the District Judge observes:

"This makes it abundantly clear that he is an employee in C. P. C. M. S. appointed by C. P. C. Co. after coming into existence of Ex. D-2. He has been selected to work as a driver not by defendants 1 to 3 but by C. P. C. Co."

It is difficult to understand how after reaching the conclusion that defendant 4 was an employee of the C. P. C. M. S. the District Judge found it possible to say that C. P. C. Company was a necessary party to the suit and that unless that company was impleaded as a defendant, no suit could be brought against the three partners of the C. P. C. M. S.

10. Panduranga Prabhu who was the manager of the C. P. C. M. S. under the C. P. C. Company gave evidence that the salary of defendant 4 was paid out of the

monies belonging to the C. P. C. M. S. I should observe here that C. P. C. M. S. is also referred to in the course of his evidence as C. P. C. Chikkamagalur. This is what Panduranga Prabhu who was examined as D. W. 1 for defendants 1 to 3 stated:

"The accounts of the C. P. C. Chikkamagalur are entirely different from those of C. P. C. Mangalore. Defendant 4's salary is given from the amounts of the C. P. C. Chikkamagalur. The insurance premium for the bus was paid from C. P. C. Chikkamagalur's funds."

Now the C. P. C. Company, Mangalore to which this witness refers is no other than the C. P. C. Company and that that is so is not disputed. So, what is clear from the evidence of this witness is that the salary of defendant 4 was paid by the C. P. C. M. S. and it is quite intelligible that it should be so, since, as stated by defendant 4 whose evidence was accepted by the District Judge he was an employee of the C. P. C. M. S.

11. The District Judge appears to have thought that since under the agreement Exhibit P-2 which was executed between C. P. C. M. S. and C. P. C. Company, the C. P. C. Company was entrusted with the management of the C. P. C. M. S. with the authority to appoint servants for the C. P. C. M. S., the fact that defendant 4 was appointed as driver by the C. P. C. Company, absolved the C. P. C. M. S. from liability for the negligence of defendant 4. The District Judge appears to have thought that although C. P. C. M. S. was the master and defendant 4 was the servant, C. P. C. M. S. was not liable for the negligence of defendant 4, since his selection was made by the C. P. C. Company. What was overlooked by the District Judge was that the relationship of master and servant to no extent depends upon the instrumentality through which the selection of the servant is made. That relationship comes into existence when the person selected as servant becomes the servant of the master, and the master then becomes liable for negligence in a case like the present one, where, the negligence of the servant was in the course of his employment. The view taken by the District Judge that the C. P. C. Company was a necessary party and that the suit brought without the C. P. C. Company being impleaded as a defendant was not maintainable, cannot, therefore be supported.

12. Although the District Judge recorded no finding on the question whether compensation was also claimable on behalf of the daughter, a full argument was addressed in this court in regard to that matter. The argument presented on behalf of defendants 1 to 3

was that the daughter Devali Bai named in the plaint was not the daughter of the deceased Putta Naika and that no claim on her behalf could, therefore, be made. The extremely slender foundation on which this argument was constructed was an answer given by the plaintiff in her cross-examination that the daughter was born eight months after the date of the institution of the suit. The suit was brought in forma pauperis and the date of the application for permission to sue in forma pauperis is June 18, 1953. The Civil Judge was of the opinion that the plaintiff who is an illiterate Lambani could not be taken too literally when she stated that the daughter was born eight months after the date of the institution of the suit and that since in the affidavit she produced very soon after the date of the presentation of the application Devali Bai was named as the daughter of Putta Naika that affidavit was more dependable than the evidence given by the illiterate plaintiff in the course of her cross-examination.

I am inclined to concur in the view taken by the Civil Judge. One good reason why I should concur in that view is that when the plaint was amended on March 19 1956 the plaintiff stated in the plaint that Devali Bai was the daughter of Putta Naika. The written statements of the defendants were produced only subsequently and in none of the written statements was there a repudiation of the allegation that Devali Bai was the daughter of Putta Naika. None of the defendants denied that she was his daughter. Not unnaturally there was no issue covering the question whether Devali Bai was the daughter of Putta Naika. Since the fact that Devali Bai was not the daughter of Putta Naika was not disputed by any of the defendants, it should be taken as admitted. The extreme argument that Devali Bai was not the daughter of Putta Naika was advanced for the first time during the course of the arguments before the Civil Judge, only, when, in the course of her cross-examination the plaintiff stated that she gave birth to Devali Bai eight months after the date of the institution of the suit. It is on this precarious foundation that the argument that no compensation could be claimed on behalf of Devali Bai was constructed and it is not surprising that the Civil Judge discarded it and the District Judge did not even refer to it in the course of his judgment.

13 On the discussion so far made, it becomes clear that the suit brought against defendants 1 to 5 was perfectly maintainable and that it was not necessary to sustain the suit, to implead the C. P. C. Company which merely managed the affairs of the C. P. C. M. S. under an agreement executed between them.

14. I, therefore, allow this appeal and reverse the decree of the District Judge and restore that of the Civil Judge with costs throughout.

ORDER - (12-6-1968)

15. I make a direction which was not made when my judgment was pronounced in this second appeal that the court-fee payable on the memorandum of appeal which was preferred by the plaintiff in forma pauperis, shall be paid by the defendant to Government.

CWM/D V C.

Appeal allowed.

AIR 1969 MYSORE 160 (V 56 C 30)

M. SADASIWAYYA, J

M Gurumurthappa, Petitioner v Commissioner, Corporation of the City of Bangalore, Respondent.

Criminal Revn. Petn. No 5 of 1968, D/- 21-8-1968 against order of second Magistrate, Bangalore D/- 6-12-1967

Criminal P C (1898), S 145 — Magistrate's jurisdiction — Foundation of — Nature of enquiry is quasi civil — Right of parties

The foundation of the Magistrate's jurisdiction under S 145 is an apprehension of the breach of the peace. Therefore where the Magistrate after considering the materials before him, is satisfied that there is no likelihood of a breach of the peace the only proper thing for him to do is to decline to proceed under the section. (Para 4)

The nature of the enquiry is quasi civil. It is an incursion by the Criminal Court in the jurisdiction of the Civil Court. It is therefore, necessary that this incursion should be carefully circumscribed to the extent absolutely necessary for discharging the functions laid on the Magistrate of preserving the peace. (Para 4)

The parties however, have no right to get their dispute adjudicated upon by the Magistrate nor are they entitled to a decision of the dispute. It is within the discretion of the Magistrate to take action or not. AIR 1959 SC 960 & AIR 1959 All 141 (FB), FolL. & AIR 1967 Mad 445 (FB). Rel. on. (Para 4)

Cases Referred Chronological Paras
(1967) AIR 1967 Mad 445 (V 54) =
1967-1 Mad LJ 392 = 1967 Cri LJ
1650 (FB) Athappa Goundar

v Athappa Pandaram 4
(1959) AIR 1959 SC 960 (V 46) =
1959 Cri LJ 1223, Bhinka v
Charan Singh 4
(1959) AIR 1959 All 141 (V 46) =
1959 Cri LJ 261 (FB), Ganga Bux
Singh v Sukhdin 4

KL/KL/F458/68

P. S. Devadas, for Petitioner; S. V. Subramanyam, for Respondent.

ORDER :— This is a revision petition directed against the order dated 6-12-1967 made by the Second Magistrate, Bangalore, in Criminal Miscellaneous Case No. 26 of 1967 on the file of his Court. The petitioner was the first Party in that Criminal Miscellaneous Case and the Commissioner of the Corporation of the City of Bangalore was the second party. In that case, the petitioner had filed an application under Section 145 of the Cr. P. C. alleging that the second party had forcibly dispossessed him of the schedule land and that there was likelihood of a breach of the peace. He prayed that proceedings under Section 145 of the Cr. P. C. be taken, that the schedule land be attached and a Receiver appointed to manage the said land and that a declaration be made that the first party was in possession of that land. The learned Magistrate called for a report from the Police. The Police of Madiwala submitted a report to the effect that the second party had taken possession of this land on 3-11-1967, that the second party was in peaceful possession and that there was no likelihood of a breach of the peace. Accepting that report, the Magistrate made the order dated 6-12-1967 holding that there was no likelihood of a breach of the peace and he dismissed the petitioner's application for proceedings being taken under Section 145 of the Cr. P. C. Aggrieved by the said order, the first party has filed the present revision petition.

2. The schedule land is an extensive tract of about 135 acres used for raising grass. Admittedly, the land belongs to the Corporation of the City of Bangalore. According to the petitioner, he had been a lessee of this property since the year 1954 till 3-11-1967 when the forcible possession (according to him) was taken by the Corporation. According to the second party, the petitioner was only a licensee and not a lessee and the period of licence ended on 31-3-1967. The second party also denies having taken forcible possession. It is stated that the second party had power under Section 403 of the City of Bangalore Municipal Corporation Act, 1949, to enter on this land. It was alleged by the second party that on 3-11-1967 the second party took possession of this land with Police help and has been in peaceful possession since then. The question as to whether the petitioner was the lessee of this land or only a licensee is the subject-matter of pending civil litigation and no opinion can be expressed about it one way or the other, in these proceedings.

3. The main contention urged by Mr. Devadas the learned Advocate for the petitioner is that the petitioner was dis-

possessed on 3-11-1967 by the show of overwhelming force and that the Magistrate should have taken proceedings under Section 145 of the Cr. P. C. and should have declared that the petitioner had been in possession within a period of two months prior to the appearance of the parties before him (the Magistrate) and should have forbidden any disturbance of the petitioner's possession until evicted in due course of law. On the other hand, Mr. S. V. Subramanyam the learned Advocate for the respondent has contended that the allegation that possession was forcibly taken on 3-11-1967 has been denied by the second party and that when the second party has been in peaceful possession and there is no likelihood of a breach of the peace, the Magistrate was fully justified in having dismissed the petitioner's application. I have heard the arguments of both the learned Advocates.

4. As pointed out by the Supreme Court in AIR 1959 SC 960, Bhinka v. Charan Singh, the foundation of the Magistrate's jurisdiction under Section 145 is an apprehension of the breach of the peace. Therefore, where the Magistrate, after considering the materials before him is satisfied that there is no likelihood of a breach of the peace, the only proper thing for him to do is to decline to proceed under Section 145 of the Cr. P. C.

As observed in a recent Full Bench decision of the Madras High Court reported in 1967-1 Mad LJ 392=(AIR 1967 Mad 445) (FB), Athiappa Goundar v. Athiappa Pandaram, the preliminary order can be made only after the subjective satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists. If the Magistrate is satisfied that there is no likelihood of a breach of the peace and therefore does not take any action under Section 145, the parties have no right to insist that their dispute should be adjudicated upon by the Magistrate. It would be useful to refer to what has been stated, in this connection, in Full Bench decision of the Allahabad High Court reported in AIR 1959 All 141 (FB), Ganga Bux Singh v. Sukhdin. In paras 13 and 14 at page 145, this is what has been stated:

"From the nature of the provisions it is clear that the Magistrate has been given this power primarily to preserve peace. The individual rights are affected only incidentally.

The nature of the enquiry is quasi civil. It is an incursion by the criminal Court in the jurisdiction of the civil Court. It is, therefore, necessary that this incursion should be carefully circumscribed to the extent absolutely necessary

for discharging the functions laid on the Magistrate of preserving the peace . . .

It is also clear that the parties have no right to get their dispute adjudicated upon by the Magistrate. Even on the receipt of the application the Magistrate may not think any action necessary. He may not take any action at all under section 145, Code of Criminal Procedure . . .

We need not emphasise that the provisions of the section clearly indicate that the parties, though they may inform the Magistrate, are not entitled under the law to a decision of the dispute. It is within the discretion of the Magistrate to take action or not and he may come to a decision or may express his inability to decide the matter."

In the present case, it cannot be said that the refusal of the Magistrate to take action under Sec. 145 of the Cr P C, is arbitrary. Though the petitioner had alleged that he had been forcibly dispossessed, the report of the Police was to the effect that the second party was in peaceful possession and that there was no likelihood of a breach of the peace. The second party who had taken possession of the property was an authority under the City of Bangalore Municipal Corporation Act who had statutory powers in respect of the property of the Corporation. There was already a civil litigation pending between the parties. It was on a consideration of all these factors, that the learned Magistrate came to the conclusion that there was no likelihood of a breach of the peace and that no action need be taken under the provisions of Section 145 of the Cr P C. The petitioner has no right in law, to insist that the question of his possession should be adjudicated upon by the Magistrate, when the Magistrate has reached the conclusion that there was no likelihood of a breach of the peace. He will have to seek his remedy if any, elsewhere and not under the provisions of Section 145 of the Cr P C. There is no good reason to interfere in the exercise of the revisional jurisdiction, with the order that has been made by the learned Magistrate.

5. In the result, this revision petition fails and is dismissed.

DGB/D V C,

Petition dismissed.

AIR 1969 MYSORE 162 (V 56 C 31)

FULL BENCH

M. SADASTIVAYYA, G. K. GOVINDA BHAT AND D. M. CHANDRASHEKAR, JJ

M. A. Sharada Bai, Petitioner v State of Mysore and others, Respondents.

Writ Petn. No. 2101 of 1965, D/- 4-4-1968.

KL/LL/F387/68

Houses and Rents — Mysore Rent Control Act (22 of 1961), Ss. 4(2) and (1), 6 and 8 and Pre. — Mysore Rent Control Rule (1961), R. 3(i) — Scheme and object of the Act — Restriction imposed under S. 4(2) whether absolute — Stage at which Controller can consider the cause shown by landlord regarding requirement of accommodation for self occupation — R. 3(i) held not repugnant to S. 4(2)

The object of the Act is to provide for the control of the leasing of buildings. The right of owners of buildings to occupy or let their buildings is restricted by the provisions of the Act contained in Part II. (Para 7)

Section 4(2) prohibits a landlord from letting, occupying or permitting to be occupied a building referred to in sub-section (1) without giving intimation of vacancy to the Controller. The said restriction imposed by the statute is absolute. Where the landlord gives intimation of vacancy, the restriction on his rights is limited to the period specified in sub-section (2) of Section 4 during which he is under a statutory obligation to keep the building vacant. That restriction however is relaxed or removed where the Controller grants permission to let, occupy or permit to be occupied but such permission is limited to and operative only for the period specified in Section 4(2) and cannot extend beyond that period. The rights of the landlord after the termination of the proceedings under section 8 are controlled not by Section 4(2) but by other provisions of Part II of the Act. (Para 13)

The stage at which the Controller is required to consider the cause shown by the landlord is when he determines whether he is satisfied or not about the necessity or expediency of making an order under sub-section (4) of Section 8. If the building is bona fide required by the landlord for occupation by himself, he may satisfy the Controller that it is not necessary or expedient to make an order directing the building to be leased. Where the Controller, on being satisfied with the cause shown, makes an order to the effect that it is not necessary or expedient to direct the building to be leased to a tenant to be selected by him, the landlord is free to occupy the building. (Para 13)

When such an order is made which enables the landlord to occupy the vacant building, the Controller does not make any allotment in favour of the landlord as in the cases arising under Section 6. The Act imposes no restriction on the right of the landlord to occupy his building after the proceedings under Sec. 8 come to an end except where the Controller has directed the building to be leased to a tenant selected by him. (Para 9)

R. 3(ii) of the Mysore Rent Control Rules, 1961, is not repugnant to S. 4(2) of the Act and therefore valid. (Para 13)

T. Radhakrishna, for Petitioner; T. Krishna Rao, Advocate General and U. L. Narayana Rao, for E. S. Venkataramiah, High Court Spl. Govt. Pleader, for Respondents.

GOVINDA BHAT J. : The questions referred to the Full Bench are:

1. Whether under sub-sec. (2) of Sec. 4 of the Act, the only restriction imposed on a landlord is that he shall not let, occupy or permit to be occupied a building referred to in sub-section (1) for a period of 15 days from the date on which intimation of vacancy is received by the Controller or within a period of one week after the termination of the proceedings under Sec. 8, if any, whichever is later, and whether the said restriction will stand removed on the Controller granting permission to the landlord?

OR

Whether the restriction above referred to is an absolute restriction and whether the permission of the Controller is an additional requirement to be complied with by the landlord even after the termination of the periods specified in the said sub-section (2) ?

2. If the answer is in the affirmative to the first alternative in the above question, then, is sub-rule (ii) of Rule 3 of the Rules ultra vires of the Act, in so far as it (the sub-rule) leaves no discretion but requires the Controller to—

(i) send immediately after the receipt of the intimation of vacancy, a copy of the intimation of vacancy and report the date to which the case stands posted, to the State Government or the Officer authorised under the proviso to sub-section (2) of Sec. 4; and

(ii) notify on the notice board of his office the particulars of the building that has fallen vacant and the date on which the case stands posted.

OR

Is that sub-rule to be construed as being applicable only when no permission has been given under sub-section (2) of Section 4, by the Controller to the landlord?

3. Whether the Controller can permit a landlord to occupy his building which has become vacant, before considering any application for allotment of that building, that may be made under Rule 6 of the Rules and received by the Controller within the date of hearing specified by the Controller under Rule 3 (ii) (for considering the causes, if any, shown by the landlord or other person)?

2. In order to appreciate the questions referred to the Full Bench, it may be useful to briefly state the facts of the case and the contentions urged by the parties. The petitioner who is a landlord of

a residential building in Bangalore City reported its vacancy to the Controller appointed under the Mysore Rent Control Act, 1961, hereinafter referred to as the 'Act'. In the letter of intimation of the vacancy submitted in Form No. 1 as prescribed under the Mysore Rent Control Rules, 1961, hereinafter called the 'Rules' the petitioner stated that the building was required for her bona fide occupation and that it is not proposed to be relet and therefore permission may be granted to her to occupy the same. The Controller (Respondent No. 3) on receipt of the said vacancy intimation examined the petitioner and made an order rejecting her request and then notified the building for allotment. Against the said order the petitioner preferred an appeal to the Deputy Commissioner, Bangalore Urban District (Respondent No. 2), who after hearing the petitioner's advocate made an order on the 10th September 1965, dismissing the appeal, holding that the procedure followed by the Controller was not regular, that the petitioner's request for permission to occupy the building ought to have been considered after the Controller initiated proceedings under Section 8 and therefore, the appeal was premature.

The material portion of the order of the Deputy Commissioner (R. 2) reads thus:

"I have considered the arguments of the learned counsel and perused the records. The procedure that the House Rent Controller has followed in this case appears to be not clear. There was no reason as to why he made an enquiry into the request made by the appellant even before he gave a date for hearing the appellant and other applicants. The appellant has herself expressed her desire to occupy the premises. She has to wait for a period of 15 days from the date of intimation of vacancy before she could occupy the premises, herself. During this period the learned House Rent Controller has to notify the vacancy and if there are applications, enquire into the matter and if the landlady herself desires to occupy the premises and if he is satisfied of her bona fides he could permit her to occupy the premises. But the learned counsel for the appellant says that the House Rent Controller need not have notified the vacancy. The request made is not in accordance with the procedure laid down in rule 3 of the House Rent Control Rules, which lays down that immediately after the receipt of intimation of vacancy of any building the Controller shall notify on the notice board of the office the particulars of the building given in items 1, 2 and 9 of Form 1. It goes without saying that only on the date of hearing the Controller has to consider the needs of the landlady-ap-

pellant and if her needs are genuine as made out in her statement, from independent enquiries and also from the statement of other applicants he should decide the issue and permit the appellant to occupy the premises herself. If he finds that there are no bona fides he should allot it to other applicants.

In view of the above provision, in the rules, the appeal cannot be allowed at this stage. If the appellant is aggrieved by the final orders passed by the learned House Rent Controller, she might come up in appeal again to this Court. The appeal is therefore dismissed."

3. Aggrieved by the order of Respondent No. 2, the petitioner approached this Court for relief under Art. 226 of the Constitution of India in which she has urged that under the scheme of the Act, the Controller can take proceedings under Section 8 only after deciding whether or not he should grant permission to the landlord to occupy the building and that Rule 3 (ii) is repugnant to sub-section (2) of Section 4 of the Act and therefore ultra vires. On the said contention, the Division Bench before whom the matter came up for hearing referred the above questions for decision of the Full Bench.

4. The question for decision in the writ petition is whether the Controller, before initiating proceedings under S. 8 of the Act in respect of a building vacancy intimation of which has been given under section 4 (1) is required to decide whether or not the building is bona fide required by the landlord for occupation by herself and therefore no order directing the leasing of the building is necessary or expedient or whether that matter has to be decided at the stage of making an order under sub-section (4) of section 8 ?

5. The contention of the learned counsel for the petitioner was that sub-section (2) of Section 4 empowers the Controller to grant permission to the landlord to let, occupy or permit to be occupied a building referred to in sub-section (1) and that power is required to be exercised before the Controller initiates proceedings under section 8. His argument was that as Section 8 contemplates the ordering of leasing of any building to any public authority or other person selected by the Controller and the question of the landlord being directed to leave the building to himself is inconceivable, the claim of the landlord that the building is bona fide required for self occupation and therefore should not be directed to be leased, should necessarily be decided before starting proceedings under section 8. He further argued that sub-rule (ii) of Rule 3 which requires the Controller to specify a date of bearing for considering the causes, if any, shown by the landlord and other persons in res-

ponse to the notice issued under sub-section (1) of section 8 immediately after the receipt of intimation of vacancy of any building before deciding the request of the landlord for permission to occupy, is repugnant to sub-section (2) of section 4 of the Act.

6. The provisions of the Act and the Rules relevant for the purpose of deciding the questions referred to us are Sections 4, 5 and 8 and Rule 3. The said provisions read thus:

'Section 4.—

Intimation of vacancy by landlords:—

(1) Every landlord shall, within fifteen days after the building becomes vacant by his ceasing to occupy it or by the termination of a tenancy or by the eviction of the tenant or by the release of the building from requisition, or otherwise, give intimation by registered post to the Controller—

Provided that this sub-section shall not apply to a building in respect of which the landlord has obtained an order for possession on any of the grounds specified in Clause (h) of the proviso to sub-section (1) of section 21 or to any building which has been released from requisition for the use and occupation of the landlord himself.

(2) A landlord shall not without the permission of the Controller let, occupy or permit to be occupied a building referred to in sub-section (1) without giving intimation and for a period of fifteen days from the date on which the intimation is received by the Controller or within a period of one week after the termination of the proceedings under section 8, if any, whichever is later

(3)(Omitted as unnecessary)

(4)(Omitted as unnecessary)

Section 5

Order of leasing of vacant building.

(1) The Controller may, by order in writing served on the landlord, direct that any vacant building whether intimation of its vacancy has been given by the landlord under sub-section (1) of section 4 or not, be given on lease to such public authority or other persons as he may think fit.

EXPLANATION—A building may be directed to be leased under this section notwithstanding that it is subject to an agreement of lease or has been let or occupied in contravention of sub-section (2) of section 4.

(2)(omitted as unnecessary)

Section 8

Procedure to be followed before ordering leasing of any building for a public authority or other person.

(1) Before issuing any order under Section 5 or Section 6 the Controller—
(a) shall call upon the landlord or any other person who may be in possession of

the building by notice in writing to show cause, within seven days from the date of the service of such notice on him, why the building should not be ordered to be leased to a public authority or other person as may be specified in the notice; and;

(b) may, by order direct that neither the landlord nor any other person shall without the permission of the Controller dispose of or structurally alter the building or let it out to a tenant or occupy it or use it until the expiry of such period not exceeding one month, as may be specified in the order.

(2)(omitted as unnecessary)

(3)(omitted as unnecessary)

(4) If, after considering the causes, if any, shown by the landlord or other person in possession of the building, the Controller is satisfied that it is necessary or expedient so to do, he may by an order in writing direct the building to be leased to such public authority or other person specified in the notice under sub-section (1) at such rent as shall be specified in such order and may make such further orders as appear to him to be necessary or expedient in connection therewith:

(5)(omitted as unnecessary)

Rule 3 :—

Intimation of vacancy and notification of vacancies :—

(i) The intimation of vacancy of the building to be given by a landlord under sub-section (1) of Section 4 shall be in Form 1 in triplicate.

(ii) Immediately after the receipt of intimation of vacancy of any building the Controller shall specify a date of hearing for considering the causes, if any, shown by the landlord and other persons. He shall send a copy of the intimation of vacancy and report the date to which the case stands posted for selecting the public authority or person in whose favour an order may be made under section 8, to the State Govt. or where an officer has been authorised under the proviso to sub-section (2) of Section 8, to such officer and shall notify on the notice board of his office the particulars of the building given in items 1, 2, 4 and 9 of Form I, and also notify the date to which the case stands posted and shall keep a copy of the intimation in the office for the inspection of all persons desiring to see it."

7. The object of the Act, as stated in its preamble, inter alia, is to provide for the control of the leasing of buildings. The right of owners of buildings to occupy or let their buildings is restricted by the provisions of the Act contained in Part II. Under the scheme of the Act, the object of control of the leasing of the buildings, is sought to be achieved by the Controller making a selection of the tenant in respect of a vacant building to

be let or relet and the landlord being directed to lease the same to the tenant selected by the Controller. The tenant selected by the Controller is deemed to be the tenant of the landlord with effect from the date on which the possession of the building is delivered. If the landlord fails to deliver possession of the building to the tenant selected by the Controller, the Controller or any officer authorised by him, is empowered to take possession of the building after removing all obstructions and give possession to the tenant (vide Section 10 of the Act).

The Act by Section 4(1), imposes a statutory obligation on every landlord to give intimation of vacancy within fifteen days after the building becomes vacant. It further forbids every landlord from letting or occupying a building which has become vacant without giving intimation of vacancy (vide sub-sec. (2) of Section 4). This restriction prohibiting every landlord from letting or occupying a building which has become vacant without giving intimation of vacancy to the Controller is intended to achieve the object of the Act. Where the landlord gives intimation of vacancy as provided under the Act, pending orders making the selection of the tenant, the landlord is under a statutory obligation to keep the building vacant for the duration of the period prescribed in sub-section (2) of Section 4 viz., a period of fifteen days from the date on which the intimation of vacancy is received by the Controller or within a period of one week after the termination of the proceedings under Section 8, if any, whichever is later. The statutory obligation imposed on every landlord, to so keep vacant such building during the said period is not an absolute restriction; the statute empowers the Controller to relax that restriction. The scope and ambit of that power of the Controller under sub-section (2) of section 4 will be considered a little later.

8. Immediately on receipt of intimation of vacancy, the Controller is required to take the following steps;

(a) He shall issue a notice as provided under clause (a) of sub-section (1) of Section 8 calling upon the landlord to show cause, within seven days from the date of service of such notice, why the building should not be ordered to be leased to a public authority or other person as may be specified in the notice.

(b) He shall specify a date of hearing for considering the causes, if any, shown by the landlord and other persons and take all steps as required by sub-rule (ii) of Rule 3.

(c) He may by order direct that neither the landlord nor any other person shall without his permission dispose of or structurally alter the building or let it

out to a tenant or occupy it or use it until the expiry of such specified period not exceeding one month, as may be specified in the said order (vide section 8(1)(b)).

(d) On consideration of the causes, if any shown by the landlord on the date fixed for hearing, if he is satisfied that it is necessary or expedient to direct the building to be leased, he shall make an order to that effect directing the leasing of the building to such public authority or other person as may be specified in the order (Vide sub-section (4) of Section 8). A copy of such order is required to be served on the landlord (vide section 5).

9. It follows from the language of Section 8(4) that where the Controller is satisfied that the landlord bona fide requires the building for his occupation, he shall make an order stating that he is satisfied that it is not necessary or expedient to direct the building to be leased. When such an order is made which enables the landlord to occupy the vacant building, the Controller does not make any allotment in favour of the landlord as in the cases arising under section 6. The statutory obligation to keep the building vacant imposed by sub-section (2) of Section 4 pending the selection of tenant by the Controller, comes to an end within one week after the termination of the proceedings under Section 8. The Act imposes no restriction on the right of the landlord to occupy his building after the proceedings under section 8 come to an end except where the Controller has directed the building to be leased to a tenant selected by him.

10. The permission of the Controller contemplated under sub-section (2) of Section 4 of the Act, in our opinion, relates to and is confined to the period during which the landlord is under a statutory obligation to keep the building vacant. It was not the intention of the legislature to impose any absolute restriction requiring the landlord to keep the building vacant without any power of relaxation. It is possible to envisage circumstances where a landlord may need his vacant building for the duration of the period specified under sub-section (2) of Section 4, he may need his building to celebrate a wedding or other functions. It may happen that the order made by the Controller under Section 8 directing the building to be leased to any particular person is appealed either by the landlord or by the other competing applicants and in such circumstances the tenant selected may not occupy the building. During the pendency of the proceedings under Section 8, the Controller is empowered to permit the landlord to let or occupy the building subject to the final result of the proceedings.

11. If we accept the contention of the learned counsel for the petitioner that Section 4(2) empowers the Controller to finally decide at the very outset the request of the landlord for permission to let or occupy the building and that where the Controller grants the permission, no proceedings under Section 8 could be taken, such a construction is capable of defeating the purpose of the Act, conferring unguided power on the Controller and giving scope to much abuse of power. If the matter were to be finally decided before taking proceedings under Section 8, the public authorities and the members of the public would have no opportunity to oppose the request of the landlord and the matter will have to be decided by the Controller solely on the representation of the landlord. The Controller will have no adequate means of finding out the truth or otherwise of the case alleged by the landlord, but, if the landlord's claims were to be decided under Section 8(4) the public authorities and the members of the public who may be interested in securing the building on lease, would be in a position to place all materials necessary for decision by the Controller.

If the case of the landlord is considered under sub-section (4) of Section 8, no injustice will be caused to any party and the purpose of the Act, in our opinion, would be better served. The proceedings under Sec. 8 are expected to terminate expeditiously. While Section 8 provides for the landlord to show cause against the proposal to direct the building to be leased to any public authority or other person selected by the Controller and for the Controller to make an order after considering the causes shown by the landlord, there is no such provision for enquiry at an earlier stage before the commencement of the proceedings under Section 8. On an examination of the scheme of the Act and its relevant provisions, we are of opinion, that the Act contemplates only one enquiry by the Controller after receipt of intimation of vacancy of the building. The permission contemplated under sub-section (2) of section 4 of the Act, in our judgment, is intended to be only for the duration of the period specified therein.

12. It is necessary to notice one more argument advanced by the learned counsel for the petitioner that if permission is granted to the landlord to occupy the building under sub-section (2) of Section 4, the building ceases to be a vacant building and it is only in respect of a vacant building that the Controller may make an order in writing directing the building to be leased, and therefore, if the interpretation we have given is accepted, it will lead to the result that the Controller is empowered to direct the

leasing of a building which is not vacant. The order directing the building to be leased is made under sub-section (4) of Section 8; the jurisdiction to make the order under section 8(4) is in respect of a building vacancy intimation of which has been given or should have been given by the landlord under Section 4(1). If permission under Section 4(2) is given to the landlord to occupy the building until the termination of the proceedings under Section 8, the building does not cease to be a building in respect of which the Controller has jurisdiction to make the order under Section 8(4).

13. For the reasons mentioned above, we answer the questions referred to the Full Bench as follows:—

Questions 1 and 3:

Section 4(2) prohibits a landlord from letting, occupying or permitting to be occupied a building referred to in sub-section (1) without giving intimation of vacancy to the Controller. The said restriction imposed by the statute is absolute. Where the landlord gives intimation of vacancy the restriction on his rights is limited to the period specified in sub-section (2) of Section 4 during which he is under a statutory obligation to keep the building vacant. That restriction however is relaxed or removed where the Controller grants permission to let, occupy or permit to be occupied; but such permission is limited to and operative only for the period specified in Section 4(2) and cannot extend beyond that period. The rights of the landlord after the termination of the proceedings under section 8 are controlled not by Section 4(2) but by other provisions of Para II of the Act.

Question 2:

The stage at which the Controller is required to consider the cause shown by the landlord is when he determines whether he is satisfied or not about the necessity or expediency of making an order under sub-section (4) of Section 8. If the building is bona fide required by the landlord for occupation by himself, he may satisfy the Controller that it is not necessary or expedient to make an order directing the building to be leased. Where the Controller, on being satisfied with the cause shown, makes an order to the effect that it is not necessary or expedient to direct the building to be leased to a tenant to be selected by him, the landlord is free to occupy the building.

Rule 3(ii) is not repugnant to section 4 (2) of the Act and therefore valid.

LGC/D.V.C.

Reference answered accordingly.

AIR 1969 MYSORE 167 (V 56 C 32)

M. SADASIVAYYA AND

D. M. CHANDRASHEKAR, JJ.

M. Parekh and Brothers, Petitioners v. State of Mysore and others, Respondents.

Writ Petns. Nos. 1648, 994 to 1001, 909, 910 and 914 of 1967.

(A) Municipalities — City of Bangalore Municipal Corporation Act (69 of 1949), Ss. 97, 98(1), 130 and Sch. III, Part V, Cl. VIII — Scope — Levy of Octroi duty on animals and goods — Procedure under S. 98(1) must be followed — Object of procedure indicated — Levy of Octroi without following procedure is without authority of law and violative of Art. 265 of the Constitution — Bangalore City Municipality — Notification dated 4-4-1967 imposing octroi on additional goods held *ultra vires* — (Constitution of India, Art. 265).

The Notification D/- 4-4-1967 issued by the Bangalore Municipal Corporation imposing octroi duty on certain additional goods similar to the goods which had already been subjected to octroi in pursuance of a prior resolution of 26-9-1950 but without following afresh the procedure prescribed by S. 98(1) is *ultra vires* and is quashed. (Para 7)

While section 97 provides the competence for the Corporation to levy taxes and the duties enumerated therein, Section 98(1) and (2) prescribe the procedure to be followed by the Corporation for imposing the tax or duty. The procedure prescribed in sub-section (1) of section 98 is intended to serve a very real purpose. Part of the purpose of this provision appears to be that there must be an opportunity for all aspects of the matter being placed before the Corporation for its consideration, before it finally determined to levy the tax or duty and at any particular rate and for any particular period, if any. Compliance with this provision is necessary, before the Corporation could levy the taxes and duties. The Corporation has no power to levy the taxes and duties enumerated in Section 97, totally ignoring the provisions of Section 98 and in particular, sub-section (1). AIR 1965 SC 895, Ref. to.

(Para 3)

S. 130 of the Act is not a charging section and the infirmity resulting from total non-compliance with the procedure prescribed by sub-section (1) of Section 98 is not in any way cured by the citation of Section 130 in the impugned notification. AIR 1962 SC 1263, Ref. (Para 4)

The fact that there was compliance with the provisions of Section 98(1) at the time when octroi was levied on certain specified goods, cannot free the corporation from its obligation to comply

with the requirements of Section 98(1) when it subsequently wants to levy octroi on other totally different goods. On the strength of the resolution of September 1950 the Corporation cannot extend the levy of octroi to the goods specified in the schedule to the impugned Notification totally ignoring the requirements of Section 98(1) of the Act. Any levy of octroi in total disregard of Section 98(1) cannot be said to be a levy which has the authority of law and the same would be violative of Article 265 of the Constitution. (1964) 1 Mys LJ 401 & (1968) 1 Mys LJ 524, Dist. (Para 6)

(B) Civil P C. (1908), Pre — Interpretation of Statutes — Taxing provision — Construction which would greatly diminish the efficacy of the provision should not be accepted unless its language is clear and compels such construction.

(Para 5)
Cases Referred Chronological Paras
(1968) 1968-1 Mys. LJ 524=W P No 704 of 1966 Spencer & Co. Ltd v State of Mysore and Corporation of City of Bangalore 5
(1965) AIR 1965 SC 895 (V 52)= (1965) 1 SCR 970 Raza Buland Sugar Co Ltd. v Municipal Board, Rampur 3
(1964) 1964-1 Mys. LJ 401=ILR (1964) Mys 948 A. Srinivasa Murthy v Corporation of City of Bangalore 5
(1982) AIR 1982 SC 1263 (V 49)= (1961) 3 SCR 698 Bangalore Woollen Cotton & Silk Mills Co Ltd. v Corporation of City of Bangalore 4
P Subba Rao and D Lakshminathan, for Petitioner S V Subrahmanyam and K. Gopalakrishna, for all Respondents (except in W P No 1648 of 1967)

SADASIVAYYA, J — The Corporation of the City of Bangalore (hereinafter referred to as the Corporation) who is the contesting respondent in all these petitions, issued a notification as per Exhibit A dated 4-4-1967 in which it was stated that the Administrator of the Corporation, exercising the powers of the Standing Committee (Taxation and Finance) and the Corporation and in exercise of the powers under Section 130 of the City of Bangalore Municipal Corporation Act, had decided that the Articles noted in the Schedule of the notification should be subjected to levy of octroi at the rates noted against each with effect from the 1st day of May 1967 the said articles being included under Clause VIII, Part V, Schedule III of the City of Bangalore Municipal Corporation Act, 1949. In the Schedule of that Notification, 48 items of goods together with the rates of octroi imposed on them, have been specified. The petitioners in these writ petitions are all dealers in one or more of

the articles specified in that schedule. In these writ petitions, they have challenged the validity of the levy of Octroi and have prayed that the Corporation be restrained from collecting Octroi under the said notification.

The main contention of the petitioners is that the procedure prescribed by Section 98(1) of the City of Bangalore Municipal Corporation Act 1949 (hereinafter referred to as the Act) has not been followed, that the levy of Octroi under the notification as per Exhibit A has not the authority of law and that any collection under such a notification would be illegal. In the counter-affidavit which has been filed on behalf of the Corporation (vide the counter) in W P 994 of 1967 the stand taken by respondents 1 and 2 (namely, the Administrator and the Corporation) is stated as follows at para 2 —

"(2) Respondents 1 and 2 do not propose to file any counter as the point raised is a pure question of law. It will be the contention of respondents 1 and 2 that the levy is legal even though the procedure prescribed in Section 98 is not followed with respect to the goods covered under the Notification dated 4-4-1967."

2 Before proceeding to examine the merits of the rival stands taken by the contesting parties in these writ petitions, it would be advantageous to set out the material portions of Exhibit A and the relevant provisions of the Act.

Exhibit A.—

"Corporation of the City of Bangalore
Office of the Commissioner
Corporation Offices,
Bangalore Dated 4-4-1967"

NOTICE

Whereas the levy of the octroi on animals and the goods brought within the Octroi Limits of the Corporation has been determined by the resolutions dated 26th September 1950 of the Corporation and whereas it is necessary to extend the levy of octroi on some more goods for augmenting the resources of the Corporation and also bring in under Octroi, goods which are similar to the goods that have already been subjected to octroi, the Administrator of the Corporation of the City of Bangalore exercising the powers of the Standing Committee (Taxation and Finance) and Corporation under S 47(A) of the City of Bangalore Municipal Corporation Act 1950 as amended from time to time and in exercise of the powers under Section 130 of the said Act, has decided that the articles noted hereunder should be subjected to levy of Octroi at the rates noted against each with effect from the 1st day of May 1967 the said articles being included under Clause VIII Part V Schedule III of the City of Bangalore Municipal Corporation Act, 1949

SCHEDULE

Sl. No.	Particulars of Items	Tax of Octroi to be levied
1.	■	■
■	■	■
■	■	■
48.	■	■

K. S. N. Murthy Commissioner
Corporation of Bangalore, Banga-
lore."

Section 98(1) of the Act reads as follows:—

"98(1) Before the Corporation passes any resolution imposing a tax or duty for the first time it shall direct the Commissioner to publish a notice in the official Gazette and in the local newspapers of its intention and fix a reasonable period not being less than one month from the date of publication of such notice in the official Gazette for submission of objections. The Corporation may, after considering the objections, if any, received within the period specified, determine by resolution to levy the tax or duty. Such resolution shall specify the rate at which, the date from which and the period of levy, if any, for which such tax or duty shall be levied."

Section 130 of the Act is as follows:

"130. If the Corporation by a resolution determines that an octroi should be levied on animals or goods brought within the octroi limits of the city, such octroi shall be levied on such articles or goods specified in Part V of Schedule III at such rates not exceeding those laid down in the said part in such manner as may be determined by the Corporation."

Clause VIII in Part V of Schedule III of the Act is as follows:—

"Part V:

Octroi on Animals and Goods.

[See Sec. 97, Clause (a) and Sec. 130]

18. The octroi on animals and goods shall be levied at the rate not exceeding the following:—

Octroi	Maximum rate
--------	--------------

■	■
■	■
■	■

CL. VIII. Other articles which are not specified above and which may be approved by the Corporation by an order in this behalf

2-0-0 per cent
ad valorem."

3. Section 97 of the Act enumerates the taxes and duties which the Corporation may levy. Clause (e) of that section provides that the Corporation may levy octroi on animals or goods or both brought within the octroi limits for consumption

or use therein. While section 97 provides the competence for the Corporation to levy taxes and the duties enumerated therein, Section 98(1) and (2) prescribes the procedure to be followed by the Corporation for imposing the tax or duty. The procedure prescribed in sub-section (1) of section 98 is intended to serve a very real purpose. The public are afforded an opportunity of putting forward such objections as they may desire, within the period set out in the public notice published in the official Gazette and the local newspapers. Under Section 98(1), the Corporation is required to consider those objections and then determine by resolution to levy the tax or duty specifying the rate at which and the date from which and the period of levy, if any, such tax or duty shall be levied. No doubt, the Corporation is not bound by any of those objections; but still it is required to consider those objections. Part of the purpose of this provision appears to be that there must be an opportunity for all aspects of the matter being placed before the Corporation for its consideration, before it finally determined to levy the tax or duty and at any particular rate and for any particular period, if any. Compliance with this provision is necessary, before the Corporation could levy the tax and duties.

In AIR 1965 SC 895, Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur, the Supreme Court, dealing with a somewhat similar provision in the U. P. Municipalities Act, has stated as follows in para 9 at page 900 :—

"We shall first deal with what we have called the first part of S. 131(3). This provision deals with taxation. The object of providing for publication of proposals and draft rules is to invite objections from the inhabitants of the municipality, who have to pay the tax. The purpose of such publication obviously is to further the democratic process and to provide a reasonable opportunity of being heard to those who are likely to be affected by the tax before imposing it on them. It is true that finally it is the Board itself which settled the proposals with respect to taxation and submits them to Government or the prescribed

authority as the case may be for approval. Even so we have no doubt that the object behind this publication is to find out the reaction of tax payers generally to the taxation proposals, and it may very well be in a particular case that the Board may drop the proposals altogether and may not proceed further with them, if the reaction of the taxpayers in general is of disapprobation. Further the purpose served by the publication of the proposals being to invite objections, in particular from the taxpayers, to the tax proposed to be levied on them, the legislature in its wisdom thought that compliance with this part of S 131(3) would essentially carry out that purpose in the circumstances if we are to hold that this part of S 131(3) was merely directory the whole purpose of the very elaborate procedure provided in Ss. 131 to 135 for the imposition of tax would become meaningless, for the main basis of that procedure is the consideration of objections of tax payers on the proposals of the Board."

We find no warrant or justification for the contention that it would be within the competence of the Corporation to levy the taxes and duties enumerated in Section 97 totally ignoring the provisions of Section 98 and in particular, sub-section (1)

4. In the impugned notification as per Exhibit A, section 130 of the Act has been cited. But, that is not a charging section and the infirmity resulting from total non-compliance with the procedure prescribed by sub-section (1) of Section 98 is not in any way cured by the citation of section 130. It has been pointed out by the Supreme Court in Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v Corporation of the City of Bangalore AIR 1962 SC 1263 at p. 1265 that Section 130 is not a charging section but imposes a limitation on the power of the Municipality as to the rate at which a tax can be imposed. Further it appears from that judgment, that the Supreme Court proceeded on the basis that in that case there was compliance with the provisions of Section 98(1) of the Act. The contention that there was not sufficient compliance with the provisions of Section 98(1) was not accepted.

5. Mr Subramanyam, the learned Advocate appearing for the Corporation argued, in the alternative, that Section 97 of the Act sets out the heads of taxation and that if the Corporation had followed the procedure prescribed under Section 98(1) in imposing a tax or duty for the first time under any particular head of taxation, then, it would not be necessary to follow that procedure again when the Corporation subsequently wanted to levy tax or duty on new objects under the same head of taxation.

Following up this argument, the learned Advocate stated that under clause (e) of Section 97 an octroi on animals or goods or both (brought within the octroi limits for consumption or use therein) was a head of taxation and that as the procedure prescribed under Section 98(1) had already been followed when the Corporation passed the resolution imposing octroi for the first time on certain animals and goods, it was not necessary to follow that procedure again when the Corporation subsequently wanted to levy octroi on the additional goods specified in the schedule to the impugned notification as per Exhibit A. In support of this argument, the learned Advocate wanted to rely on certain observations made in (1964) 1 Mys. LJ 401 A. Srinivasa Murthy v Corporation of the City of Bangalore and in W P No 704 of 1963 Spencer & Co. Ltd. v State of Mysore and the Corporation of the City of Bangalore reported in (1968) 1 Mys. LJ 524 and connected W P Nos. 711, 712, 713, 1873, 2026 and 2027 of 1966 and 591 and 592 of 1967.

In the case reported in (1964) 1 Mys. LJ 401 the question was whether when a new area was included in the Corporation limits and that area became subject to all the laws of the Corporation, the procedure laid down under Section 98 had to be followed again for the levy of property tax on buildings and lands in the newly included area. It was held that it was not necessary.

In W P No 704 of 1966—(1968) 1 Mys. LJ 524 and connected petitions, the ground on which it was considered unnecessary to follow the procedure under section 98(1) was that the impugned levy on vacant land merely provided for a new basis for computation of the tax on vacant land which had already been subjected to property tax which was being levied since a number of years both on buildings and vacant land, though the computation had been on a different basis. It was in those circumstances that the impugned tax on vacant land was not considered as a new tax imposed for the first time. In (1968) 1 Mys. LJ 524 at p. 547, this Court has stated as follows:—

"The tax, with which we are concerned in these cases, is undoubtedly the property tax. It is not disputed that the property tax had been imposed long ago by a resolution and that it has since been levied for a number of years. Before the amendments, the property tax was a tax levied both on buildings as well as on lands, although in the case of both the basis of computation was the annual value. The only question therefore is whether a change brought about by its amendment in the basis of the computation of the tax, so far as it relates to vacant lands, may be regarded as a change in the

nature of the tax itself in such a way as to make it necessary to hold that the tax in respect of land is a new tax altogether.

Prima facie, it appears to us that the amendments cannot have the effect of converting the property tax in respect of lands into quite a new tax altogether. It continues to retain its character as property tax. Only the basis of calculation and the rate of tax have been changed, both by the statute itself, without the Corporation being called upon to effect any such change by a resolution."

Thus, they were all cases pertaining to property tax and not the levy of octroi; the question did not arise there, for consideration as to whether compliance with the requirements of Section 98(1) was not necessary when the Corporation wanted to impose octroi on certain specified goods, merely because on a previous occasion when octroi was imposed on certain other goods there had been compliance with Section 98(1); any observations made in those decisions were only in the context of examining the contentions pertaining to the validity of the property tax; therefore, they cannot be of any assistance in the present case. It may also be stated that the Corporation had not taken such a stand in the case (pertaining to the levy of Octroi) which went up to Supreme Court and which was decided in the judgment reported in AIR 1962 SC 1263; in that case, as already stated, there was compliance with the provisions of Section 98(1) of the Act. The construction which Mr. Subramanyam seeks to place on the expression 'imposing a tax or duty for the first time' occurring in Section 98(1), is imposing for the first time one of the new heads of taxes enumerated in clauses (a) to (h) of Section 97 and not imposing for the first time the same head of tax on a fresh object which was not hitherto subjected to tax. If the construction proposed by Mr. Subramanyam is accepted, it would lead to the following results. Once the Corporation has imposed octroi on a few articles, it can extend the imposition of octroi to hundreds of new articles without following the procedure under Section 98(1). Such a construction would greatly diminish, if not render nugatory, the efficacy of Section 98(1) which requires notice to be given to the public of the proposal to impose a tax and the objections of the public to be considered before the Corporation decides to impose a tax. A construction which leads to such results should not be accepted unless the language of the Section is clear and compels such a construction.

6. Mr. Subramanyam has filed copies of the resolution of the Corporation of

September 1950 which has been referred to in the impugned notification as per Exhibit A. That resolution does not purport to levy octroi on all goods entering the octroi limits. The relevant part of that resolution refers to levy of octroi, only on certain specified goods. The fact that there was compliance with the provisions of section 98(1) at the time when octroi was levied on those specified goods, cannot free the Corporation from its obligation to comply with the requirements of Section 98(1) when it subsequently wants to levy octroi on other totally different goods like those mentioned in the schedule of Exhibit A. On the strength of the resolution of September 1950, the Corporation cannot extend the levy of octroi to the goods specified in the schedule of Exhibit A, totally ignoring the requirements of Section 98(1) of the Act. The important point to be noted is, that in respect of the particular goods set out in the schedule of Exhibit A, the public did not have any opportunity of submitting their objections or the Corporation considering the same, as is required under Section 98(1) of the Act. The result is, that in the present case, so far as the goods specified in the schedule of Exhibit A are concerned, there has been a total disregard of the provisions of section 98(1). Any levy of octroi in total disregard of Section 98(1) cannot be said to be a levy which has the authority of law and the same would be violative of Article 265 of the Constitution.

7. In the result, the impugned notification as per Exhibit A is quashed and the respondent Corporation is ordered not to collect any octroi from the petitioners on the basis of the said notification. The petitioners will get their costs from the respondent Corporation. Advocate's fee Rs. 100/- in each of these writ petitions.

KSB

Petitions allowed.

AIR 1969 MYSORE 171 (V 56 C 33)

A. R. SOMNATH IYER AND
AHMED ALI KHAN, JJ.

The Management of National Newspapers, Tainadu, Petitioner v. K. Jayathirtha Rao and others, Respondents.

Civil Petn. No. 80 of 1966, D/- 30-9-1968.

Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955). S. 17 — Working Journalists (Fixation of Rates and Wages) Act (1958). S. 9 — Claim for back wages by working journalist — Cessation of relationship of employer and employee at the time of claim does not bar application of those provisions.

KL/LL/F605/68

Cessation of relationship of employer and employee at the time when a claim is made for the recovery of wages, does not make the provisions of S 17 of 1955 Act and those of S 9 of 1958 Act, inapplicable. The emphasis of these sections is on the existence of the relationship of employer and employee during the period to which the claim relates. It does not insist upon the subsistence of that relationship when the claim is made. When the object of these two laws is to assist speedy recovery of the emoluments due to an employee and when S 9 of 1958 Act provides for recovery even after the death of the claimant at the instance of his legal representative, there can be scant reason for thinking that a working journalist after he ceases to be an employee, cannot himself claim.

(Paras 4, 5 and 6)

M. N. Farukhi, for Petitioner N S Chandrasekhar, for K. Subba Rao for Respondents Nos. 1, 2, 3 & 5

ORDER — We are asked in this civil petition by the Management of a Newspaper industry to quash an order made by the Labour Court under Section 17 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act 1955 which will be referred to as the 1955 Act and Section 9 of the Working Journalists (Fixation of Rates and Wages) Act, 1958 which will be referred to as the 1958 Act. By that order which was made on an application presented by six quondam employees of the newspaper concern, the Labour Court directed the payment of the wages which became due under the 1955 Act on their fixation under the 1958 Act. Section 2(f) of the 1955 Act defines a working journalist, and it is undisputed that respondents 1 to 6 during the period to which the claim made by them related, were working journalists as defined by that clause. Section 17 of that Act authorises an application by a 'newspaper employee' to an authority specified by the State Government for a certificate to the Collector that the amount claimed by him was due, and, that certificate when granted, authorised the Collector to recover the amount specified in the certificate as an arrear of land revenue.

2. Section 9 of the 1958 Act contains similar provisions for the recovery of the amount fixed as wages under the provisions of that Act. The expression 'newspaper employee' occurring in Section 17 of the 1955 Act is defined by Section 2(c) of that Act and that definition says that a newspaper employee means a working journalist.

3. The petitioner which is the newspaper concern did not dispute that respondents 1 to 6 were working journalists during the period to which the

claim made by them related. But it was contended before the Labour Court that since on the date of the presentation of their applications for a certificate they ceased to be employees, they were not working journalists at that point of time, and so the relevant statutory provisions became inapplicable. The Labour Court repelled that contention which is again reiterated before us by Mr Farukhi, the petitioner's learned Advocate.

4. We are of the opinion that the cessation of the relationship of employer and employee between respondents 1 to 6 and the petitioner at the point of time when a claim was made did not make the provisions of Section 17 of the 1955 Act and those of Sec. 9 of 1958 Act, inapplicable. The scheme of these two laws makes it clear that their purpose was to assist speedy recovery of the amounts which became due to a working journalist when he was an employee and the postulate that the right to that speedy recovery perishes when the working journalist ceases to be an employee cannot be sound. Neither Section 17 of the one Act nor Section 9 of the other restricts its provision to a person who is still a working journalist when the claim is made. On the contrary, their provisions reveal that if the person who makes a claim was a working journalist during the period to which the claim relates, he could seek the recovery of the amount due to him whether or not he continued to be a working journalist when the claim is made.

5. There is something in Section 9 of the 1958 Act which reinforces this view. That section provides that recovery under its provisions is possible even after the death of working journalist and at the instance of his legal representative. If a legal representative of a working journalist can make a claim under that Section after the death of the working journalist, there can be scant reason for thinking that a working journalist after he ceases to be an employee cannot himself make a claim.

6. The emphasis of Section 17 of the 1955 Act and Section 9 of the 1958 Act is on the existence of the relationship of employer and employee during the period to which the claim relates. It does not insist upon the subsistence of that relationship when the claim is made. If the object of the two laws is to assist speedy recovery of the emoluments due to an employee so that he could be protected against privation and economic embarrassment, there would be no justification for taking the view that one who is still an employee and therefore continues to earn is alone entitled to speedy recovery of the amounts due to him while one who has ceased to earn on cessation of employment is not.

7. Mr. Farukhi does not dispute that the amounts determined to be due to respondents 1 to 6 was really due to them.

8. We therefore dismiss this civil petition.

NYR/D.V.C.

Petition dismissed.

AIR 1969 MYSORE 173 (V 56 C 34)

B. VENKATASWAMI J.

Bhimappa Timmappa Kividi, Petitioner v. Gireppa Laxmappa Kivadi, Respondent.

Civil Revn. Petn. No. 837 of 1968, D/- 2-9-1968, against order of Munsiff Mudhol, D/- 17-6-1968.

Civil P. C. (1908), O. 40, R. 1 — Plaintiff returned for want of jurisdiction — Court appointing receiver during pendency of suit — Term of receiver not expressly fixed — Court can issue direction to receiver even after refiling of suit in a proper court — Probability of anomalous situations — Remedy open to parties.

The legal position with regard to the continuance of receivers is that even if the suit comes to an end, in the absence of fixation of his term of office in express terms, he is answerable to the court which appointed him till he is finally discharged by a specific order to be made by that Court. Even after the decree in a suit, the Court has ample power to continue the receiver if the exigencies of the case call for such continuance. AIR 1962 SC 21, Foll. (Para 9)

Thus, where the receiver was appointed by the Court but was not discharged by specific order and subsequently the plaintiff was returned to the plaintiff for re-filing it in a court having jurisdiction to deal with it, although the suit came to an end the moment the order was made directing the return of the plaintiff, that court was competent to issue directions with regard to the discharge of the functions of his office as a receiver even after the refiling of the plaintiff by the plaintiff in a proper court. (Para 9)

It is true that if a suit is pending in one court and the receiver is answerable to another, it might lead to some anomalous situations. But, that by itself is not a ground to hold that the receiver shall not be answerable to the Court which appointed him until he is properly discharged in accordance with law. In such an eventuality, the court which has seisin of the original suit is not powerless to give appropriate directions by providing for the continuance of the receiver thus making him responsible to itself. It is not also difficult for either party to move the Court which appointed the receiver in the first instance to put an

end to the receivership thus leaving the parties free to move the court before which the matter is pending for such orders as the exigencies may require.

(Para 10)

Cases Referred: Chronological Paras (1962) AIR 1962 SC 21 (V 49) =

(1962) 1 SCR 868, Hiralal Patni v. Loonkaran Sethiya

7

H. F. M. Reddy, for Petitioner; B. V. Deshpande and T. J. Chouta, for Respondent.

ORDER :— This petition is directed against an Order made by the learned Munsiff at Mudhol, in Misc. Application No. 7 of 1967 on 17-6-1968.

2. This application came to be presented by the plaintiff in C. S. No. 31 of 1965. This suit, it may be mentioned, was disposed of with a direction that the plaintiff be returned on account of want of pecuniary jurisdiction in that Court to entertain it. It would appear that subsequent to such a return the suit was re-presented or re-filed in the Court of the Civil Judge at Bagalkot. The said suit is Spl. C. S. No. 22/67. While the suit was pending in the Court of the Munsiff at Mudhol, an order of temporary injunction was made, against which an appeal was preferred. In the course of the hearing of that appeal the parties appear to have come to terms and agreed for the appointment of a receiver to be nominated by the trial Court. It was further agreed that out of the realisation, by way of rent or otherwise, from the suit lands, the plaintiff was to take 1/3rd and the balance 2/3rds to be drawn by the defendants. There was an order in terms of the above agreement. After the suit was remanded to the Court of the Munsiff, a receiver was nominated and he took possession of the properties. It is stated that about Rs. 3,700/- was deposited as proceeds realised by the receiver from the suit properties. It is not in dispute that the defendants had drawn 2/3rds of the said money after furnishing the security.

3. Sri H. F. M. Reddy, the learned Counsel appearing on behalf of the petitioner, however submits that his client has not withdrawn the money in terms of the above agreement. In so far as the next year or years in question are concerned, one of the parties approached the learned Civil Judge before whom the re-filed suit was pending. The learned Civil Judge disposed of the application virtually directing the parties to approach the Court which appointed the receiver. It was thus that the defendants were compelled to approach the Court of the Munsiff at Mudhol, although there was no suit as such pending before it. It may be relevant to mention that even before approaching the learned Civil Judge for the relief, the Court of the learned Mun-

siff at Mudhol had been moved for an appropriate Order That Court had rejected the said application, being of the view that it was the Court of the Civil Judge which was the appropriate forum for making an order in that regard. In these circumstances, the plaintiff filed Misc. Application No 7 of 1967 and secured the Order impugned herein.

4 Sri H. F. M. Reddy the learned counsel appearing on behalf of the petitioner submits that the learned Munsiff was not competent to make the order as no suit in regard to property under receivership was pending before him. He further submits that in the absence of an order for the continuance or for the fresh appointment of a receiver made by the learned Civil Judge, no direction could be issued by a Court which had no seisin of the original dispute. He proceeds to argue that a receiver being an officer of the Court will have to seek directions every now and then with regard to various matters relating to the management of the properties. Hence the more appropriate court would be the Court which has seisin of the original dispute. It is also his contention that the original agreement regarding the appointment of a receiver was entered into to the prejudice of the minor plaintiff. According to him, the appointment was agreed upon by some counsel acting for and on behalf of the counsel for the minor plaintiff. His argument is, at any rate, this compromise should not be held binding on the minor plaintiff in view of all these circumstances.

5 Taking the last of his contentions first, relating to the prejudicial nature of the compromise, suffice it to say that his remedy is to have the receivership determined or at any rate to have the terms of the compromise annulled, substituting them by an order of the Court having regard to all the facts and circumstances which have a bearing on the equities of the case. It is, therefore, unnecessary to deal with this aspect of the matter further.

6 The next contention of Sri Reddy is that the Court which appointed the receiver namely the Court of the Munsiff, Mudhol, was not competent to make this direction, which according to him is one made under Rule 3 of Order 40 C. P. C. It, therefore, follows according to his submission that it is the Civil Judge's Court that is competent to make the direction. To this extent Sri Reddy concedes the position. It will be seen from the submission of Sri Reddy that the primary contention is that the Court of the Munsiff ceases to exercise jurisdiction over the receiver even in the absence of the pendency of a suit relating to the subject matter of the receivership in that Court.

7 On this contention, Sri T. J. Chouda, the learned counsel appearing on behalf of the respondent, invited attention of the court to a decision of the Supreme Court reported in (1962) 1 SCR 868—(AIR 1962 SC 21). The passage in question runs thus:

'Held that the receiver continued by the preliminary decree was entitled to function till he was discharged. The legal position with regard to the continuance of receivers is that: (i) if a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the suit; (ii) if a receiver is appointed in a suit without his tenure being expressly defined he will continue till he is discharged; (iii) even after the final disposal of the suit, though as between the parties his functions are usually terminated, the receiver continues to be answerable to the Court till he is finally discharged; and (iv) the Court has ample power to continue the receiver even after the final decree if the exigencies of the case so require. The final decree in the present case did not finally dispose of the suit and did not bring the appointment of the receiver to an end.'

8. While referring to this enunciation, Sri Reddy concedes that the receiver continues to be in possession of the property and submits that it is not open to the court to give further directions to the receiver once the suit comes to an end. If by this statement Sri Reddy means that a receiver is not answerable to the Court which appointed him, I cannot agree with him. It is clear from the above enunciation that he continues to be answerable to the Court. That, however, does not dispose of the other contentions about the competence of the Court to issue the direction.

9 Adverting to the enunciation extracted above it is clear therefrom that even if the suit comes to an end, in the absence of fixation of his term of office in express terms, he will continue till he is discharged. It is also clear that he is answerable to the Court till he is finally discharged by a specific order to be made by the Court. It is further clear that even after the decree in a suit the Court has ample power to continue the receiver if the exigencies of the case call for such continuance. It, therefore, follows that the Court which appointed the receiver would be competent to issue directions with regard to the discharge of the functions of his office as a receiver. It is true that in the present case, the suit came to an end the moment the order was made directing the return of the plaint to the plaintiff for further action either by way of re-presentation or re-filing of the plaint in a Court having jurisdiction to deal with it. It is also obvious from the circumstances obtaining

in this case that the receiver has not been discharged. In this view, so long as he is answerable to the Court, which appointed him that court will continue to exercise jurisdiction over him in regard to every matter pertaining to the subject-matter of the dispute.

10. It is, however, pointed out by Sri H. F. M. Reddy, that if a suit is pending in one court and the receiver is answerable to another, it might lead to some anomalous situations. In my opinion, that by itself is not a ground to hold that the receiver shall not be answerable to the Court which appointed him until he is properly discharged in accordance with law. It is conceivable that certain situations might arise which require giving directions to the receiver in the light of the proceedings in the original suit. In such an eventuality, the Court which has seisin of the original suit is not powerless to give appropriate directions by providing for the continuance of the receiver thus making him responsible to itself. It is not also difficult for either party to move the court which appointed the receiver in the first instance to put an end to the receivership thus leaving the parties free to move the Court before which the matter is pending for such orders as the exigencies may require. It follows from this discussion that either party is at liberty to approach the Court of the learned Munsiff for the termination of the receivership. It is not disputed that the suit did come to an end the moment the plaint was returned to the plaintiff for further action.

11. In the light of the discussions, the petition deserves to fail and is dismissed.

12. In the circumstances of the case, I make no order as to costs.

GDR/D.V.C. Petition dismissed.

AIR 1969 MYSORE 175 (V 56 C 35)

A. NARAYANA PAI, J.

Laxmi and others, Petitioners v. Parameshwari Hengsu and others, Respondents.

Civil Revn. Petn. Nos. 931, 1173 and 1631 of 1967, D/- 13-8-1968, against order of Civil J., Mangalore, D/- 18-1-1967.

(A) Madras Aliyasanthana Act (9 of 1949), S. 36(5) — Hindu Succession Act (1956), S. 7(2)—Hindu family governed by Aliyasanthana Law—Suit for partition — Preliminary decree allotting certain share to kavaru of defendants 22 to 24 all males — Deaths of defendants 24 and 23 in 1957 and 1962 respectively — Succession to their shares — Held governed by S. 7(2) of Hindu Succession Act and

not by S. 36(5) of the Madras Act. (Aliyasanthana law — Partition).

In a suit for partition filed by some members of a joint family governed by Aliyasanthana law in South Canara District, a preliminary decree was passed granting certain share jointly to a kavaru consisting of three male members defendants 22 to 24. Defendant 24 died before passing of the preliminary decree, on 10-6-1957 and defendant 23 died on 9-3-1962. Legal representatives of both defendants were brought on record. It was contended by defendant 22 that the three defendants being undivided members of the kavaru, defendant 22 as the surviving member was entitled to the entire share. Defendants 11, 12 and 16, on the other hand contended that the shares of the deceased defendants devolved on them as members of the nearest santhathi kavarus under S. 36(5) of the Madras Act. Legal representatives of the deceased defendants claimed to be their rightful heirs under S. 7(2) of the Hindu Succession Act, 1956.

Held that defendants 22, 23 and 24 together constituted a nissanthathi kavaru and divided itself from the main Kutumba but the said three members of the said kavaru did not get themselves divided from each other; (Para 26)

(2) that so long as the last surviving member of the said kavaru, viz. 22nd defendant was alive, devolution in favour of the nearest santhathi kavaru or kavarus under S. 36(5) of the Madras Act could not take place; (Para 27)

(3) that when the 24th and 23rd defendants died, they had an undivided interest in the properties of the kavaru of himself and other defendants and that the said undivided interest quantified as provided by the Explanation to sub-section (2) of Section 7 of the Hindu Succession Act, would devolve by intestate succession on their respective heirs under the said Succession Act. (Para 28)

(B) Constitution of India, Art. 254 — Madras Aliyasanthana Act (9 of 1949), S. 36 — Hindu Succession Act (1956), S. 7(2) — Repugnancy between Central and State Act — When arises — Acts held covered different fields and hence not repugnant.

As the Madras Aliyasanthana Act, 1949 deals with the topic of partition and the Hindu Succession Act, 1956 deals with succession, the two statutes deal with two entirely different fields of legislation and therefore no question of repugnancy can arise between the two Acts. AIR 1962 Mys. 72 (FB), Rel. on. (Para 32)

(C) Madras Aliyasanthana Act (9 of 1949), S. 36(5) — Hindu Succession Act (1956), S. 7(2) — Partition — Share allotted to kavaru of three males — Death of two members — Difference in devolution of shares — Anomaly — Remedy lies with the legislature.

Where it was decided that the shares of two deceased members of a kavaru consisting of three males only passed to their respective legal heirs, it was contended that it was an anomaly that these shares should devolve on the legal heirs of deceased members of the kavaru under S 7(2) of the Hindu Succession Act, 1956 and the share of the last surviving member should, on his death, pass to the members of nearest santhathi kavaru under S 36(5) of the Madras Act.

Held that if it was an anomaly such anomaly could be cured only by legislation and not by decisions of Courts.

(Para 33)

Cases Referred Chronological Paras

(1968) AIR 1966 Mys. 216 (V 55) =

(1968) 1 Mys. LJ 599 Ratnamala

v State of Mysore 33

(1963) 1963-2 Mys LJ 552 Lakshmi

Shedthi v Jalaja Shedthi 20

(1962) AIR 1962 Mys 72 (V 49) =

40 Mys. LJ 1 (FB) Sundara v

Girija 18, 32

(1960) 38 Mys LJ 409 Koragappa

Rai v Sanakappa Rai 22, 24

In No 931/67 =

P Ganapathy Bhat, for Petitioners, B.

P. Holla, for Nos. 11 13 14, 16 to 21 and

M. Gopalakrishna Shetty for No. 23 for

Respondents.

In No 1173/67 =

M. Gopalakrishna Shetty for Petitioners

B. P. Holla, for Nos. 21 23 24, 26 to 31

and 33 for Respondents.

In No 1681/67 =

M. Gopalakrishna Shetty for Petitioner

ORDER — These Revision Petitions,

which are directed against a common

order made by the Civil Judge at Mangalore

on two interlocutory Applications

before him, raise a common question of

law as to whether and if so in what

manner the provisions of sub-sec. (2) of

Section 7 of the Hindu Succession Act,

1956 (Central Act 30 of 1956) operate on

the death of a party in a suit for partition

of the properties of a Hindu family

governed by the Aliyasanthana law

2 The details of the previous

proceedings in this matter to the extent

necessary for the disposal of the above

question are briefly the following:

3 The parties are governed by the

Aliyasanthana law prevalent in the District

of South Kanara. They constituted

a family or kutumba descended from a

common ancestress by name Majekke.

One Parameshwari and a daughter and a

son of hers as plaintiffs instituted Original

Suit No 91 of 1950 before the Court

of the Subordinate Judge at South

Kanara for partition of its properties,

pursuant to and in the light of the provisions

of the Madras Aliyasanthana Act,

1949 (Madras Act IX of 1949) Apart from

the contentions based on the merits of

the case, one important defence to the suit was that a certain award decree made in Original Suit No 314 of 1924 on the file of the District Munsiff, Mangalore, amounted to a partition within the meaning of sub-section (6) of Section 36 of the Madras Aliyasanthana Act. This was made the subject of issue No 1. The trial court decided this issue against the plaintiffs and held that the suit for partition was not therefore sustainable. Although it recorded findings on some of the other issues also including issue No 3 regarding the shares to which members or several branches are entitled in the event of there being a decree for partition, the Court ultimately dismissed the suit in view of its finding on the first issue.

4 There was an appeal presented against the decree dismissing the suit to the Madras High Court. After the reorganisation of the States, the said appeal stood transferred to this Court and was renumbered R. A. (M) 64 of 1956. On the question of law raised by the first issue the members of the original Bench which heard the appeal differed in their opinion resulting in a reference to a third Judge. The ultimate decision was that the previous award decree did not amount to a partition so as to make the present suit unsustainable. Accordingly a preliminary decree for partition was passed on 28th June 1961 by this Court and the suit remanded for further proceedings.

5 Regarding the quantum of shares themselves this Court held.—

The learned Advocates on both sides are agreed that the suit be decreed for partition in respect of the plaint schedule immoveable properties they are also agreed that the shares be divided as indicated in para 17 of the trial Court's judgment. We direct that a preliminary decree for partition of the plaint schedule immoveable properties be drawn up accordingly.

6 Paragraph 17 of the trial court's judgment contains its finding on the third issue as to shares. It reads —

In case this suit is to be decreed, the shares to which the several parties are entitled to will be as set out in the joint memo filed by the parties on 25-9-1963, which are as follows.—

Plaintiffs.	61 991
1st Defendant	58 565
Defendants 2 to 8 & 25	1 40 556
9th Defendant	65 520
Defendants 22 to 24.	65 176
21st Defendant	52 920
Defendants 12 to 15	38 073
Defendants 16 & 17	27 185
10th Defendant.	21 756
Defendants 11 16 to 20 & 25	43 512

the Calcutta High Court was of the view that the Court's power to impose terms and conditions u/s. 17 (5) is limited only to such terms and conditions as may be called for in the interests of the share holders or creditors or other persons who might be affected by the alteration, and where no such prejudice is involved, the Court has no power to impose terms and conditions. Admittedly, in the present case there has been no objection from any share holders or creditors of the Company in respect of this resolution. There is no serious challenge that the financial position of the Company is sound. Indeed, the only objection advanced on behalf of the Registrar in para 8 of his affidavit is that the alteration suggested is in conflict with the proposed legislation in Parliament banning contributions to political parties by Companies. Apart from the fact that no such bill has been placed before me, it is not certain whether Parliament would ultimately enact such a measure. In case Parliament does so in future it would certainly supersede the memorandum of the Company. It therefore appears to me to be idle to speculate on future legislative measures and on that ground reject the resolution which at the present moment does not suffer from any infirmity. The special resolution dated 21-7-66 would therefore be confirmed.

10. The main target of attack in this proceeding is the special resolution dated 6-12-67 by which substantial additions are proposed to be made to the objects of the Company and these additions are sought to be justified under either clause (a) or Cl. (d) of Section 17 (1). In support of their respective contentions regarding the scope and ambit of Clauses (a) and (d), the learned Advocates on both sides have relied on several decisions and it is necessary to briefly notice them here. I may state at the outset that so far as the expression "some business" occurring in Section 17 (1) (d) is concerned, all the High Courts agree that this expression must include business other than business which is already being carried on under the existing memorandum, the only requirement of the statute law being that the business must be one which can (1) conveniently and advantageously be combined with the existing business of the Company and (2) that this must be so under the existing circumstances and not under any hypothetical circumstances. So long as these limits are observed, the share-holders and the management of the company should be left free to add to or reduce their business by suitable alterations in their memorandum.

In the matter of *Bhutoria Brothers (P) Ltd.*, AIR 1957 Cal 593, the main object of the Company was to purchase, store, sell, manufacture and otherwise deal in the agricultural, mineral and animal products and live-stock, and in the bye-products and the

waste products of their manufacture including jute. Extensive alterations were proposed in the objects by a special resolution which tried to include the business in optical, photographic, chemical and surgical goods on the one hand and watches, clocks and musical instruments on the other, as also other kinds of machinery. Mukherjee, J. held that so far as the alterations of the objects in respect of business in jute, cotton and woollen mills are concerned, they can be permitted u/s. 17 (1) (a) and (d) on the ground that the new business can be economically and efficiently carried on and under the existing circumstances and they can conveniently and advantageously be combined with the existing business of the Company because jute and cotton will certainly come under agricultural products forming one of the main objects in the existing memorandum. But in respect of items relating to clocks and musical instruments and surgical goods, the learned Judge thought that they would be a very strange new-comer into a business in agricultural, mineral and animal products and live-stock and hence disallowed those items.

11. A recent decision of the Calcutta High Court in the matter of *Standard General Assurance Co. Ltd.*, AIR 1965 Cal 16 dealt with the case of a Company whose original object was to carry on all kinds of insurance, guarantee and indemnity business. One of the other objects was to carry on business as capitalists, financiers, concessionaries and merchants and to undertake and carry on and execute all kinds of financial, trading and other operations. In July 12, 1963, a special resolution was passed to alter the Memorandum of Association of the Company, the net effect of which was that the Company sought to abandon insurance business of all kinds and to acquire new objects namely, to carry on business as manufacturers of and dealers in chemicals, petro-chemicals, drugs, essences, acids etc. to carry on business of engineers, metallurgists, iron, steel and brass founders, metal makers, moulders etc., to execute contracts for supply or use of any machinery and to carry on ancillary or other works comprised in such contracts, to carry on business of importers, exporters, merchants, ship-owners and charterers of ships and transport and haulage contractors etc. to render pecuniary or other assistance for helping settlement of industrial or labour problems or the promotion of industry or trade.

While allowing the application for confirming the alterations of the Memorandum of Association of the Company in terms of the special resolution, Mitra, J. observed that if the directors and members of a company propose to alter its objects, and if there is no objection from the creditors or if their position is not prejudiced by the proposed alterations the court should not stand in the way of the company's seeking new objects

to enable it to embark on a new venture, subject to the limitations that the new business must not be destructive of or inconsistent with the existing business, and there must be some existing business which the company should be carrying on at the time when it passes the resolution for altering its objects and such business must be carried on under its existing object clauses and lastly that the company's financial position must be sound to enable it to carry on the new business. In the matter of *Dalmia Cement (Bharat) Ltd.*, AIR 1965 Mad 78 the Madras High Court has taken the view that the Directors of the Company alone are best fitted by reason of their experience in the particular business to decide whether the business can be carried on more economically or more efficiently by adding fresh objects and if the directors consider that under the existing circumstances, it will be convenient and advantageous to combine the new objects with the existing objects, and if it appears that that conclusion may be fairly arrived at, the Court would not go behind it and hold an enquiry as to whether the opinion of the directors is well founded or is justified. That was a case where the existing objects of the Company included import, export in cement, alumina cement, lime and lime-stone, kanker and bye-products thereof and building materials generally. The new objects sought to be added were to enable the Company to do export business in all varieties of goods. The Court allowed that application.

The Allahabad High Court in *Juggi Lal Kamalpat Jute Mills Co. Ltd. v. Registrar of Companies*, AIR 1968 All 417, held that the Court cannot refuse to confirm the alteration to the Memorandum of Association simply because the change is desired to carry on a new business not connected with, nor having any relation to the existing business or businesses of the Company, provided the new business desired to be undertaken is one which can be combined with the existing business of the Company, and it is not destructive of or inconsistent with the existing business. Practically the same view was taken by the Punjab High Court in the case reported in (1963) 33 Com Cas 585 (Punjab).

In another case of the same High Court reported in (1963) 33 Com Cas 811 (Punjab) the Memorandum of Association of a limited company stated that the object of the company was to purchase acquire, and to carry on the business carried on by an existing distillery company. The company passed a special resolution to alter the Memorandum of Association by adding a new object, viz. to acquire or take over on hire, picture houses, cinemas, theatres etc. and applied to the Court for confirmation of the resolution. The application was rejected on the ground that there is no suggestion whatsoever that the new business which is

sought to be carried on has anything to do even remotely with its existing business and it cannot be said that the new business will be conducive to the economical or efficient doing of the existing business. Even the element of convenience or advantage in combining the two businesses is absent. On the facts therefore this case is clearly distinguishable.

In a later decision of the same High Court however reported in 37 Com Cas 331=(AIR 1967 Punj 15) *Khanna, J.* allowed the application of a Company whose original object was to carry on business of insurance and investment business and passed a special resolution to alter its objects to enable it to carry on business of engineers, metallurgists, iron, steel and brass foundries, metal makers, moulders, millwrights, wheelwrights, joiners galvanisers etc. and to carry on business of cotton spinners and doublers, flax hemp and jute spinners etc., to carry on business in chemicals, petro-chemicals, drugs etc. and to undertake and execute any contracts for work involving the supply or use of any machinery and to carry out any ancillary or other works comprised in such contracts and to carry on business of importers, exporters, merchants, ship-owners, charterers of ships and transport. The learned Judge allowed the application on the grounds that the share-holders were of the view that better returns are likely to be given to the share-holders if some industrial or commercial activity is undertaken by the company, that the new business suggested is not inconsistent with or destructive of the previous business, that the special resolution was passed unanimously and none of the share-holders, who are the persons directly concerned, has appeared to oppose the petition.

12. On examination of Section 17 (1) of the Companies Act and law bearing on the subject, the following principles can be laid down:—

(i) The language of Section 17 (1) (d) of the Companies Act permits the alterations in the Memorandum of Association of a company to enable it to carry on a business which is entirely a new departure from the business already carried on provided (a) that such business is one which can be conveniently or advantageously be combined with the existing business of the company, and (b) that this must be so under the existing circumstances and not under hypothetical circumstances. The additional business need not be even akin to the existing business but it must not be destructive of or inconsistent with and detrimental to the existing business. It must leave the existing business substantially what it was before.

(ii) The question whether any additional business is one which may be conveniently or advantageously combined with the business of the Company carried on at the time

when the special resolution is passed, is essentially a business proposition and must be determined by the persons engaged in the business of the Company.

(iii) The Court can confirm the alteration either wholly or in part subject to such terms and conditions as it may deem fit on being satisfied that the alterations sought to be confirmed, are not beyond the scope of Section 17 (1) and do not adversely affect the rights and interests of the members of the Company and/or of its creditors. No hard and fast rule can be laid down as to the quantum of evidence necessary for the satisfaction of the Court. The fact that the Company is in a sound financial position and that the share-holders unanimously or by majority decision seek alterations of the memorandum is a factum in favour of confirmation thereof.

13. It is not contended before me that any one of the items of additional business proposed to be started would be destructive of the existing business. What is vehemently contended by Mr. Ghosh is that there are certain additional items of business which have no relation to the existing business and cannot be conveniently or advantageously combined with it. In fact consequent on his objection and as a result of discussion at the time of hearing, the petitioner has, as already stated, deleted several items of proposed new business from the original resolution and we are now therefore concerned only with the resolution as it stands altered. Even in respect of some of the items of the altered list particularly the items relating to manufacture of type writers and computers Mr. Ghosh presses his objections. It is therefore, necessary for me to briefly notice the submissions made on behalf of the petitioner in support of his contention that the proposed new items of business can be economically or more efficiently combined with the existing business.

14. Regarding its proposed business in general merchandise goods it is submitted by the Company that it runs two factories one at Bhopal and the other at Jaykaypur for developing townships and to cope with modern times and to supply amenities and comforts for its employees and workers, it has been found expedient to deal in general merchandise goods.

(i) Regarding the activities mentioned in the proposed Clause 3 (10) it is submitted that in course of working of the factories for the last several years it has been found expedient to deal in plant and machinery and office equipments to meet its own requirements and since new industrial complexes are coming up in nearabout places where the Company is having its existing factory, it is necessary that the Company should be free to take up this and other lines of business and once they take up business relating to plant, machinery and

office equipments, the Company would also be able to provide the servicing and maintenance on account of its having experienced and qualified Engineers under the employment of the Company.

(ii) Regarding manufacture of computers it is submitted that the Company is doing business in paper industry and has got an equipped workshop and trained personnel. They can be able to assemble, manufacture, repair, maintain computers and other business machines considered to be efficient and economic and this can be advantageously combined with their existing business. The same argument is also advanced in respect of type writers and it is submitted that the Company has already taken certain steps in collaboration with other Companies for the manufacture of type writers.

(iii) Regarding furnitures it is stated that for the purpose of running the paper mills they take forest leases and for this purpose they have got a trained staff and necessary machinery. At the present moment they operate and exploit bamboos in the forest. It would be economical to take up the business of exploiting timber and manufacturing furniture therefrom not only for its own use in the factory and its own township but also for sale to others.

(iv) Regarding the proposal in para 10(b) relating to synthetic yarn, clothes and materials rubber, latex, plastics and formations etc. and plastic products, it is submitted that with the technological development, paper has been advantageously used with cloth, synthetic yarn and is also being used in rubber, latex and plastics. It would therefore be convenient and advantageous to combine this business with the existing one.

(v) Regarding manufacture of pharmaceuticals, medicinals, chemicals, caustic soda, compound products, machine, live wires, disinfectants, oils, colours, paints and varnishes it is submitted that paper industry being mostly and mainly a chemical-based industry, the company has got chemical laboratories and it will be very efficient and economic to combine this business, with the existing one.

(vi) Regarding manufacture of carbons, ink, paper and stationery goods, the argument is that in process of manufacturing paper some chemicals and impurities are burnt resulting in carbons and with the active elements of ink and other ingredients, carbon papers can be manufactured. Since they are dealing in paper they can be efficiently and advantageously combined with the existing business.

(vii) Regarding the business referred to in sub-clause (11), it is submitted that the Company has taken various forests on leases and is also carrying on forest operations. At the present moment it is only exploiting the bamboo wealth of the forest. It is proposed that with the same machinery and without

spending more money it can also deal in timber and timber products, economically and advantageously

(viii) Regarding the proposals mentioned in sub-para 12 it is stated that the effluent of the paper industry has been experimented to get fertilisers and the Company has got several experimental plots where agricultural operations can be carried on and food stuffs can be produced for its own employees and the township

(ix) Regarding sub-para (13) the submission is that the Company has taken up erection work of its factories by the engineers who have got vast experience in designing, planning, erecting, expansion and maintenance of modern factories. The Company can therefore use this personnel with advantage. At the present moment the Company has to engage transport contractors to carry finished products from them and also to get bamboo etc from the forest. If the Company can maintain its own vehicles, it can save a huge amount. For maintenance of its existing vehicles it runs an efficient motor garage and workshop and with little addition to it, this can efficiently handle bigger transportation facilities both for itself and for the purpose of business

(x) Regarding sub-para 14, the submission of the Company is that at present it has to generate its own power and if the proposed expansion is done this will mean a lot of savings and with small alterations and expansion of the generating units and utilisation of its own electrical staff and know-how it can save a huge amount and also can have some profit.

(xi) Regarding sub-para 15 it is stated that it is ancillary to the existing and proposed objects and can be efficiently combined with the existing business

(xii) Regarding sub-para 16 and 17 the submission of the Company is that these clauses are found in the Memorandum of Association of all Companies of repute and are necessary for more efficiently carrying on the business either existing or future.

15. I have carefully considered the aforesaid submissions made by the learned Advocate for the petitioner and feel that although in some respects they appear to be ambitious it cannot at all be said that any of the proposed activities is either inconsistent with the existing business or would be destructive of the same. The Directors who are in charge of the day to day administration of the affairs of the Company are of the view that the proposed activities can be efficiently and conveniently combined with the existing business and how this would be so has been explained in the submissions referred to above which *prima facie* appear to be acceptable. The resolutions for the alteration of the provisions in the memorandum had been passed unanimously by the share-holders without a single dissenting voice. Notice of the present

petition was given to all concerned by publication in newspapers, but apart from the Registrar of Companies, no share-holder or creditor of the Company has appeared to oppose the application. The Registrar in para 12 of his affidavit has stated that he had received a letter from Shri B. A. Ojha a share-holder of the Company addressed to the Company Law Board objecting to the additional new business on certain grounds. A copy of the letter has been annexed to his affidavit. The original letter is not before me and has not been proved. The objection is Sri Ojha has not appeared before this Court to raise any objection. No notice can therefore be taken on the alleged objection. A further safeguard so far as the share-holders are concerned is afforded by sub-section (2A) newly added by Sec 15 of the Companies (Amendment) Act, 1965 to Section 149 of the Companies Act whereby before actually commencing any new business the Company has to get the approval of the general body of share-holders. That would give a further opportunity to the share-holders to say whether the Company should actually take up any new business. This appears to me to be a further safeguard against any speculative action on the part of the Directors of the Company

16. In the result, I would allow this application and confirm the alterations proposed by the Company in the special resolutions dated 21-7-66 and 6-12-67 subject to the modifications proposed in the memorandum dated 12-9-68 filed on behalf of the Company. As substantial objections had been raised on behalf of the Registrar of Companies who alone has appeared to oppose this application, I would order that the Company should bear the costs of the Registrar. Hearing fee is assessed Rs 500 KSB

Application allowed.

AIR 1069 ORISSA 100 (V 56 C 86)

G. K. MISRA, J

Union of India, Appellant v Bhagaban Rout, Respondent.

Second Appeal No 534 of 1964, D/- 23-8-1965 from decision of 3rd Addl. Sub-J., Cuttack, D/- 22-6-1964

(A) Railways Act (1890), Sec. 74C (3) — Mango consignment, despatched at owner's risk, reaching destination 2 days late than reasonable time — Mangoes found unfit for human consumption — Delay of two days not being unreasonable Railway not responsible for destruction — Presumption that damage was due to delay of two days cannot be drawn — (Evidence Act (1872), Section 114)

A reasonable time is certainly not necessarily always the actual time for the consignment to reach the destination. In fact

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sometimes the consignment might reach the destination earlier and sometimes later. To assess reasonable time one is not to be guided by the actual time taken by similar consignments in respect of identical goods. Where seven days is the reasonable transit time for a whole wagon of mango consignment from one station to another and the whole consignment, which is at the owner's risk reaches its destination two days late than the reasonable time, it cannot be said that the delay of 2 days is unreasonable so as to make liable the Railway administration for the deterioration of the mangoes, particularly when there is no assertion or proof that the mangoes would not have been damaged during the reasonable time of seven days required for the transit. The delay is not so unusual and unreasonable that a presumption under Section 114, Evidence Act is to be drawn that the damage was due to the delay of two days. S. A. No. 276 of 1962 (Ori), Rel. on. (Para 5)

(B) Railways General Rules No. 29 (1954) — In terms, Rule 29 has no application to booking of perishable goods.

Cases Referred: Chronological Paras
(1962) S. A. No. 276 of 1962 (Ori.),

Fagumani Khuntia v. Union of India 4

B. K. Pal and Bijoy Pal, for Appellant;
H. Sen, for Respondent.

JUDGMENT: Plaintiff despatched 629 baskets of mangoes from Ellore station on 11-6-57 to Cuttack Station. The consignment in a whole wagon reached Cuttack on 20-6-57. Plaintiffs' case is that the usual time for arrival of the consignment was 5 days. Though the consignment was booked in good condition, at the time of delivery they were found to be rotten and unfit for human consumption. An open delivery was taken and the Station Master, Cuttack, granted a certificate showing damage of mangoes at sixty per cent. The damage was due to unusual delay in the arrival of the consignment. Defendant was responsible for the damage caused by the delay. The suit was for recovery of Rs. 3924/4/-.

The defence case is that the goods were sent at owner's risk. It was clearly stated in the railway-receipt that the goods were liable to perish in transit. The distance between Ellore to Cuttack is 477 miles and the usual period of transit cannot be less than 7 days.

The Courts below concurrently found that the delay was unreasonable and it was responsible for the damage. They decreed the plaintiffs' suit for an amount of Rs. 3890/7/-. The defendant has filed the second appeal.

2. There is no dispute that there was sixty per cent damage of the mangoes. The only point for consideration is whether the defendant was responsible for the damage. The findings of the lower appellate Court are that the consignment was despatched

at the risk of the owner, the usual time for a consignment of mangoes to reach from Ellore to Cuttack is 4 to 5 days, the consignment reached Cuttack in 9 days, the delay of 4 to 5 days was unusual and was responsible for the damage, and the goods were sent in good condition at the time of loading.

3. Exhibits 7 and 8 show that consignments of mangoes from Ellore to Cuttack reached Cuttack within 4 and 5 days respectively. D. W. 2, the goods clerk at Cuttack, deposed that the normal time for arrival of mango wagons from Ellore to Cuttack was 5 to 6 days. This evidence is not, however, enough to hold that the delay was unreasonable or unusual.

4. The inter se liabilities of the parties depend upon the construction of Sec. 74-C (3) of the Indian Railways Act, prior to its amendment. In Second Appeal No. 276 of 1962 (Ori), Fagumani Khuntia v. Union of India this section was considered and the Court observed thus—

"The onus is on the plaintiff not only to prove that there was delay in transit but also to prove that the delay was not unusual and unreasonable that it amounts to negligence or misconduct on the part of the railway administration or of any of its servants and that such negligence or misconduct was responsible for the deterioration." In that particular case, the delay was of 3 days. There was no further proof that the delay was of such unusual character that it caused deterioration and that the goods could not have been deteriorated even during the normal period of transit of 9 to 10 days as claimed in that case.

5. Rule 49, sub-rule (14) of the Goods Tariff No. 29 in force from 1st June, 1954, (General Rules for acceptance, carriage and delivery of goods) deals with contraband goods like arms and ammunition etc. It says that in every case when a consignment of any kind of arms, ammunition or military stores fails to reach the destination station within a reasonable period from the date of booking, as shown by the Invoice or Way-bill, the Station Master of the station to which such ammunition or arms is booked must report the facts by wire to the Station Master of the Booking Station, junctions concerned, if any, District Tariff/Divisional Superintendent and Superintendent of Railway Police in whose jurisdiction booking and destination stations are situated. A reasonable time may be assumed to be an allowance of 100 miles per day in the case of goods trains and 250 miles per day in the case of passenger trains, plus two days for necessary formalities of booking and destination stations.

In terms this rule has no application to the booking of perishable goods. It, however, gives an idea as to what a reasonable time is. A reasonable time is certainly not

necessarily always the actual time for the consignment to reach the destination. In fact sometimes the consignment might reach the destination earlier and sometimes later. To assess reasonable time one is not to be guided by the actual time taken by similar consignments in respect of identical goods. Rule 8 of the above Tariff Rules accordingly lays down that railways do not guarantee the dispatch of goods by any particular train nor will they be responsible for the arrival of goods at any station within any definite time.

The distance between Ellore and Cuttack is 477 miles. If the reasonable time for any goods carried by goods train is 100 miles per day, then it would take a little less than 5 days only for transit. Further 2 days more is necessary for the formalities of booking and destination stations. The reasonable time in this particular case therefore would be 7 days. The delay was hardly by 2 days. The Courts below committed an error of law in depending upon the time taken in Exts 7 and 8 as the reasonable time for the arrival of the consignment from Ellore to Cuttack. It is not known whether Exts 7 and 8 were despatched at owner's risk or were subject to special contract, on account of the nature of the perishable goods consigned thereunder.

If 7 days is the reasonable transit time for a whole mango wagon consignment from Ellore to Cuttack, the delay of 2 days cannot be said to be unreasonable. Moreover there is no assertion or proof that the mangoes despatched from Ellore would not have been damaged and were not in fact damaged during the reasonable time of 7 days required for transit. The delay was also not so unusual and unreasonable that a presumption under Section 114, Evidence Act, is to be drawn that the damage was due to the delay of those 2 days.

6. From time to time this Court has been laying down the strict standard of proof in cases of this nature. Plaintiff conducted the case in an unsatisfactory manner and the necessary elements for discharging the onus were not established.

7. On the aforesaid conclusion the judgments of the Courts below are set aside and the plaintiffs' suit is dismissed. The second appeal is allowed but in the circumstances, parties to bear their own costs throughout. HGP/D.V.C. Appeal allowed.

AIR 1969 ORISSA 102 (V 58 C 37)
G. K. MISRA AND S. ACHARYA, JJ
Sarka Gundusa, Appellant v. State, Respondent.

Criminal Appeal No 157 of 1966, D/- 15-11-1968, from order of S. J. Koraput D/- 0-8-1966

LL/AM/G612/68

Penal Code (1860), S. 84 — Insanity — Legal insanity — Any insanity recognized in medical science is not legal insanity — Destruction of cognitive faculty of mind to such an extent as to render the accused incapable of knowing the nature of the act or that what he was doing was contrary to law is necessary — Onus lies on accused to prove insanity — Tests laid down — Evidence Act (1872), Ss. 101 to 104

The ingredients that must be proved under S. 84 are:

- (a) that the accused was insane,
- (b) that he was insane at the time when he committed the act and not merely before or after the act, and
- (c) that as a result of the unsoundness of mind the accused was incapable of knowing the nature of the act or that he was doing what was really wrong or contrary to law.

Any and every type of insanity recognised in medical science is not legal insanity. Every minor mental aberration is not insanity. There can be no legal insanity unless the cognitive faculty of mind is destroyed as a result of unsoundness of mind to such an extent as to render the accused incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law. AIR 1960 Mad 316 Rel. on.

(Para 4)

The burden of proof of insanity lies on the accused. This burden is not as heavy as it is on the prosecution to prove an offence. The prosecution is to prove the guilt of the accused beyond reasonable doubt. The burden on the accused is analogous to that on the plaintiff or the defendant in a civil proceeding. The burden on the accused is discharged if the Court is satisfied that the version of the accused is reasonably probable or true though it might not have been proved beyond reasonable doubt. Mere possibilities cannot however be sufficient to discharge the onus.

(Para 5)

Although no hard and fast rule can be laid down and the conclusion would vary according to the facts and circumstances of each case, certain broad tests based on objective standards are generally looked into by Courts. These are antecedent and subsequent conduct of the person accused of the offence. Such conduct is not per se enough, but is relevant only to show what the state of the mind of the accused was at the time of the commission of the act. Some indication of the precise state of the offender's mind at the time of the commission of the act is often furnished by the words of the offender used while committing the act or immediately before or after the commission. Speaking generally the pattern of the crime, the circumstances under which it was committed, the manner and method of its execution, and the behaviour of the offender before or after the

commission of the crime furnish some of the important clues to ascertain whether the accused had no cognitive faculty to know the nature of the act or that what he was doing is either wrong or contrary to law. AIR 1927 Lah 674 and AIR 1958 Ker 80 Rel. on. (Para 6)

Held on facts that accused was not entitled to plead insanity as the burden of proof had not been discharged. (Para 9)

Cases Referred: Chronological Paras

(1960) AIR 1960 Mad 316 (V 47)=

1960 Cri LJ 930, In re, Kandasami Mudali 4

(1958) AIR 1958 Ker 80 (V 45)=

1958 Cri LJ 513, Kerala State v. Madhavan 6

(1927) AIR 1927 Lah 674 (V 14)=
28 Cri LJ 598, Tola Ram v. Emperor 6

S. S. Bhanja Deo, for Appellant; Stand-
ing Counsel, for Respondent.

G. K. MISRA, J.: The appellant has been convicted under Section 302 I. P. C. and sentenced to imprisonment for life.

2. The prosecution case is that on 22-9-65 a child of 3 years was playing in the village street. The accused came out of his house brandishing an axe and gave a sudden blow with its sharp side on the neck of the child. The boy fell down and died instantaneously. With the blood stained axe the accused ran into the adjoining jungle. The villagers searched for him, but could not trace him out. On 23rd morning the accused returned to his house without the axe. The accused pleads insanity. The learned Sessions Judge held that the death was homicidal and the accused killed the deceased. He rejected the plea of insanity.

3. That the death of the child was homicidal and that the accused killed him with his axe are not challenged before us. P. Ws. 1, 2 and 3 are the eye-witnesses. They vividly describe as to how the accused came out with his axe and killed the child by giving a sudden stroke with its sharp side. The finding is based on unassailable evidence.

4. The only question for consideration is whether the plea of insanity is tenable. Section 84, I. P. C. runs thus:

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind is incapable of knowing the nature of act or that he is doing what is either wrong or contrary to law."

All the ingredients of Section 84 must be fulfilled before the plea of insanity succeeds. The ingredients which must be proved under the Section are—

(a) that the accused was insane,
(b) that he was insane at the time when he committed the act and not merely before or after the act, and

(c) that as a result of the unsoundness of mind the accused was incapable of knowing the nature of the act or that he was doing what was really wrong or contrary to law.

It was very aptly said in AIR 1960 Mad 316 In re Kandasami Mudali that,

"There is no rule that once insane always insane or that now sane, he must have been sane before."

Any and every type of insanity recognised in medical science is not legal insanity. Every minor mental aberration is not insanity. There can be no legal insanity unless the cognitive faculty of mind is destroyed as a result of unsoundness of mind to such an extent as to render the accused incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law.

5. The burden of proof of insanity is on the accused. Section 105 of the Evidence Act with illustration (a) makes the position absolutely clear. The Section and illustration run thus:

"When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code 1860, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustration (a). — A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A."

It is clear from the section that the Court shall presume absence of insanity that means, the court shall presume that the accused was sane at the time he did the act. It is now well settled that the burden of proof on the accused is not as heavy as it is on the prosecution to prove an offence. The prosecution is to prove the guilt of the accused beyond reasonable doubt. The burden on the accused is analogous to that on the plaintiff or the defendant in a civil proceeding. The burden on the accused is discharged if the court is satisfied that the version of the accused is reasonably probable or true though it might not have been proved beyond reasonable doubt. Mere possibilities cannot however be sufficient to discharge the onus.

6. It is not easy to lay down the tests as to how insanity within the ambit of Section 84, I. P. C. is to be established. The difficulty arises on account of the fact that proof of prior or subsequent insanity would not discharge the onus. Insanity at the time of the commission of the act is to be established. It is difficult to enter into the recesses of the accused's mind exactly at the time of the commission of the offence.

Mere ghastly character of the act or absence of motive is not enough to prove legal insanity for the simple reason that each of them is consistent with non-existence of insanity. Though no hard and fast rule can be laid down and the conclusion would vary according to the facts and circumstances of each case certain broad tests based on objective standards are generally looked into by courts. Those are antecedent and subsequent conduct of the person accused of the offence. Such conduct is not per se enough, but is relevant only to show what the state of the mind of the accused was at the time of the commission of the act. See AIR 1958 Ker 80 Kerala State v Madhavan.

Some indication of the precise state of the offenders mind at the time of the commission of the act is often furnished by the words of the offender used while committing the act or immediately before or after the commission. See AIR 1927 Lah 674 Tola Ram v Emperor.

Speaking generally the pattern of the crime, the circumstances under which it was committed, the manner and method of its execution and the behaviour of the offender before or after the commission of the crime furnish some of the important clues to ascertain whether the accused had no cognitive faculty to know the nature of the act or that what he was doing is either wrong or contrary to law.

7 On the aforesaid tests the facts of this case would be examined. P W 1's evidence is that the left palm of the accused was swollen for 4 to 5 days prior to the occurrence. The accused was talking incoherently and was also talking to him self. Otherwise he was attending to his work, taking his food and moving about properly. The accused is the cousin of P W 1. He noticed that the aforesaid condition developed only 3 to 4 days prior to the occurrence before which the accused was all right. P W 2 stated that the accused appeared to be out of his sense when he came out of his house brandishing the Tangi. P W 3's version is that for 3 or 4 days prior to the occurrence he found the accused talking like a mad man and the accused was complaining of pain in his left hand and crying loudly.

P W 8 is the mother of the accused who is her only son. Her story is that her son was never mad or insane. Only from the previous Thursday the accused was confined to the house as he was having pain in his left hand and forearm which were swollen. On the date of occurrence she and her son were in their house.

Suddenly at about noon the accused behaved like a mad man and ran to the street with the Tangi (M O I). From the Thursday before the date of occurrence the accused was not talking with anybody and

was not taking his food properly and could not sleep at night. On the day following the occurrence the accused came back from the jungle and stood in the village street without entering into his house. He did not talk to his mother. The Doctor (P W 4) examined the accused and noticed swelling on his left hand and forearm. The accused complained to him of acute pain. The Doctor also found multiple abrasions in front of the middle of the neck of the accused running transversely over an area of $1 \times 1 \frac{1}{2}$ ". The abrasions were simple in nature and were caused by some sharp cutting weapon within 48 hours of the examination which he did on 24-9-65 at 11.30 A. M.

According to the Doctor these multiple abrasions appeared to be self-inflicted and could be caused by the axe M O I. He examined the mental condition of the accused and found no abnormality in him. In cross-examination the Doctor answered that he had not specialised in mental disease. That does not however make him disqualified for examining the accused to test whether he found any abnormality in the accused. P Ws 6 and 7 noticed that immediately after the occurrence the accused ran towards the jungle.

8 From the aforesaid evidence the following features emerge—

(i) The accused was having severe pain on account of his left palm and forearm being swollen. He was not having proper sleep but he was attending to his normal duties though sometimes he did not take food.

(ii) The mother's evidence established that the accused was not insane or mad, but showed certain mental aberrations about 4 to 5 days before the date of occurrence.

(iii) On the date of occurrence the accused suddenly came out with the axe and killed the deceased.

(iv) Apparently there was no motive for the murder.

(v) Immediately after the murder the accused ran away to the forest with the blood-stained axe.

(vi) He threw away the blood-stained axe inside the jungle of which he subsequently gave recovery and came back home next morning without the axe.

(vii) On his return he stood on the village Danda, did not enter into his house and did not talk to his mother.

The question is whether on the aforesaid features the burden of proof on the accused to establish insanity can be said to be reasonably true or probable. This burden can be said to be discharged only if a finding can be recorded on the basis of the aforesaid facts that the cognitive faculty of the accused was impaired to such a degree that he was incapable of knowing the nature of the act that he committed or that what he

was doing is either wrong or contrary to law.

9. Certain features establish that the accused was not deprived of his cognitive faculty. Immediately after the murder he ran towards the jungle to conceal himself. The fact that he threw away the axe in a place which could not be traced out without his assistance, is evidence of the fact of his being alive to his guilt. On his return next morning he stood in the village Danda, did not enter into his own house and did not talk to his mother. These give indication of his guilty consciousness.

The fact that he talked like a mad man a few days before the date of occurrence on account of the severe pain is no indication of his loss of cognitive faculty at the time of the commission of the act. There are therefore no decisive circumstances in favour of the accused that he lost his cognitive faculty to a degree prescribed in Section 34, I. P. C. excepting the absence of motive and the ghastly nature of the act. As has already been said, these factors by themselves do not militate against the theory of sanity which the law presumes the accused as having at the time of the commission of the act. The burden of proof on the accused as to insanity has not been discharged.

10. The appeal fails and is dismissed.

11. ACHARYA, J.: I agree.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 ORISSA 105 (V 56 C 38)

G. K. MISRA AND B. K. PATRA, JJ.

Dhansai Sahu and another, Appellants v. State, Respondent.

Criminal Appeal No. 79 of 1966, D/- 8-11-1968 from order of S. J., Bolangir-Kalahandi, D/- 19-3-1966.

(A) Oaths Act (1873), Sections 5 and 13 — Object of Act — Child witness — Duty of court to record its opinion — Omission to administer oath or to attach certificate as required by proviso to Sec. 5 — Does not affect admissibility of his evidence by virtue of Section 13 — (Evidence Act (1872), Section 118).

The Oaths Act does not deal with the competency of a person to give evidence. Its main object is to render persons who give false evidence liable to prosecution and another object obviously is to bring home to the witnesses the solemnity of the occasion and to impress upon him the duty of speaking the truth. (Para 11)

Since an omission to take the oath does not by reason of Sec. 13 of the Oaths Act affect the admissibility of evidence, an irregularity arising from the fact, that the Trial Judge has failed to record the certificate as required by the proviso to Sec-

tion 5 of the Oaths Act cannot affect the admissibility either. (Para 11)

Section 13 of the Oaths Act is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs per incuriam. AIR 1946 PC 3, Rel. on. (Para 11)

Despite the requirement of the statute it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and why they think so. A I R 1952 SC 54, Rel. on. (Para 11)

(B) Evidence Act (1872), S. 118 — Competency of witness to give evidence — Child witness — Evidence of — Court should accept it with caution and should require substantial corroboration before acting upon it. (Para 11)

(C) Penal Code (1860), Section 34 — Scope — Section does not create a specific offence — It merely enunciates principle of constructive liability for acts committed by two or more persons in furtherance of common intention.

Section 34, I. P. C. does not create any specific offence, but merely enunciates the principle under which one person is liable for the joint act of himself and another when the crime is committed in pursuance of the common intention of both. In furtherance of common intention several acts may be done by several persons resulting in the commission of the crime. In such a situation section 34 provides that each one of them would be liable for that crime in the same manner as if it were done by him alone. (Para 12)

(D) Penal Code (1860), Section 34 — Charge — Absence of mention of Sec. 34 — Effect — (Criminal P. C. (1898), Sections 233 and 537).

Where two accused are jointly charged for having committed murder of P, there is sufficient indication that each of them would be held liable for the joint acts of both of them. The absence, therefore, of Section 34 from the charge or of the words "in furtherance of the common intention" in the circumstances of the case is immaterial, and the accused are not in any way prejudiced nor is it fatal to the prosecution case. AIR 1956 Raj 67, Foll. (Para 12)

(E) Penal Code (1860), Section 300, Clauses secondly and thirdly — Applicability — Intention to cause bodily injury sufficient in the ordinary course of nature to cause death — Existence of such injury caused by act of accused proved — Intention to cause it may be presumed unless there is evidence to contrary — On facts accused held were guilty under Section 302/34 I. P. C. as case was covered by clause thirdly and not secondly of Section 300.

Clause thirdly of Section 300, I. P. C. speaks of an intention to cause bodily injury which is sufficient in the ordinary

course of nature to cause death. Here the emphasis is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, there was probability in a lesser degree of death ensuing from the act committed, the conviction should be for culpable homicide not amounting to murder. AIR 1968 SC 148, Foll. (Para 13)

The question so far as intention is concerned is not whether they intended to kill or to inflict the injuries of a particular degree of seriousness, but whether they intended to inflict the injuries in question and once the existence of the injuries is proved, the intention to cause the injuries will be presumed unless the evidence or circumstances warrant an opposite conclusion. AIR 1968 SC 867, Foll. (Para 13)

The two accused were charged under Section 302, I P C for jointly assaulting one P, an old man of 70 years with a wooden pole and thereby causing his death. As many as 19 injuries were inflicted on his person, some on vital parts of the body. One of the injuries which was dealt on the left chest caused fracture of the 8th and 9th ribs of the left side of the chest and the other injury caused fracture of the right temporal bone resulting in the fractured pieces depressing into the brain substance.

Held that the injuries were sufficient in the ordinary course of nature to cause death of P and therefore the case was covered by clause thirdly of Section 300 and not clause secondly of Section 300. The accused were therefore guilty of murder under S 302, I P C read with Section 34 and the absence of charge under Section 34, I P C was immaterial. (Para 13)

Cases Referred	Chronological	Paras
(1968) AIR 1968 SC 867 (V 53) = 1968 Cr LJ 1023, Harjinder Singh v Delhi Administration		13
(1966) AIR 1966 SC 148 (V 53) = 1966 Cr LJ 171 Andra v State of Rajasthan		13
(1956) AIR 1956 Raj 67 (V 43) = 1956 Cr LJ 550, State v Babulal and Berumah		12
(1952) AIR 1952 SC 54 (V 89) = 1952 Cr LJ 547, Rameshwar Kalyan Singh v State of Rajasthan		11
(1946) AIR 1946 PC 3 (V 33) = 1946 All LJ 100, Mohammad Fugal Esa v King		11
(1888) ILR 10 All 207 = 1888 All WN 86 Queen Empress v Maru		11
(1875) 14 Beng LR 294 = 23 WR Cr 12 (FB), R. v Sewa Bhogta D Sahu, for Appellants, Standing Coun- sel, for Respondent.		11

PATRA, J: The appellants were convicted u/s 302, I P C by the Sessions Judge, Bolangir and sentenced to imprisonment for life. They are brothers and the case against them is that at about 11 A. M. on 20-6-1965 they severely assaulted one Pihu Sahu and caused his death.

2. There was a proceeding u/s 145, Criminal P. C between the deceased Pihu Sahu on one side and the appellants and two others on the other in respect of an Adakata in mouza Amlidadar. The Court of first instance declared the possession of Pihu Sahu by its order dated 31-8-64 and this order was subsequently upheld in Revision by the Sessions Judge, Bolangir by order dated 4-12-64. There was consequently ill-feeling between the parties.

On the date of occurrence Pihu Sahu was sitting on a chair under a mango tree near the Khamahandh and was guarding the mango crop. Julu Sahu (P W 8) aged about 10 years and Sarhu, the grandson of the deceased, a boy aged about 12 years were washing their buffaloes in the Adakata tank. Keshari Bai, the daughter of appellant Dhansai challenged the boys as to why they were doing so and pelted stones at the buffaloes. They retaliated by throwing mud at her and she went home weeping. The prosecution case is that immediately thereafter she came back accompanied by the two appellants each of whom was armed with a wooden pole. Dhansai questioned Pihu as to why he did not prohibit the boys from quarrelling with Keshari. Pihu advised them to convene a Panchayat for the purpose. Thereupon Dhansai gave a blow with a wooden pole which struck the left ear of Juglu and it slipped off and struck the thigh of Pihu. Pihu got up from the chair. The appellant Santhikumar gave a blow with the wooden pole on the back of Pihu's neck and Dhansai assaulted Pihu on his right flank. Meanwhile P Ws 3, 4 and 6 who were near about the tank came to the spot and assaulted the appellants and the latter retaliated and assaulted them. P W 5 intervened, but being threatened he left the place. The appellants then assaulted Pihu and he fell down. Even after he fell down on the ground, they continued to assault him as a result of which he died.

First Information Report (Ex. 1) was lodged at the Thana by P W 1, the son of the deceased at 1-30 p m on the same day on which a case was registered against the appellants. Shortly before the F I R was lodged, the appellant Dhansai had gone to the Thana and had made a statement on the basis of which a station diary entry (Ex. 24) had been recorded. The A. S. I. who in the absence of the Officer-in-charge recorded the F I R, came to the place of occurrence that afternoon and sent the dead body for post mortem examination. The Medical Officer who performed autopsy found the following 19

injuries on the person of the deceased (Ex. 14): (After enumerating these injuries His Lordship proceeded).

It was found on dissection that the right temporal bone beneath injury No. 18 was fractured into three pieces and the fractured pieces were depressed into the brain substance tearing the membraneous vessels, at their sites and injuring the brain substance. It was also found that the 8th and 9th ribs of the left side beneath injury No. 12 were fractured at their angles, and the fractured ends tearing the muscles and pleura at their sites pierced into the left lung. Injuries Nos. 5, 12 and 18 were grievous in nature and the rest were simple. In the opinion of the doctor the deceased died due to severe shock and haemorrhage as a result of injuries on vital parts of his body.

3-9. [After discussion of evidence his Lordship proceeded]:

10. We have carefully considered the evidence regarding the occurrence and are fully convinced that the version of the occurrence as given by the prosecution witnesses is the correct one. As stated already, the presence of each of the prosecution witnesses who has spoken about the occurrence is admitted on the defence side, apart from the fact that some of them have also received injuries during the occurrence. From the prosecution evidence we also get an explanation as to how the appellants have received a few minor injuries found on their persons. The defence version has not afforded any explanation as to how Pilu sustained the large number of injuries amounting to 19 found on his body. It is fantastic to believe the suggestion made on the defence side that in the course of the alleged mutual assault the witnesses on the prosecution side have inflicted injuries on Pilu Sahu by mistake. The occurrence took place in broad day light and the persons who were present at the place of occurrence were not more than a dozen. It is impossible to believe that the prosecution witnesses could have by mistake inflicted the several injuries of which some are grievous in nature on Pilu Sahu. In the course of investigation two wooden poles M. Os. V and VI were seized from the appellants and the prosecution case is that the appellants came armed with the same, to the place of occurrence. None of the prosecution witnesses has said that it is with these identical poles that the appellants had assaulted Pilu. Therefore the evidence of the doctor that some of the injuries on Pilu Sahu could not have been caused by M. Os. V and VI does not in any way affect the truth of the prosecution case. It is quite likely that the appellants came there armed with some other poles and not necessarily M. Os. V and VI and the actual weapons of offence have not been seized in this case. What the prosecution witnesses have said is that

appellants came with two wooden poles. That evidence stands unrebutted.

11. Mr. D. Sahu appearing for the appellants then contended that the evidence given by P. Ws. 8 and 9 should be ignored as inadmissible in evidence as they have not been administered any oath and the Trial Judge has not given the certificate as required by the proviso to Section 5 of the Oaths Act. P. Ws. 8 and 9 are aged 10 and 12 years respectively. What the learned Trial Judge did was that before examining them regarding the facts of the case he questioned them generally, obviously with the intention of judging for himself whether they understood the nature of the questions and were capable of giving rational answers to the same. After thus generally questioning them he has recorded the impression that the witnesses did not appear to him to be intelligent and hence oath was not administered to them. S. 5 of the Oaths Act, enjoins that oath should be administered to witnesses and then follows the proviso which may be quoted:

"Provided that where the witness is a child under twelve years of age, and the Court or persons having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

Despite the requirement of the Statute and the caution given by their Lordships of the Supreme Court in *Rameswar Kalyan Singh v. State of Rajasthan*, AIR 1952 SC 54 that it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and why they think so; it is regrettable that the opinion of the Court has not been recorded in the manner required in the proviso. The question therefore is whether the opinion referred to above must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken. In this connection a reference must be made to S. 13 of the Oaths Act, and Section 118 of the Evidence Act. The Oaths Act does not deal with the competency of a person to give evidence. Its main object is to render persons who give false evidence liable to prosecution and another object obviously is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth. In fact S. 13 of the Oaths Act says that no omission to take any oath or to make any affirmation and no irregularity whatsoever, in the form in which any one of them is administered,

shall invalidate any proceeding or render inadmissible any evidence. Section 118 of the Evidence Act deals with the competency of the witnesses and provides that,—

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

Thus if an omission to take the oath does not by reason of Section 13 of the Oaths Act affect the admissibility of evidence, it follows that an irregularity arising from the fact, that the Trial Judge has failed to record the certificate as required by the proviso to Section 5 of the Oaths Act cannot affect the admissibility of the evidence. There was at one time a controversy as to whether Section 13 of the Oaths Act can be pressed into service even though the omission to administer the oath is not accidental. In *Queen Empress v. Maru*, (1888) ILR 10 All 207 Mahamood, J held that Section 13 of the Oaths Act is only applicable when the omission is accidental. On the other hand the Calcutta High Court in *R v. Sewa Bhogta*, (1875) 14 Beng LR 294 (FB) took a contrary view. This conflict of judicial opinion was however resolved by a decision of the Privy Council in *Mohammad Fugal Esa v. King* (AIR 1946 PC 3) in which their Lordships of the Privy Council observed that Section 13 of the Oaths Act is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs per incuriam. In the instant case although the learned trial Judge has not recorded the requisite certificate and on the other hand recorded his opinion that P Ws 8 and 9 were not sufficiently intelligent, it is quite clear on a perusal of the evidence given by P Ws 8 and 9 that they have got the power to understand the questions put to them and gave answer to these questions. We are therefore satisfied that P Ws 8 and 9 are competent witnesses and their evidence is admissible. It is true that being child witnesses one is to accept their evidence with caution, but as in this case their evidence is substantially corroborated by the evidence given by P Ws 3, 4 and 6 we feel that these two witnesses have also spoken the truth. On a careful consideration of the evidence on record and the circumstances of the case we are satisfied that the prosecution version as to the manner in which the occurrence took place is true and that Pilu Sahu died as a result of the injuries inflicted on him by the two appellants.

I P C each of the appellants can be punished only for the particular injury or injuries inflicted by him and as there is no evidence to show as to which appellant had caused the injury or injuries which have been proved to be fatal, neither of them can be convicted either under Section 302 I P C or 304 I P C and if at all, they can be convicted only for causing hurt punishable under Section 323 I P C. In making this submission he considerably relies on the fact that the appellants were charged only under Section 302, I P C and not 302 read with 34. The charge framed in this case may be quoted—

"I, Sri R C Kar B L., Sessions Judge, Bolangir Kalahandi hereby charge you (1) Dhansal Sahu (2) Santh Kumar Sahu as follows—

"That you, on or about the 20th March, 1965 at about 11 A. M. at Amlidadar did commit murder by intentionally causing the death of Pilu Sahu by means of Wooden poles and thereby committed an offence punishable under Section 302 of Indian Penal Code and within my cognizance, and I hereby direct that you be tried by me on the said charge."

It will be noticed that the words "in furtherance of the common intention" mentioned in Section 34, I P C had not been embodied in the body of the charge. It is contended that the appellants had no notice to meet a charge of constructive liability and that as such in the absence of any evidence to show that the particular accused caused the fatal injury he cannot be convicted either under Section 302 or 304, I P C. It may be remembered that Section 34, I P C does not create any specific offence, but merely enunciates the principle under which one person is liable for the joint act of himself and another when the crime is committed in pursuance of the common intention of both. In furtherance of common intention several acts may be done by several persons resulting in the commission of the crime. In such a situation Section 34 provides that each one of them would be liable for that crime in the same manner as if it were done by him alone.

Now in this case a common charge was framed against both the appellants and they were told that they committed murder by intentionally causing the death of Pilu Sahu by means of wooden poles. Can it be said in the circumstances that the accused had no idea that they would be liable under the explanatory provision under Section 34, I P C? We are of opinion that in view of the fact they were jointly charged for having committed murder of Pilu Sahu, there was sufficient indication to the appellants that each of them would be held liable for the joint acts of both of them. The absence therefore of Section 34 from the charge or of the words "in furtherance of

12. This leads us to a consideration of the question as to what offence the appellants have committed. Mr Sahu for the appellants has vehemently contended that in the absence of a charge under Section 34

the common intention" in the circumstances of the case is immaterial, and we feel that the accused were not in any way prejudiced. It has been proved in this case that there was previous litigation between them and the deceased regarding possession of the tank and that the appellants were unsuccessful in that litigation. This is evident from Exts. 3 and 4. It has been established that on the date of occurrence on hearing from Keshari that she was assaulted by P. Ws. 8 and 9, the two appellants together left their house armed with a wooden pole each and went to the tank and questioned the deceased. It is proved that Santha Kumar first gave a blow with the wooden pole on Pilu's neck and Dhansai also gave a blow on Pilu's right flank. It has been established that even after Pilu Sahu fell down on the ground both the appellants continued to assault him and after he died they left the place of occurrence together. P. Ws. 4 and 9 have stated that after killing Pilu, the appellants said that they had finished one enemy and one more remained to be finished. These circumstances establish beyond any doubt that it is in pursuance of the common intention of both the appellants that they brought about the death of Pilu Sahu. We are satisfied that mere non-mention of Section 34 in the charge has in no way prejudiced the appellants nor is it fatal to the prosecution case.

We may in this connection refer to a Division Bench decision of the Rajasthan High Court in *State v. Babulal and Berumal*, AIR 1956 Raj 67 where Wanchoo, C. J. speaking for the Bench observed that—

"Even though there might be no charge under Section 34, I. P. C. it is possible to convict the accused with the aid of S. 34. This does not mean that Magistrates and Judges should not indicate in the charge that Section 34 would be used against the accused. It is always desirable that this should be indicated in the charge.

But where by oversight or otherwise specific mention of Section 34 is not made in the charge, that defect by itself would not be fatal, if otherwise the Court can come to the conclusion that the accused had notice that they would be liable under Section 34 also, for after all Section 34 is merely an explanatory provision in the Code and does not create any specific offence itself."

In that case the charge against Berumal one of the accused persons was that he and Babulal on or about 31-1-52 between 3 and 5 P. M. committed murder by intentionally causing the death of Foujmal and thereby committed an offence punishable under S. 302, I. P. C. The charge against the other accused Babulal was that he and Bherumal at the same time and place committed the murder of Foujmal by intentionally causing the death and thereby committed an offence punishable under Section 302, I. P. C. In

neither of the charges there was mention of Section 34 or the words "in furtherance of the common intention of both" were embodied in the body of the charge. After getting satisfactory proof that the two accused persons acted in furtherance of a common intention in committing the murder of Foujmal, the High Court convicted them under Section 302/34, I. P. C. although the Sessions Judge acquitted them on the ground that Section 34 had not been included in the charge. We respectfully agree with the view Wanchoo, C. J. had taken in that case. We are not referred to any decision either of this Court or of the Supreme Court where a contrary view was taken.

13. So far as the offence is concerned we have no difficulty in accepting Mr. Sahu's contention that the appellants had no intention to cause the death of Pilu. There is no scope for application of the second clause of Section 300, namely, that the appellants intended to cause such bodily injuries as they knew to be likely to cause the death of Pilu. In our opinion clause "thirdly" of Section 300 would apply to the facts of the case. That clause speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. Here the emphasis is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, there was probability in a lesser degree of death ensuing from the act committed, the conviction should be for culpable homicide not amounting to murder. *Anda v. State of Rajasthan*, AIR 1966 SC 148. It is clear from the evidence in this case that the appellants intended to cause the injuries which were found on the person of Pilu. In fact if there is nothing beyond the injury and the fact that the appellants inflicted them, the only possible inference that can follow is that they intended to inflict the same. Whether the appellants knew of the seriousness of the injuries or intended the serious consequences is not at all material. The question so far as intention is concerned is not whether they intended to kill or to inflict the injuries of a particular degree of seriousness, but whether they intended to inflict the injuries in question and once the existence of the injuries is proved, the intention to cause the injuries will be presumed unless the evidence or circumstances warrant an opposite conclusion. *Harjinder Singh v. Delhi Administration*, AIR 1968 SC 867. Pilu Sahu is a man about 70 years old. As many as 19 injuries were inflicted on his person, some on vital parts of the body. One of the injuries (no. 12) which was dealt on the

left chest caused fracture of the 8th and 9th ribs of the left side of the chest and the other injury caused fracture of the right temporal bone resulting in the fractured pieces, depressing into the brain substance. These are injuries which are sufficient in the ordinary course of nature to cause death. This case therefore comes under clause "thurdly" of Section 300 I P C

14 In the result both the appellants are liable to be convicted under Section 302/34 I P C. We would therefore alter the conviction of the appellants from Section 302, I P C to Section 302/34 I P C and uphold the sentence of imprisonment for life imposed on each of them. The appeal fails and is dismissed.

15 G. K. MISRA, J I agree
KSB Appeal dismissed.

AIR 1969 ORISSA 110 (V 58 C 39)

S BARMAN C J AND S ACHARYA, J
Bisra Lime Stone Co Ltd Petitioner v
Labour Inspector, Central and another, Opp
Parties

O J C No 180 of 1964, D/- 16-10-1968

(A) Minimum Wages Act (1948), Section 2 (b), 2 (g) and Sch. Part I Item 8 — Appropriate Government — Scheduled employment — Employment in stone-breaking or stone-crushing — Appropriate Government in matters of employment in such works in relation to mine is Central Government whereas in matters of employment in such business otherwise than in relation to mine is State Government. (Para 7)

(B) Minimum Wages Act (1948), Section 2 (b) — 'Mine' for purposes of Act includes 'quarry' though there is some distinction between the two — (Words and Phrases — 'Mine')

Though there is some distinction between a quarry and a mine in that the former is an open air excavation of certain classes of minerals and the latter is essentially an underground excavation, for the purpose of Minimum Wages Act—a quarry is included in a Mine. There is nothing in that Act to show that the word 'mine' should be given a narrower meaning so as to exclude stone quarries AIR 1968 SC 189 Foll. (Para 10)

(C) Minimum Wages Act (1948), Sections 3 and 5 (2) — Orissa State Government Notification under, dated 27-3-1963 fixing minimum rates of wages payable to employees in stone-breaking and stone-crushing operations in quarries in Orissa — Validity — Notification is intra vires — (Constitution of India, Article 253 — Delegation by President of function of Central Government)

Held that the impugned notification which was issued in supersession of the earlier notification D/- 27-3-1952 was intra vires the

powers of the Orissa Government under Section 3 read with S 5 (2) of the Act. In the context the operations carried on in quarries as mentioned in the impugned notification were intended to be operations carried on in mines as are situated in the State of Orissa. If the scheduled employment in stone-breaking and stone-crushing operations in relation to a mine was thus viewed, the appropriate Government for fixing the minimum wages under Section 5 (2) of the Act was the Central Government, and it was by virtue of the delegation made by the President of India under Article 258 of the Constitution (vide President's Notification No 2052 D/- 11-12-51) that the Government of Orissa had authority to issue the impugned notification dated March 27, 1963 (Para 11)

Cases Referred Chronological Paras
(1966) AIR 1966 SC 189 (V 53) =
1965-2 Lab LJ 157 = 1968 Cri
LJ 176, State of Maharashtra v.
Mohanlal Devichand Sah 10

S Mohanty and B C Swain, for Petitioner, Advocate-General, for Opp Parties.

BARMAN, G J. Bisra Limestone Company Limited—who is stated to carry on mining operations at Bisra in Sundargarh District involving drilling, blasting, collection of blasted materials by mechanical means breaking of boulders to separate limestone and dolomite mechanically and manually dumping and shovelling and other such operations stated to be incidental to mining—as the petitioner challenging the legality of the notification dated March 27, 1963 issued by the Government of Orissa Labour Department, purported to be in exercise of the powers conferred by Section 3 read with Section 5 (2) of the Minimum Wages Act, 1948 (Central Act No 11 of 1948) (hereinafter referred to as the Act) by which the Government of Orissa fixed the minimum wages at rates mentioned therein payable to the class of employees employed in stone-breaking and stone-crushing operations carried on by the petitioner in quarries situated in Orissa. The petitioner also challenges the show cause notices dated July 22 and July 23, 1964 issued by the Labour Inspector, Central Government, at Jharsuguda, and served on the petitioner as to why legal action should not be taken against the petitioner for alleged contraventions as noted therein, and for irregularities in that the persons specified therein were paid wages at rates less than the minimum rate of wages as fixed for their category by the said notification.

2 The impugned Orissa Government notification dated March 27, 1963 is quoted below—

Government of Orissa

Labour Department

NOTIFICATION

Dated Bhubaneswar, 27th March, 1963
No IW 17/63.3740/Lab In exercise of
the powers conferred by Section 3 read with

sub-section (2) of Section 5 of the Minimum Wages Act, 1948 (II of 1948) and in supersession of the Notification of the Government of Orissa, Labour Department No. 1175 Lab. dated the 27th March, 1952, the State Government do here-

by fix the minimum wages at the rates as specified in the Schedule below which shall be payable to the class of employees employed in stone-breaking and stone-crushing operations carried in quarries as are situated in the State of Orissa.

Schedule.

Employment in stone-breaking or stone-crushing.	Class of Employees.	Rates of wages per day.
1	2	3
(i) Districts of Cuttack, Puri, Balasore and Ganjam (excluding agency areas)	(i) Man (ii) Woman	Re. 1.00 Re. 0.75
(ii) Agency areas of Ganjam and the Districts of Mayurbhanj, Keonjhar, Dhenkanal, Sambalpur, Khondmals, Boudh, Kalahandi, Bolangir-Patna, Sundergarh and Koraput.	(i) Man (ii) Woman	Re. 0.75 Re. 0.50

By Order of the Governor

Sd.....

Joint Secretary to Government"

3. The main points urged on behalf of the petitioner are, in substance, these: The impugned notification dated March 27, 1963, issued by the Government of Orissa is ultra vires because employment in stone-breaking and stone-crushing operations carried on by the petitioner in quarries situated in Orissa, if it is purported to be included as a scheduled employment in relation to a mine, could not, under the law, be issued by the State Government. The State Government is not the "appropriate Government", as defined in Section 2 (b) of the Act, to issue the impugned notification in relation to any scheduled employment carried on in relation to a mine.

4. Section 3 of the Act in exercise of the powers whereof the State Government purports to have fixed the minimum wages by the impugned notification provides that the appropriate Government shall in the manner provided in Section 3 fix the minimum rates of wages payable to employees employed in an employment specified in Part I or Part II of the Schedule after following the procedure for fixing and revising the minimum wages in respect of any scheduled employment, in the manner as laid down in Section 5 (2).

5. The question is: Which Government—the Central Government or the State Government—has the power to fix or revise the minimum wages in respect of employees engaged in stone-breaking or stone-crushing operations carried on by the petitioner in

his business of mining operations in quarries as are situated in the State of Orissa?

6. Section 2 (b) of the Minimum Wages Act, 1948 provides that in the said Act unless there is something repugnant in the subject or context—

"appropriate Government" means

(i) in relation to any scheduled employment carried on by or under the authority of the Central Government, or a railway administration or in relation to a mine, oil-field or major port or any corporation established by a Central Act, the Central Government; and;

(ii) in relation to any other scheduled employment, the State Government."

Section 2 (g) provides

'scheduled employment' means an employment specified in the schedule, or any process or branch of work forming part of such employment".

Item 8 of Part I of the Schedule is

"employment in stone-breaking or stone-crushing".

7. It is clear that in matters of employment in stone-breaking or stone-crushing in relation to a mine, the appropriate Government is the Central Government; whereas in matters of employment in stone-breaking or stone-crushing otherwise than in relation to a mine, the appropriate Government is the State Government.

8. Under Article 253 of the Constitution the President of India by a notification, No. 2052 published on December 11, 1951, entrusted the Governments of certain States

including Orissa, with their consent, to function as the Central Government under the Minimum Wages Act in so far as such functions related to fixation of minimum rates of wages in respect of employees employed in stone-breaking or stone-crushing operations carried on in mines situated in their respective States

9 It was submitted on behalf of the opposite parties in support of the impugned notification dated March 27 1963 issued by the Government of Orissa in the Labour Department that the Orissa Government as so entrusted by the President of India, had fixed and notified the minimum rate of wages payable to employees employed in stone-breaking and stone-crushing operations carried on in mines situated in the State by notification No 1175 Lab dated March 27 1952, and subsequently revised the minimum rate of wages payable to employees employed in stone-breaking or stone-crushing operations carried on in quarries by Government of Orissa Labour Department Notification No IV 17/63 3740-Lab dated March 27 1963

10 It was contended on behalf of the petitioner that whereas the earlier notification dated March 27 1952 was in respect of employees employed in stone-breaking or stone-crushing operations carried in mines situated in Orissa, but in the impugned notification dated March 27 1963 the minimum wages fixed thereby were to be payable to "employees employed in stone-breaking or stone-crushing operations carried on in quarries situated in Orissa."

The petitioner's point is that there may be quarries not attached to mines the fundamental distinction being that while a quarry is an open air excavation of certain classes of minerals but mine is essentially an underground excavation thus a mine and a quarry are not the same. In our opinion while there may be some substance in this argument bereft or independently of the context, the well settled position in law is that a quarry is included in a mine as appears from the decision of the Supreme Court in State of Maharashtra v. Mohan Lal Devchand Sah 1965-2 Lab LJ 157 = (AIR 1966 SC 189) where it was held that the Central Legislature must have intended to include quarries in the word "mine" otherwise it would be rather incongruous that some matters should be regulated by the Central Government and minimum wages by the State Governments further there is no indication whatsoever in the Act that the word "mine" should be given narrower meaning so as to exclude stone quarries

11 That apart, in the context in which the impugned notification dated March 27 1963 was issued in supersession of the earlier notification dated March 27 1952, limited to the extent as provided in the notification, it is clear that the operations

carried on in quarries as mentioned in the impugned notification were intended to be operations carried on in mines as are situated in the State of Orissa. If the scheduled employment in stone-breaking and stone-crushing operations in relation to a mine is thus viewed, the appropriate Government for fixing the minimum wages under Section 5(2) of the Act is the Central Government, and it was by virtue of the delegation made by the President of India under Article 253 of the Constitution as aforesaid, that the Government of Orissa had authority to issue the impugned notification dated March 27 1963

12. In this view of the case the petitioner is not entitled to any relief as claimed. The writ petition is accordingly dismissed with costs. Hearing fee Rs. 100/ (one hundred only)

13 ACHARYA, J: I agree
KSB Petition dismissed.

AIR 1969 ORISSA 112 (V 56 C 40)

S ACHARYA J

Sribataha Barik, Petitioner v. Musamat Padma, Oppos to Party

Criminal Revn No 164 of 1968 D/ 23-8-1968 against order of Sub-divisional Magistrate Atmalkik, D/ 29-3-1968

Criminal P C (1898) S 488 — Neglect or refusal — Husband always ready to maintain wife and son if they resided with him — Wife however insisting husband to stay with her in her father's house — No other allegations such as cruelty ill treatment made — Maintenance for wife and son awarded — Alternatively husband directed to stay with wife in her parent's house and to maintain them according to the desire of wife — Award of maintenance to wife and alternative direction illegal — Son however entitled to maintenance — (Hindu Law — Maintenance)

Where a husband is always ready to maintain his wife and son if they resided with him but the wife insists that he should stay with her in her father's house and no allegations such as cruelty or ill treatment are made award of maintenance for the wife in the alternative directing the husband to stay with his wife in her parent's house and to maintain her according to her desire is illegal. The son however is entitled to maintenance (Paras 4 and 7)

In such a case, it cannot be said that the husband has neglected or refused to maintain the wife by not acceding to the insistence of the wife to stay with her in her parent's house. The award of maintenance for her and such alternative direction are illegal and contrary to public policy (1901) ILR 28 Cal 751 Foll.

(Paras 4 and 6)

The child, wherever he may be, has to be maintained by the father, so long he is incapable of maintaining himself and the father cannot refuse to maintain such a child on the ground that he is not living with him. The child is not deprived of his right to maintenance because his mother refuses to live with her husband or to give him in his father's custody. A mere offer by the father to maintain the child if he is left with him, will not disentitle the child to get maintenance from him. As such, the father is liable to maintain the child.

(Paras 7 and 8)

Cases Referred: Chronological Paras
(1901) ILR 28 Cal 751 = 5 Cal WN

573, Tekait Mon Mohini Jemadai v.

Basant Kumar Singh

5

S. C. Ghosh, U. N. Sahu and M. Hazra, for Petitioner; A. K. J. Mohapatra, for Opp. Party.

ORDER: This is a revision against an order passed by Sri D. Naik, Sub-divisional Magistrate, Athmallik in Case No. 13-M of 1967 ordering the petitioner to pay a sum of Rs. 40/- per month with effect from the date of the institution of the said case on 26-6-1967, towards the maintenance of his wife, the opposite party and his minor son, who are now living away from the petitioner. While passing this order, the Magistrate has further ordered that if the petitioner does not choose to pay the maintenance as aforesaid, he is to live in the house of his wife's parents and to maintain them according to the desire of his wife.

2. The petitioner's wife (the opposite party) filed the aforesaid case against her husband (the petitioner), on the allegation that she being the only daughter of her parents, her father, negotiated with the petitioner, and on getting his consent kept him as Ghar Jwain after performing their marriage. The petitioner lived with his wife in his father-in-law's house for a few years and thereafter, on two or three previous occasions, he left that place and went away to his own village on creating troubles and picking up quarrels with her and her parents. The petitioner has come back to his father-in-law's village with his widowed mother, but is living separately from his wife in his own house, and is not agreeable to stay with her in her father's house in spite of her repeated requests and the decisions of the village Panch. The opposite party as such is remaining in her father's house with her child four and half years old, and the petitioner, does not care to maintain her and her child.

3. The petitioner, on the other hand contended that he could not live in his father-in-law's house because of ill-treatment meted out to him there. He stated in his written statement that he was and is always ready and willing to maintain his wife, and his son if they would come over and live with him in his house, in the same village.

Instead of the wife and child coming to live with the petitioner, his wife, on the ill-advice of her father, is rather insistent upon him that he should come and live with her in her father's house.

4. The learned Magistrate in para 5, while concluding his findings states as follows:—

"It also appears that the O. P. (the husband) is actually willing to maintain the petitioner (the wife) and her son if the petitioner goes over to the house of the O. P. himself and lives there with him as husband and wife. But when the O. P. has married the petitioner on condition that he would live in the house of her parents and maintain her as well as her parents, it seems undesirable to compel her to live with the O. P. in his own house at present. Hence I find that O. P. is legally bound to maintain the petitioner by living with her in the house of her parents."

Finally while passing the order for maintenance of the wife and the child at the rate of Rs. 40/- per month, he passed an alternative order by saying.

".....or in the alternative to live in the house of the petitioner's parents and to maintain them according to the desire of the petitioner forthwith,"

The above finding underlined (here in ' ') by me and the order quoted above are untenable, illegal, and contrary to public policy. In a cause under S. 488 Criminal Procedure Code, the wife may get maintenance from her husband, if she can prove that her husband has sufficient means, and he has neglected or refused to maintain her. Under the first proviso to clause (3) of the said section it is provided that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. So, under this clause there is an expectation that the wife should ordinarily live with the husband, and if she refused to reside with him, the courts, before passing the order for maintenance, should enquire into and consider the reasons for her such refusal. It must be mentioned here that there is no allegation of habitual cruelty, torture, ill-treatment of the wife by the petitioner or that he has contracted marriage with another wife, or keeps a mistress. This case proceeded mostly on the basis that the petitioner should stay with the opposite party in her parent's house and maintain all of them there, because of an alleged pre-nuptial agreement between them.

5. Under the Hindu Law, as has been observed in the case of Tekait Mon Mohini Jemadai v. Basanta Kumar Singh reported in (1901) ILR 28 Cal 751.

"the duty imposed upon a Hindu wife to reside with her husband, wherever he may

choose to reside, is a rule of Hindu Law and not merely a moral duty.

An ante-nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her parental abode, would defeat the rule of Hindu Law, and is invalid on that ground, as well as on the ground that it is opposed to public policy." In the above decision the following few lines from Mayne's Hindu Law, have been quoted with approval.

"As soon as the wife is mature, her home is necessarily in her husband's house. He is bound to maintain her in it while she is willing to reside with him and to perform her duties. If she quits him of her own accord, either without cause or on account of such ordinary quarrels as are incidental to married life in general, she can set up no claim to a separate maintenance. Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there, or such continued ill-usage as would be termed cruelty in an English Matrimonial Court."

6. The fact in this case is that the petitioner is always ready and willing to maintain the opposite party and their son if they come and stay with him in his house constructed in the same village, but the wife, on the advice of her father, does not agree to the same and insists that the petitioner should come and stay with her in her father's house. This being so, it cannot be said that the husband, the petitioner has neglected or refused to maintain the wife by not acceding to the insistence of the wife for going and staying with her in her parent's house. Therefore, the impugned order is illegal in so far as it provides for maintenance for the wife in her father's house, and in the alternative ordering the petitioner to go and stay there with his wife.

7. The case of the child stands on a different footing. The child, wherever he may be, has to be maintained by the father, so long he is incapable of maintaining himself and the father cannot refuse to maintain such a child on the ground that he is not living with him. The child, as I find, is hardly 4 to 5 years old and is staying with the mother, which may not be due to his own choice, but because he is in the power and control of his mother. The child is not deprived of a right of maintenance, because his mother refused to go and live with her husband or to give him in his father's custody. A mere offer by the father to maintain the child if he is left with him, will not disentitle the child to get maintenance from him.

8. In view of the discussions made above, I will set aside the order of the court below granting maintenance for the wife and also the alternative order directing the petitioner to go and stay with his wife in her parent's house to maintain

them according to the desire of the petitioner. I would, however, order that the petitioner is liable to pay maintenance only for the child, who is, at present, with his mother. Accordingly it is ordered that Rs. 15/- per month will be paid by the petitioner to the opposite party only for the maintenance of their child with effect from the date of the order of the lower court, that is, from 29-3-1968 till he remains away from his father and is considered under the law incapable to maintain himself. The revision thus is partly allowed.

JRM/D.V.C. Petition partly allowed.

AIR 1969 ORISSA 114 (V 58 C 41)

G. K. MISRA, J.

Smt. Bela Dibya, Appellant v. Ramkishore Mohanty, Respondent.

Misc. Appeal No. 181 of 1968, D/- 23-8-1968 against order of Dist. J., Cuttack, D/- 30-6-1968.

(A) Transfer of Property Act (1882), S. 100 — Applicability — Charge created by decree passed after contest — Charge is by operation of law — S. 100 applies, (1963) 31 Cut LT 932, Foll. AIR 1963 SC 834, Expl. AIR 1968 Pat 238, Ref. (Para 4)

(B) Transfer of Property Act (1882), Ss. 100 and 52 — S. 52, if applicable to a case, controls second part of S. 100 — Maintenance decree creating charge on property — Auction purchaser purchasing such property for consideration and without notice of charge — Decree not satisfied — Auction hit by his pendens — Such property purchased by auction-purchaser put to sale — Auction-purchaser objecting under S. 47 Civil P. C. — Objection cannot be upheld — (Civil P. C. (1908), S. 47).

S. 52 of the Transfer of Property Act, if it is applicable to a case, controls the second part of S. 100. Where an auction-purchaser purchases a property for consideration and without notice of a charge created on such property by a maintenance decree and the decree is not satisfied, the auction is hit by his pendens and an objection under S. 47 Civil P. C. of such auction purchaser to the sale of such property when it is brought to sale again, cannot be upheld.

(Paras 6 and 7)

The second part of S. 100 is qualified by the expression, "save as otherwise expressly provided by any law for the time being in force". S. 52 is such a law and as such the second part of S. 100 is controlled by S. 52 provided it is applicable to the facts of the case. (Para 5)

The expression "right to immovable property" in S. 52 is not confined only to a right to the possession or title to or any interest in the property. It includes rights affecting

specific immovable property. The charge created by a maintenance decree affects the right to the immovable property. Hence in a suit for maintenance asking for a charge, a right to immovable property is directly and specifically in question. If the charged property is put to auction before the decree is satisfied, the auction will be hit by lis pendens and the property in the hands of the auction-purchaser will be liable for discharge of the maintenance decree. AIR 1945 Mad 126 and AIR 1943 Cal 227 and AIR 1951 All 141 (FB) and AIR 1951 Orissa 306, Foll.; AIR 1943 Oudh 354 (FB), Diss. from.

(Para 6)

The judgment-debtor or the auction-purchaser cannot deal with the property in any manner to adversely affect the rights of the maintenance-holder created by the charge. Thus, an objection under S. 47 Civil P. C. by such auction-purchaser to the sale of such property when it is brought to sale again, cannot be upheld.

(Para 7)

Cases Referred: Chronological Paras
(1968) AIR 1968 Pat 238 (V 55),

Shyam Narain v. Khub Lal Mahato 4

(1965) AIR 1965 SC 884 (V 52) =
(1965) 1 SCR 726, Laxmi Devi v. 4
Mukund Kunwar

(1965) 31 Cut LT 932, Diwan Chitra 4
Bhanu Singh v. Balmukund Singh

Rai 4
(1951) AIR 1951 All 141 (V 38) =
1951 All LJ 39 (FB), Mahesh Prasad 6
v. Mt. Mundar

(1951) AIR 1951 Orissa 306 (V 38) =
ILR (1949) 1 Cut 336, Tirthabasi 6
v. Trinayani Dasi

(1945) AIR 1945 Mad 126 (V 32) =
ILR (1945) Mad 726, Rajgopala 6
Chetty v. Kesava Pillai

(1943) AIR 1943 Cal 227 (V 30) =
76 Cal LJ 191, Hiranya Bhusan v. 6
Gouri Datta

(1943) AIR 1943 Oudh 354 (V 30) =
1943 Oudh WN 261 (FB), Abdul 6
Gaffar v. Ishtiaq Ali

B. K. Pal and N. C. Patnaik, for Appel-
lant; R. Ch. Mohanty, P. K. Patnaik, M.
Patra and H. Jena, for Respondent.

JUDGMENT: One Kashinath Tiadi had two sons, Hrudananda and Rama. Bela Dibya (decree-holder) is the widow of Rama. She brought Title Suit No. 234 of 1948 in the Court of the Munsif, Kendrapara, for maintenance against her husband's son as Rama died in joint status and the entire joint family property devolved upon Hrudananda's branch. The suit was decreed and a charge was created in her favour in respect of the disputed property and other properties (Lots 1 to 4). In Execution Case No. 127 of 1959 Lot No. 1 was put to auction sale for Rs. 87-55 paise. In the proclamation for sale the charge on Lot No. 1 was not mentioned. On 16-11-59 Rajkishore Mohanty (auction-purchaser-respondent) purchased lot No. 1 in auction sale for Rs. 200/-.

The decree-holder (appellant) withdrew her decretal dues with costs. The sale was confirmed on 23-12-59 and the sale certificate was issued on 22-1-60. Respondent took delivery of possession on 10-4-60. The decree-holder again started Execution Case No. 77/62 for Rs. 144/- and for costs against the previous judgment-debtors and the respondent. She advertised for sale all the lots of properties including lot No. 1. Respondent filed an objection u/s 47, C. P. C. on 13-4-63 in Misc. Case No. 81/63. On 6-9-63 lot No. 1 (the disputed property) was released from attachment and sale. Misc. Appeal No. 177/63 was filed by the decree-holder. The learned District Judge, Cuttack, dismissed it. Against the appellate order this miscellaneous appeal has been filed by the decree-holder.

2. Mr. Pal raised the following contentions:

(i) The maintenance decree in favour of the appellant was passed after contest and was not a compromise decree. The charge created by such a decree is not a charge either by act of parties or by operation of law, and Section 100, Transfer of Property Act (hereinafter referred to as the Act) has no application to such a decree. The charge is binding against the purchaser for value without notice; and

(ii) The charge created by the aforesaid contested decree is enforceable against the auction-purchaser even if he purchased the property without notice of the charge being mentioned in the sale proclamation. The auction sale is affected by the doctrine of lis pendens u/s 52 of the Act.

Both the contentions require careful examination.

3. The first question for consideration is whether the charge on lot No. 1 created under the maintenance decree passed on contest comes within the ambit of Section 100 of the Act. The section runs thus—

S. 100. Charges. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any person in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

4. There is conflict of authority as to whether a charge created by a decree on contest comes within the purview of sec-

tion 100 of the Act. The latest decision in support of Mr Pals contention is AIR 1968 Pat 238, Shyam Narain v Khublal Mahto. In (1965) 81 Cut LT 932 Diwan Chitra Bhanu Singh Rai v Balmukund Singh Rai, this Court held that the charge created by a decree of Court even after contest was by operation of law and would come within section 100 of the Act (Para 8). In AIR 1965 SC 834, Laxmi Devi v Mukund Kunwar a charge was created initially by a document and ultimately by a maintenance decree over certain properties (para 2). There it was the common ground that respondent No 1 could claim to be a chargeholder as defined by Section 100 of the Act (para 11). As the charge originated in a document by act of parties, the case proceeded on the concession of both parties that section 100 was applicable to the case. The Supreme Court case did not resolve the conflict. I am bound by (1965) 81 Cut LT 932 and hold that section 100 has application to a decree passed on contest also.

5 After a thorough discussion their Lordships held in the aforesaid Supreme Court decision that the latter part of section 100 should be deemed to include auction sales (para 16). The next question for consideration is whether the second part of Section 100 is controlled by Section 52 of the Act. This part of the section lays down that the charge shall not be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. This provision is, however, qualified by the expression "save as otherwise expressly provided by any law for the time being in force." Section 52 of the Act is such a law and, as such, second part of section 100 is controlled by Section 52 of the Act, provided it is applicable to the facts of the case.

6 Section 52 runs thus—

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable

by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

By virtue of the Explanation, the suit would be deemed to be pending until there is complete satisfaction or discharge of the decree. The crucial question for consideration, however, is whether in the suit for maintenance filed by the appellant where the decree created the charge any right to immoveable property was directly and specifically in question. On this point there is conflict of authority. The expression "right to immoveable property" is not confined only to a right to the possession or title to or any interest in the property. It includes right affecting specific immoveable property. The charge created by the decree affects right to the immoveable property. Hence in a suit for maintenance asking for a charge, a right to immoveable property is directly and specifically in question. If the charged property is put to auction sale before the decree is satisfied, the auction sale would be hit by *lis pendens* and the property in the hands of the auction purchaser would be liable for the discharge of the maintenance decree.

I am clearly of opinion that second part of Section 100 is subject to Section 52 of the Act. *Ragopala Chetty v Kesava Pillai*, AIR 1945 Mad 128, *Hiranya Bhusan v Goun Dutt*, AIR 1943 Cal 227, *Mahesh Prasad v Mt. Mundar*, AIR 1951 All 141 (FB) and *Trithabasi v Trinayam Das*, AIR 1951 Orissa 308 support the aforesaid view. The contrary view on this point expressed in *Abdul Ghaffar v Isbhaq Ali*, AIR 1943 Oudh 354 (FB) does not represent the correct law.

7. Applying the aforesaid test to the facts of this case, it is clear that the auction-purchaser purchased the property for consideration and without notice of the charge. As the decree had not been satisfied, the auction sale of the disputed property is hit by *lis pendens*. The judgment-debtor or the auction purchaser cannot deal with the property in any manner to adversely affect the rights of the maintenance-holder created by the charge. The objection of the auction-purchaser under S 47 cannot be upheld.

8. In the result, the judgments of the Courts below are set aside and the appeal is allowed. In the circumstances, parties to bear their own costs throughout.

JRM/D.V. G.

Appeal allowed.

AIR 1969 ORISSA 116 (V 56 C 42)

S BARMAN, C J

Rameswarlal, Petitioner v. Panchu Sahu and another, Opp Parties

Civil Revn. No 381 of 1965 D/- 13-9-1968 against order of Munsif, Khurda, D/- 16-12-1965

JL/LL/E954/68

Civil P. C. (1908), Order 1, Rule 10 (2) and Section 115 — Rent suit — Third party claiming to be owner of property in question — Such party seeking to be impleaded — Title suit of such party in respect of same property pending — Addition of such party wrong and material irregularity.

Where a third party seeks to be impleaded in a rent suit claiming to be the owner of the property in question but a title suit filed by him in respect of the same property is pending his addition is wrong and is a material irregularity. (Para 3)

It is not that under no circumstances that such addition should be made. The result of the title suit must be awaited in such a case and then such an application filed by him should be decided. The addition of such a party is thus wrong and a material irregularity. (Para 4)

R. N. Misra and R. C. Patnaik, for Petitioner; Mrs. A. K. Padhi, for Opp. Parties.

ORDER: The plaintiff is the petitioner in revision against an order of the learned Munsif, Khurda, by which he allowed the application of a third party being Opposite Party No. 2 Gagan Behari Patnaik for being impleaded as a defendant in a rent suit.

2. This revision arises out of a suit filed by the plaintiff for recovery of rent from the defendant-opposite party No. 1 Panchu Sahu. Before the written statement was filed by the defendant-opposite party No. 1 Panchu Sahu, the opposite party No. 2 Gagan Behari Patnaik made an application to be impleaded as a party claiming that he is the owner of the suit property in respect of which the plaintiff had filed the suit for recovery of rent from opposite party No. 1 Panchu Sahu.

3. The question is: Can this simple suit for rent be converted into a suit for title by adding Opposite Party No. 2 Gagan Behari Patnaik? It is not that under no circumstances such application should be allowed. In the present case, opposite party No. 2 Gagan Behari Patnaik himself had already filed a title suit being O. S. No. 86/60 before the Munsif, Khurda, claiming that he is the real owner of the disputed property. It is not understandable why the learned Munsif allowed the application of opposite party No. 2 Gagan Behari Patnaik to be impleaded as a party in this suit for rent when the said title suit filed by him was already pending. What the learned Munsif should have done is to wait for the result in the said title suit and then give his decision on the said application for being impleaded as a party. Apparently, the attention of the learned Munsif was not drawn to this aspect of the matter. In any event, it is a material irregularity which vitiates the impugned order.

4. In this view of the case, the impugned order of the learned Munsif dated December 16, 1965 by which he allowed the ap-

plication of opposite party No. 2 Gagan Behari Patnaik for being impleaded as a defendant in the rent suit is set aside. The learned Munsif is directed to keep the application pending until the title suit O. S. No. 86/60 is disposed of.

5. In the result, the civil revision is allowed with the directions as aforesaid. There will be no order as to costs.

JRM/D.V.C.

Petition allowed.

AIR 1969 ORISSA 117 (V 56 C 43)

S. BARMAN, C. J. AND A. MISRA, J.

Sarat Chandra Biswal and another, Petitioners v. Surendra Mohanty, Editor "Kalinga" and others, Opposite Parties.

Original Criminal Misc. Cases Nos. 3 and 4 of 1968, D/- 7-8-1968.

(A) Constitution of India, Article 226 — Bias — Contempt proceeding — Alleged contempt by scandalising Chief Justice and another Judges of High Court — Bench hearing proceeding consisting of Chief Justice himself — Contempt of Courts Act (1952), Section 5.

A "Representation petition" was filed by party in pending writ petition, containing matters scandalizing High Court, its Judges and the Chief Justice in particular. As the High Court consisted only of four judges including the Chief Justice the Writ petition was actually heard and judgment reserved by two judges of High Court who both were specifically mentioned in "representation petition". Contempt proceeding out of representation petition for scandalising the judges including the Chief Justice was posted before Chief Justice and another judge. Objection was taken to the constitution of Bench on ground that contempt alleged was against the Chief Justice himself.

Held that it was obviously impossible to associate the two judges who had heard the writ petition with the hearing of the contempt case and the only other alternative left was for the remaining two judges, including the Chief Justice to hear them. There was also another reason which weighed with the Chief Justice to be on Bench for hearing contempt case. It was that he alone had the best knowledge of all the facts of the incident out of which these proceedings arose and was in the best position to clarify matters. There were thus special reasons which called for the Chief Justice being on this Bench. No objection could be taken to the constitution of the Bench. AIR 1954 SC 186 (190) and AIR 1942 Lah 105, Rel. on; AIR 1918 Cal 988 (SB) and AIR 1929 Pat 72 (FB) and AIR 1918 Cal 713, Ref. (Paras 21, 22, 24)

(B) Contempt of Courts Act (1952), Section 3 — Practice — Derogatory remarks

[L/AM/E965/68

against certain actions and remarks by Chief Justice in a speech on flag-hoisting ceremony in High Court — Contempt proceedings arising out of such remarks for scandalising Chief Justice — Chief Justice himself member of Bench bearing contempt proceedings—Matters being within knowledge of the Chief Justice, the reasons why the Chief Justice took particular course of action during flag hoisting ceremony have to be stated in the judgment itself in the contempt proceedings. AIR 1942 Lah 105 Ref (Para 28)

(C) Contempt of Courts Act (1952) Section 1 — Writ petition against ministry pending decision — Speech by Chief Justice on flag hoisting day appreciating co-operation of Chief Minister in getting High Court Tower built — Petition before High Court protesting against speech and making derogatory remarks against High Court Judges — Petition held scandalised judges, and tended to interfere with due course of law — Actual interference need not be established.

Writ petition was filed against the Chief Minister and others to quash the orders of the ministry constituting enquiry committee to enquire into the conduct and deeds of the ex ministry Counter was filed by Chief Minister. The Bench reserved the judgment. Meanwhile during flag hoisting ceremony in High Court on Republic Day the Chief Justice in his speech appreciated the co-operation of the Chief Minister in getting a tower in the High Court erected. A "Representation petition" was filed in High Court by a party to the writ petition and some persons and signed by Advocates making allegations that the special treatment meted out to the Chief Minister during the flag hoisting ceremony by the Chief Justice, was likely to influence the decision in the pending writ petition. The Representation petition also contained certain statements against the Chief Justice and the High Court Judges.

Held that the derogatory statements against the High Court in general and the Chief Justice in particular scandalised or had the tendency to scandalise the High Court and the Honourable Judges constituting the same, undermining its dignity in the estimation of the public and impeaching its impartiality in the dispensation of justice. The offending passages were of such character and import or made in such circumstances as would tend to hinder or obstruct or interfere with the due course of administration of justice by the Court, and amounted to contempt of Court. The Representation petition containing offending passages was written by the petitioner in writ petition himself which petition was pending for judgment. Plea of justification was not tenable.

It was not necessary that there should have been in fact an actual interference with the course of administration of justice, but it was enough if the offending publica-

tion was likely or if it tended in any way to interfere with the proper administration of law. Such insinuations as were implicit in passages in question were derogatory to the dignity of the Court and were calculated to undermine the confidence of the people in the integrity of the Judges.

Whether the passage was read as fulsome flattery of the Judges or was read as containing insinuations or the rest which contained an attack on a party in the pending proceedings was taken separately it was equally contemptuous of the court in that the object of writing it and the time and place of its publication were, or were calculated, to deflect the Court from performing its strict duty either by flattery or by a veiled threat or warning or by creating prejudice in its mind against a party to the proceedings. A mere ventilation of grievance was not the sole or even the main object with which these offending paragraphs were written or with which the representation petition was filed at the time when the judgment in the pending writ petitions was reserved. AIR 1954 SC 10 and AIR 1954 SC 743 Rel. on.

(Paras 30 31, 35 38 39)
Offending passages were by way of sinister move—a hidden threat—to blackmail the High Court and its judges with reference to a particular proceeding pending decision in the court, all with an ulterior motive as so obvious. The object of writing these offending paragraphs and particularly of filing the representation petition in the High Court at the time it was actually done was quite clearly to influence or affect the minds of the judges and to deflect them from the strict performance of their duties the offending paragraphs and the time and place of their publication certainly tended to hinder or obstruct the due administration of justice the court and its judges were scandalised with a view to diverting the due course of justice. This clearly amounted to contempt of this Court. (Para 39)

(D) Contempt of Courts Act (1952), Sections 3 and 5 — Power of committal for contempt of court when to be exercised.

The power of committal for contempt must be wielded with the greatest of care and caution, should be exercised with the greatest of reluctance and the greatest of anxiety and only with the object of seeing that the dignity and authority of the Court be not impaired. Courts in India derive their authority from the Constitution which the people of this country have themselves adopted and given unto themselves and hold it in trust for the security and benefit of the people. The power that the Judges are called upon to exercise is, but the authority of the people themselves, vested by the Constitution in law courts. Contempts against law courts are insults to the authority of the people and their Constitution and not to their agents the judges. Wherever

there is substantial exhibition of such contumacious conduct towards law courts, judges must uphold the Constitution and the majesty of the courts. The extreme proposition that judges can never be influenced or embarrassed by extraneous publication is not correct. A prejudicial publication concerning a pending proceeding may amount to contempt and is a risky business; but the trained mind of the Judge is likely to ignore extraneous matters and may not be embarrassed or influenced by each and every prejudicial publication. If, however, the publication be so grossly improper that it embarrasses the judge, then it may be treated as contumacious and dealt with accordingly.

(Para 36)

(E) Contempt of Courts Act (1952), Sections 3, 4 — Representation petition containing passages constituting contempt of court by scandalising the High Court and the judges with a view to diverting due course of justice — Advocates signing the petition, asserting that it was their duty as Advocates to place their client's cause fearlessly before the Court, relying on Rule 15 of rules framed under Section 49 (c) Advocates Act, 1941 — Held that Rule 15 envisages that Advocate shall fearlessly uphold the lawful interest of his client, befitting his status as an officer of court — Rule 15 is subject to the Preamble of the rules and Rules 3 and 4 which state that he shall not influence decision of court by illegal or improper means and that he shall use his best efforts to restrain and prevent his client from resorting to sharp or unfair practice and that he shall not be a mere mouthpiece of his client — Rules do not alter the position of an Advocate who is primarily an officer of the Court which cannot override his duty to client — The conduct of the Advocates signing the petitioner amounted to contempt of Court — AIR 1955 SC 19, Ref. Advocates Act (1961) Section 49 (c), Rules under, Preamble Rules 15, 3, 4.

(Paras 42, 44)

(F) Contempt of Courts Act (1952), Section 1 — Position of journalists in matter of contempt of court explained.

Journalists have the fundamental right to carry on their occupation guaranteed to them under Article 19 (1) (g) of the Constitution and the right to freedom of speech and expression guaranteed under Art. 19 (1) (a) includes the right to publish, as journalists, all proceedings which they have witnessed and heard.

The Court accepted the submissions made on behalf of the Editor and the Printer and Publisher of the newspaper that what they did was intended to be nothing more than to give as news an impartial and verbatim report of the petition filed in court and which contained matters amounting to contempt of Court.

(Para 51)

(G) Contempt of Courts Act (1952), Section 4 — Petition containing matters amount-

ing to contempt of Court signed by senior advocate who was former Advocate General — Action wrongly justified on ground of duty towards client — Forgiveness asked for — Advocate directed to pay fine of Rs. 100 — Petitioner's plea that it was the result of misunderstanding and asking for forgiveness — Petitioner sentenced to fine of Rs. 300

Another Advocate, fairly senior in practice, who had signed petition, and asserted that he had no reason to regret his engagement in the cause, issued a strong admonition and warning — Proceedings dropped against another advocate of two years standing and who acted as junior.

(Para 58)

(H) Contempt of Courts Act (1952), Sections 1, 5 — Rule for contempt, issue of — Contents.

Per A. Misra, J.—A notice or rule for contempt of Court must set out precisely and in detail the deeds or words which are said to constitute contempt, the obvious reason being that unless such details or the charges are furnished, the alleged contemner will be placed in a definite disadvantage as he will not be in a position to know the actual charge which he is to answer or explain. AIR 1958 Cal 474, Ref.

(Para 67)

(I) Contempt of Courts Act (1952), Section 3 — Remarks against Chief Justice as administrative head, as bringing administration of justice into disrepute — When contempt — Tests indicated.

Per A. Misra, J.:— Generally speaking, any act or deed which brings or tends to bring the authority and administration of the law into disrespect or disregard or interferes with the administration of justice or prejudices parties, litigants or the witnesses during litigation amounts to contempt of Court. The proper test is what impression an ordinary and average reader will obtain by reading the statements. When the statements in no uncertain terms express that the public have lost confidence in the Court in administration of justice and a litigant against the State cannot get his legitimate grievance redressed, it is difficult to construe that they amount only to a criticism against the Chief Justice in his role as a leading personality or as Head of the administrative side of the judicial machinery. Such statements have clearly a tendency to bring the authority of the administration of the highest seat of justice in the State to disrepute and shake the confidence of the public in the administration of justice.

(Para 69)

(J) Contempt of Courts Act (1952), Section 4 — Apology and justification cannot go together.

The Court has power to pardon on sincere and contrite apology tendered unconditionally, but in such a case, there cannot be both justification and apology. To seek to justify an act and at the same time seek forgiveness can be nothing short of incongruous and a party cannot be allowed to

blow hot and cold at the same time

(Para 70)

- Cases Referred. Chronological**
 (1958) AIR 1953 Cal 474 (V 45) =
 1958 Cri LJ 1162, Dulal Chandra
 Bhar v Sukumar Banerjee 67
 (1955) AIR 1955 SC 19 (V 42) =
 1955 Cri LJ 133 M Y Shareef v
 Judges of Nagpur High Court 43
 (1954) AIR 1954 SC 10 (V 41) =
 1954 Cri LJ 238 Brahma Prakash
 v State of U P 65
 (1954) AIR 1954 SC 186 (V 41) =
 1954 Cri LJ 460 Sukh Dev Singh
 v Justice S Teja Singh and Judges
 of Pepsu High Court at Patiala 19
 (1954) AIR 1954 SC 743 (V 41) =
 1955 SCR 677, Hiralal v State of
 U P 65
 (1942) AIR 1942 Lah 105 (V 29) =
 43 Cri LJ 599 (FB) In re, K. L.
 Gauba 23
 (1936) AIR 1936 PC 141 (V 23) =
 1936 All LJ 671 Ambard v Attorney
 General for Trinidad and Tobago 51
 (1929) AIR 1929 Pat 72 (V 16) =
 ILR 8 Pat 323 (FB) In re, Murlil
 Manohar Prasad 23
 (1918) AIR 1918 Cal 713 (V 5) =
 44 Ind Cas 930 = 19 Cri LJ 402,
 In re, William Taylor 23
 (1918) AIR 1918 Cal 988 (V 5) =
 ILR 45 Cal 169 = 19 Cri LJ 530
 (SB) In re, Motilal Ghosh 23

Ori. Cr Misc. Case No 3 of 1968
 B K. Behura, D Bhuyan and J Das for
 Petitioner A. S. R. Chari, K. C. J. Roy
 G B Mohanty and A. Mukherjee, for Opp
 Parties

Ori. Cr Misc Case No 4 of 1968
 Advocate General, for Petitioner A. S. R.
 Chari, K. C. J. Roy G N Mohanty A.
 Mukherjee, Govind Das and B R, G K.
 Achari, for Opp Parties

BARMAN, C. J. Original Criminal Miscel
 laneous Case No 4 of 1968 of alleged con
 tempt arises out of a petition of an unusual
 nature described as a "representation peti
 tion"—without mention of opposite party and
 without any specific prayer against anybody
 —filed by Sri Santosh Kumar Sahu, a party
 in a pending writ petition (O J C No 418
 of 1967) in this High Court, alleged to con
 tain matters purporting to scandalise the
 Orissa High Court, its Judges and the Chief
 Justice in particular and Original Criminal
 Miscellaneous Case No 3 of 1968 arises out
 of the publication of certain news items and
 editorial in the Orissa daily 'Kalanga' of
 Cuttack—all in connection with the ceremony
 of the First Flag Hoisting over the newly
 constructed Tower over the Orissa High
 Court on the last Republic Day January 26,
 1968

2. In Original Criminal Miscellaneous
Case No. 4 of 1968 the opposite
 parties against whom notices were issued

by this Court were Sri Santosh Kumar Sahu
 of the Congress Party, a former Deputy
 Minister in the previous Government and Sri
 Dinabandhu Sahu, Sri Raghunath Das and
 Sri S F Ahmad, Advocates of this High
 Court. In Original Criminal Miscellaneous
 Case No 3 of 1968, the opposite parties or
 whom notices for alleged contempt were
 issued, were Sri Surendra Mohanty Editor
 of the 'Kalanga' and Sri Bankim Chandra
 Das Printer and Publisher of the 'Kalanga'.
 Sri Santosh Kumar Sahu was also made a
 party in the said case. The background in
 which notices for contempt were issued
 against the opposite parties are, shortly
 stated, as follows

A. Genesis Background.

8 In October 1967, a Commission of
 Enquiry was appointed by the present Orissa
 Swatantra Jana Congress Coalition Govern
 ment to enquire into the conduct and ac
 tions of 15 persons who were members of
 the various Ministries from 1961 to 1966
 including Sri Santosh Kumar Sahu. Writ
 petitions were filed by some of the aggrrieved
 Ministers of the Congress Party—whose con
 duct and actions were to be investigated—
 including Sri P V Jagannatha Rao Sri Buren
 Mitra and Sri Santosh Kumar Sahu, chal
 lenging the validity of the Notification ap
 pointing the Commission of Inquiry set up
 by the Orissa Government. The first of
 these writ petitions O J C No 396 of
 1967 was filed by Sri Jagannath Rao a
 former Minister of the Congress Party on
 November 13 1967 O J C No 403 of
 1967 was filed by Sri Buren Mitra, a former
 Chief Minister of the Congress Party on
 November 22, 1967 and lastly O J C
 No 418 of 1967 was filed by Sri Santosh
 Kumar Sahu, a former Deputy Minister of
 the previous Congress Government, on
 December 1 1967

The State of Orissa, Secretary Home
 Department, Justice Sri H R. Khanna, the
 Commission of Inquiry, and Sri R. N Singh
 Deo Chief Minister of Orissa, were opposite
 parties 1 to 4 respectively in all the writ
 petitions. In the last of these writ petitions
 O J C No 418 of 1967, five more opposite
 parties are stated to have been impleaded,
 namely Dr H K. Mahtab Sri Mahakrishna
 Chowdhury Sri Pabitra Mohan Pradhan, Sri
 Santanu Kumar Das and Sri Surendra Nath
 Patnaik. It is said that Dr H. K. Mahtab
 leader of the Jana Congress Party and Sri
 R N Singh Deo now Chief Minister of
 Orissa and leader of the Swatantra Party
 filed affidavits purporting to be in support
 of the appointment of the Commission of
 Inquiry against the various members of the
 previous Government. It is apparent that,
 as usual, when there was serious tussle be
 tween two rival political parties they criti
 cised each other and from their respective
 angle of approach mutual criticism is under
 standable.

4. On November 13, 1967, when the earliest of these writ petitions O. J. C. No. 896 of 1967 was filed and listed for admission on November 14, 1967, the only available Division Bench which could take up this matter was the Division Bench consisting of Mr. Justice G. K. Misra and Mr. Justice S. K. Ray, as the Chief Justice was on that day away on tour in connection with the extension of the scheme of separation of the judiciary from the Executive in Boudh-Phulbani District. The said writ petition after being heard on November 14 and November 15 on the question of admission was admitted by the same Bench on November 20, 1967. Two days later, on November 22, 1967 O. J. C. No. 408 of 1967 involving the same point was filed before this Court and that was also admitted by the Division Bench consisting of Mr. Justice G. K. Misra and Mr. Justice S. K. Ray on November 23, 1967 fixing January 2, 1968 for hearing. The third writ petition O. J. C. No. 418 of 1967 by Shri Santosh Kumar Sahu which also involved the same point was filed before a Division Bench consisting of the Chief Justice and Mr. Justice Ray on December 1, 1967; but as the two other petitions involving the same point had already been admitted by the other Bench, it was considered proper that this writ petition should also be heard by that Bench. The Division Bench consisting of Chief Justice and Mr. Justice Ray accordingly admitted the writ petition on December 4, 1967 and directed it to be heard along with O. J. C. No. 396 of 1967. It was thus that eventually all the three writ petitions were heard by the Division Bench consisting of Mr. Justice G. K. Misra and Mr. Justice S. K. Ray from January 9, 1968 to January 17, 1968 and judgment was reserved.

5. It was in this background — while the said writ petitions were pending decision before this Court—that on the Republic Day [January 26, 1968, there was a function in the High Court premises to celebrate the First Flag-Hoisting over the newly constructed Tower over the High Court.

In that function the Governor, the Chief Minister, the members of the High Court Bar and some leading public men who had, in the past, some connection with the inauguration of the Orissa High Court in 1948, including Dr. H. K. Mahtab (who was Chief Minister of Orissa at the time of inauguration of the High Court in 1948), Sri Nitya nanda Kanungo at present Governor of Bihar (who was then the Law Minister of Orissa at the time of the creation of the Orissa High Court), Dr. K. N. Katju and Sri Y. N. Sukhtankar former Governors of Orissa and many others, both official and non-official, irrespective of their party alignments or political views, were invited to participate in the function and also to Lunch thereafter —all in the High Court premises. Among the invitees, the Governor Dr. A. N. Khosla,

the Chief Minister Sri R. N. Singh Deo, the Health Minister Sri Ramseshaiah, and Dr. H. K. Mahtab, the entire High Court Bar, many public men and high officials of the State attended the function.

Among those who could not attend the function Sri Nityananda Kanungo and Sri Y. N. Sukhtankar, ex-Governor of Orissa, Sri Asoke Sen Ex-Union Law Minister and Sri Nanda Kishore Misra, Speaker of the Orissa Legislative Assembly and many others sent messages of good wishes on this happy occasion of the First Flag-Hoisting over the newly constructed High Court Tower.

6. The programme of the function shows that after the arrival of the Governor he was received by the Chief Justice and there were speeches first by the Chief Justice, then by the Chief Minister and finally by the Governor. Thereafter the guests moved to the lawn to witness the flag hoisting over the Tower, and the function ended with the playing of the National Anthem at 11.30 a. m. Thereafter there was Lunch in the High Court premises in which all the invitees, who attended, participated.

7. Everything went on well and it is said to have been a successful function. Visitors and invitees, including the Governor, the Chief Minister, the leading public personalities including Dr. H. K. Mahtab went over the grounds of the High Court premises to see the new Bar Wing, the Fountain, the Tower and its pinnacles from various angles, the new Conference Hall, the new Court halls and chambers, the Judges' Library and the new Administrative Block on the ground floor. The set up was appreciated by every one and it was a day of rejoicing for all.

8. On January 28, 1968 the Oriya daily "Kalinga" in its issue of the same date published a news item, stated to have been reported by its special correspondent, to the effect that though the Governor had been invited officially, the presence of the Chief Minister Sri Singh Deo and the Jana Congress leader Sri Mahtab, among the special invitees, invited strong criticism among the visitors. This report was later on followed up by an editorial (dated January 31, 1968) commenting in figurative language on the working of the newly constructed Fountain in the High Court premises as I shall discuss hereafter.

9. On January 30, 1968 Sri Santosh Kumar Sahu filed the "representation petition"—out of which Orgl. Cri. Misc. case No. 4 of 1968 arises — alleged to contain derogatory statements against the Orissa High Court in general, its Judges and the Chief Justice in particular, scandalising or having a tendency to scandalise the High Court and its Judges and undermining its dignity in the estimation of the public by reference to what took place at the First Flag-Hoisting function in the High Court premises on

January 28 1968 The said petition was not only signed by Sri Santosh Kumar Sahu but was also signed and presented by Sri Dinabandhu Sahu as the Advocate appearing for him. The petition was also presented by Sri Raginnath Das and Sri S F Ahmad as Advocates. All the three said Advocates had signed the Vakalatnama for Sri Santosh Kumar Sahu.

10 On February 1, 1968 the "Kalinga" published another news item, purporting to have been reported by its special correspondent in which it was stated that Sri Santosh Kumar Sahu has filed the said petition in the High Court with the newspaper's comments thereon.

11 On February 2, 1968 Sri Sarat Chandra Biswal filed an application purporting to be a proceeding under Sections 4 and 5 of the Contempt of Courts Act, 1952 against the Editor and the Printer and Publisher of the Kalinga, Sri Santosh Kumar Sahu was also made a party in the case in the said petition it was stated that the impugned publications in the "Kalinga" dated January 28 1968 January 31 1968 and February 1 1968 as aforesaid had the tendency to malign the highest Judiciary of the State of Orissa and to bring the administration of justice into contempt and further that the publications were unfair, malicious and motivated and had been deliberately published with a view to tarnish the reputation of the Orissa High Court. This case was registered as Orgl. Crl. Misc. Case No 3 of 1968.

12 On February 9 1968 this Court while summarily dismissing the said representation petition dated January 30 1968 filed by Sri Santosh Kumar Sahu passed an order calling upon him to show cause by February 15 1968 why he should not be committed for contempt of court for filing such a petition. By the same order the Court also called upon Sri Dinabandhu Sahu, Sri Raginnath Das and Sri S F Ahmad to show cause by February 15 1968 why they should not be committed for contempt of court for signing and presenting the said petition containing matters scandalising the Orissa High Court with a view to perverting the course of justice by making statements in the petition impeaching the impartiality of the Court and imputing improper motives to the Judges. This contempt case against Sri Santosh Kumar Sahu and his three Advocates was registered as Orgl. Crl. Misc. Case No 4 of 1968.

On the same day (February 9 1968) this Court also passed an order in the said Orgl. Crl. Misc. Case No 3 of 1968 filed by Sri Sarat Chandra Biswal and directed the issue of notice on Sri Surendra Mohanty, Editor of "Kalinga" and Sri Bankim Chandra Das, Printer and Publisher of "Kalinga" and also on Sri Santosh Kumar Sahu to show cause by February 15 1968 why they should not be committed for contempt of Court.

13. In due course, affidavits were filed by the respective opposite parties purporting to show cause in reply to the notices. The explanations of the opposite parties namely Sri Santosh Kumar Sahu, his three Advocates and the Editor Printer and Publisher of the "Kalinga", in substance, are as hereinafter stated.

14. The explanation of Sri Santosh Kumar Sahu is to the effect that the petition filed by him on January 30 1968 was a "representation petition" with regard to some of the events referred to therein which—as explained by the Chief Justice himself in open court when Sri Dinabandhu Sahu placed his explanation—were unintentional and just happened in the course of the events. In his affidavit Sri Santosh Kumar Sahu stated that people outside should know the course of events for removal of doubts and fears in their mind, that the petition was all due to certain misapprehensions which were explained by the Chief Justice in open court and his observations in court allayed such fears from the minds of the people present in Court. It was submitted that it was all due to a misunderstanding of the whole situation as explained in the affidavit and in the course of arguments on his behalf.

15 The explanation of Sri Santosh Kumar Sahu was supported by his three Advocates who had signed and presented the "representation petition" dated January 30 1968. The three Advocates in their affidavit explained that the petition signed, presented and filed by them in Court purported to be an act in furtherance of their duty as Advocates fearlessly to uphold the interests of their client by all fair and honourable means regardless of unpleasant consequences to themselves. In support of this stand they relied on Rule 15 framed under Sec. 49 (c) of the Advocates Act, 1961.

16 The explanation on behalf of the newspaper "Kalinga"—The Editor Printer and Publisher against whom notices were issued to show cause—on its publication, two news items and the editorials, was in substance to the effect that the news reports were mere statements of fact about things said or done in and about the High Court function which was of public importance—criticism was all due to some misunderstanding of the situation arising out of the presence of Dr H. K. Mahtab at the function if from the very beginning the correct position was known—as it was subsequently clarified by the Chief Justice in Court on February 15 1968 to the effect that he had never intended to confer any such alleged undue special distinction on Dr Mahtab as alleged—there would have been no scope for such misunderstandings and comments on that august assembly of legal luminaries and others present at the function.

As regards the editorial in the "Kalinga" with reference to the newly constructed Fountain in the High Court lawn, it was submitted that the metaphor used therein and the good humour underlying the spirit of the editorial did not receive the appreciation they deserved; and that the metaphor was not meant to make a mockery of the Fountain as unfortunately misunderstood; they fail to see how such a metaphor used in the editorial was taken serious note of and was considered a ridicule; in fact the comment about the Fountain was not criticism but a well meaning homily and there was nothing to feel offended about it.

B. Constitution of the Bench hearing these Cases:

17. A preliminary objection was taken on behalf of the opposite parties regarding the constitution of the Bench to hear these two cases in that according to them the Chief Justice's (referring to myself) speech and actions during the said function of First Flag-Hoisting over the High Court Tower were the subject matter of criticism and that as the "representation petition" dated January 30, 1968 filed by Sri Santosh Kumar Sahu and the publications in the "Kalinga" cast reflections on the said speech and actions of the Chief Justice he should not be a member of the Bench to hear these two cases.

18. In fact, in the course of arguments an application was filed on March 20, 1968 by the learned counsel for the contemnors making a prayer to nominate another Hon'ble Judge of the High Court in place of the Chief Justice to hear these cases. By way of a reply to the said application, another petition for rejection of the petition of transfer of the cases to any other Bench was filed by on March 21, 1968 by the learned Advocate General on behalf of the State and affirmed by an affidavit of the Joint Registrar of the High Court. In reply to this latter petition the representationist Sri Santosh Kumar Sahu filed on March 22, 1968 an affidavit in rejoinder in which he submitted that the affidavit affirmed by the Joint Registrar should be rejected and be not taken on record on the grounds mentioned therein. We rejected the said petition of the learned Advocate General filed on behalf of the State affirmed by the Joint Registrar which we totally ignored.

Mr. A. S. R. Chari, learned counsel appearing for the contemnors, was then specifically asked by us in Court whether he proposed to move his petition as a petition for transfer of the two cases from this Bench so that an appropriate order could be passed. In reply, the learned counsel categorically stated that he did not intend, his petition to be one for transfer of the cases from this Bench and his whole object was only to bring certain facts to the notice of the Court. After lengthy arguments addressed on the preliminary objection, we over-ruled

it after careful consideration of all aspects of the question as discussed hereunder.

19. The legal position—on the basis of which it was decided that the Chief Justice should be in the Bench to hear these two cases—is clearly laid down by their Lordships of the Supreme Court in *Sukh Dev Singh v. Hon'ble Chief Justice S. Teja Singh and Hon'ble Judges of the Pepsu High Court at Patiala*, AIR 1954 SC 186, 190 where their Lordships of Supreme Court, while dismissing an application asking for transfer of certain contempt proceedings from the Pepsu High Court to some other High Court or in the alternative asking that at least the matter should not be heard by two of the Judges of that High Court who were named, observed as follows:

"We wish however to add that though we have no power to order a transfer in an original petition of this kind we consider it desirable on general principles of Justice that a judge who has been personally attacked should not, as far as possible, hear a contempt matter which, to that extent, concerns him personally. We do not lay down any general rule because there may be cases where that is impossible, as for example in a court where there is only one judge or two or both are attacked. Other cases may also arise where it is more convenient and proper for the judge to deal with the matter himself, as for example in a contempt in *facie curiae*.

All we can say is that this must be left to the good sense of the judges themselves who, we are confident will comport themselves with the dispassionate dignity and decorum which befits their high office and will bear in mind the oft-quoted maxim that justice must not only be done but must be seen to be done by all concerned and most particularly by an accused person who should always be given, as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial by judges who have no personal interest or concern in his case."

20. Here, the position was that at the time these two cases came up for hearing there were only four Judges in the High Court, including the Chief Justice. The writ petitions including O. J. C. No. 418 of 1967 filed by Sri Santosh Kumar Sahu in which Dr. H. K. Mahtab and Sri R. N. Singh Deo were made opposite parties were pending and were in fact actually heard and judgment reserved by Mr. Justice G. K. Misra and Justice S. K. Ray who both by name were specifically mentioned in the "representation petition" dated January 30, 1968 filed by Sri Santosh Kumar Sahu. There was a specific reference in paragraph 2 of that petition to this O. J. C. No. 418 of 1967 pending decision before these two particular Judges, and the petitioner expressed certain apprehensions and fears that

these two Judges might be influenced by the presence of Dr H. K. Mahtab, a party in the said writ petition, at the said function at the High Court premises and by the alleged undue special distinction given to Dr Mahtab in the speech of the Chief Justice and also by the alleged undue honour shown to him otherwise in the course of the function and at Lunch—all as alleged in the said representation petition.

The reference to these two Judges Mr Justice G. K. Misra and Mr Justice Ray occurs in, inter alia, paragraphs 2 and 17 and 20 of the representation petition which are quoted below—

"2. That the said O J C No 418 of 1967 was heard before a Division Bench of this Hon'ble Court consisting of the Hon'ble Mr Justice G. K. Misra and Hon'ble Mr Justice S. K. Ray very recently—"

"17. That on the occasion when the speech was delivered addressing the honoured guests on the occasion the Hon'ble Mr Justice G. K. Misra and the Hon'ble Mr Justice S. K. Ray were both present in the front row forming part of the audience."

"20. That the distinction offered to Dr H. K. Mahtab on the aforesaid occasion has had the effect of undermining the confidence in the court of the public and of the petitioner and the petitioner has every reason to apprehend that it is likely to influence the mind of Hon'ble Mr Justice G. K. Misra and Hon'ble Mr Justice S. K. Ray in whose presence the speech was delivered and the distinction was given by the Chief Justice of the Court himself."

21. In this background, therefore it was obviously impossible to associate the aforesaid two Judges with the hearing of the present two contempt cases and the only other alternative left was for the remaining two Judges, including the Chief Justice (myself) to hear them.

22. There were also other special circumstances which weighed with the Chief Justice to be on the Bench for the hearing of these two contempt cases. It was he alone who had the best knowledge of all the facts about the Flag Hoisting Function fixed to be held on the Republic Day on January 26, 1968 at the High Court premises—a function which he organised down to every detail, including the timing of the various items of the programme, the persons to be invited, the considerations on which invitations were sent to particular persons on such an occasion, the background of the printed speech that he made, the sequence in which the programme for the function was to be arranged, the manner in which the guests, including the Governor, the Chief Minister and other persons, were to be directed from the High Court lawn towards the High Court building for Lunch and for being shown round the various additions, al-

terations and improvements, including the Tower, the Fountain and the different wings of the building and his reasons for taking a particular course of action.

Indeed the Chief Justice was in the best position to clarify all matters which are alleged to have caused misapprehensions and misunderstandings among certain sections of the public and such clarification was necessary in public interest. In fact, Sri Santosh Kumar Sahu in his affidavit dated February 20, 1968 himself expressed as follows

"Certain incidents happened on the Republic Day on 26-1-68 which, if unexplained, might lead to some misapprehensions in the mind of the public and the Hon'ble Chief Justice did explain those matters in the open court to allay such fears from the mind of the people, though he said on that occasion that what he said was out of Court and meant only for those who are present in Court. It should be appreciated that though some of the observations gave me an impression that some of the events referred to in my representation petition filed on 30-1-68 were unintentional and just happened in the course of events, there are still a large section of the people outside who should know the course of events before the doubts and fears in their mind are removed." This justified the necessity of the Chief Justice being a member of the Bench to hear the cases.

The Editor of the "Kahnga" also expressed to the same effect in that he stated in his affidavit that, if what Chief Justice had spoken in Court on February 15, 1968 been known before, there would have been no scope for such misunderstanding and comment. There were thus special reasons which called for the Chief Justice being on this Bench.

23. This view is also supported by the Full Bench decision of the Lahore High Court in *In Re K. L. Gauba* Barrister-at-Law AIR 1942 Lah 105 where contempt proceedings were drawn against one K. L. Gauba for scandalising the Chief Justice and another Judge of the Lahore High Court by publishing a book called "New Magna Carta". One of the preliminary objections taken was that as the publication cast serious reflections on the Chief Justice and Monroe J. in their capacity as Judges of the Lahore High Court they were disqualified from sitting as members of the Bench and hearing the said contempt proceeding.

The Lahore High Court disallowed the objection following the authority of some earlier decisions in *Re Motilal Ghosh*, ILR 45 Cal 169 = (AIR 1918 Cal 938) (SB) *In Re. Mimi Manohar Prashad*, ILR 8 Pat 323 = (AIR 1929 Pat 72) (FB) *In the matter of William Taylor* 44 Ind Cas 930 = (AIR 1918 Cal 713) and the famous Allahabad case where Sir Iqbal Ahmad C. J. had been maligning by the Hindustan Times and him-

self was one of the Judges who heard the case.

The Lahore High Court decided that in such cases the practice has been for Judges who have been defamed to hear the case and to state in their judgment the facts within their knowledge or their reasons for taking a particular course of action. Chief Justice Sir Douglas Young delivering the judgment of the Lahore Full Bench laid down the law to be this:

"While it is unpleasant for any Judge to have to sit in judgment in a case in which he has been personally attacked, I consider that it is his duty to do so where, as in this case, he has been the subject of a malicious and impudent publication containing imputations which are obviously false and of the falsity of which he himself has the best knowledge. I will go further and say there is no alternative but to sit, as the authorities to which I have referred clearly indicate, that it is impossible to vindicate the reputation of the Court which has been attacked by taking proceedings in any court for libel or otherwise. The sole object of these summary proceedings is to vindicate the prestige of the Court. They are not to establish the position of an individual Judge. Unless an answer in this case is given to the scandalous allegations made against me and my brother Judge, the position of the High Court which has been attacked cannot be said to be re-established. It is for these reasons that Monore J. and myself have taken part in these proceedings. No other Judges will be in a position to answer the allegations and there may be persons who have read this book and do not know its author who might be impressed by it."

24. In the present case also, for the reasons stated above, the Chief Justice had no alternative but to sit on the Bench to hear these cases. This leads us to a consideration of the cases on merits.

C. Original Criminal Misc. Case No. 4 of 1968 arising out of the representation petition dated January 30, 1968 filed by Sri Santosh Kumar Sahu.

25. The alleged derogatory statements in paragraphs 3, 7, 12, 13, 14, 15, 16, 17, 20, 24 and 25 of the representation petition, on which notices were issued on the opposite parties why they should not be committed for contempt, all refer to what took place during the function in the High Court on the last Republic Day and their alleged bearing on the pending writ petitions including O. J. C. No. 418 of 1967. The gist of what the opposite party No. 1 Sri Santosh Kumar Sahu stated in his impugned representation petition in the offending paragraphs which contained derogatory statements against the High Court in general and the Chief Justice in particular in that the said paragraphs scandalised or had a tendency to scandalise the Judges constituting the Court and undermining its dignity in the estimation of the

public and impeaching its impartiality in the dispensation of justice is seriatim set out below.

Paragraph 3: The Chief Justice did not hear O. J. C. 418 and transferred the same to be heard by Mr. Justice G. K. Misra and Mr. Justice S. K. Ray although the rules prescribe that writ petitions should be heard before a Division Bench of which the Chief Justice should be a member.

Paragraph 12: In the situation as described in the previous paragraphs there was an arrangement for flag hoisting ceremony in the High Court premises on the Republic Day at 11.30 a. m. which was alleged to be not the usual time for hoisting of the National Flag.

Paragraphs 13, 14, 15: These paragraphs questioned the propriety of the invitation to Dr. Mahtab to the function including the Lunch.

Paragraph 16: This paragraph commented on the special address to Dr. H. K. Mahtab in the printed speech delivered by the Chief Justice and the alleged special distinction shown to him on the occasion.

Paragraph 17: This paragraph which has already been quoted, comments on the alleged special honour done to Dr. Mahtab by the manner he was addressed in the printed speech in the presence of Mr. Justice G. K. Misra and Mr. Justice S. K. Ray who were in the front row of the audience.

26. The three concluding paragraphs 20, 24 and 25 which are alleged to contain the most offending matters are quoted below for facility of better appreciation.

"20. That the distinction offered to Sri H. K. Mahtab on the aforesaid occasion has had the effect of undermining the confidence in the court of the Public and of the petitioner and the petitioner has every reason to apprehend that it is likely to influence the mind of Hon'ble Mr. Justice G. K. Misra and Hon'ble Mr. Justice S. K. Ray in whose presence the speech was delivered and the distinction was given by the Chief Justice of the Court himself.

24. That this statement of the Hon'ble Chief Justice of Orissa (mentioning in his speech about the co-operation and help of the Chief Minister) created a belief in the mind of the public that the Hon'ble Court feels obliged to Sri R. N. Singh Deo for the co-operation and help sought for by this Hon'ble Court and an ordinary citizen stands at a disadvantage in getting a remedy against the present Government if he has it in law from this Hon'ble Court since it is already under obligation to Sri R. N. Singh Deo for his co-operation and help. Besides Sri R. N. Singh Deo is a party in the aforesaid O. J. C. No. 418 of 1967 in which he has filed a counter and the counter is challenged as false and motivated.

25. That this statement has thrown an indirect aspersion against the previous Ministry and has canvassed for the popularity

of the present Ministry by this untrue and uncalled for statement by giving an impression to the public that the previous Ministry refused co-operation and help to the Hon'ble High Court which is only obtained from this present Ministry. This has a direct bearing on the decision in O J C No 418 where the present Ministry and the previous Ministry are in dispute."

27 In the remaining portion of the said representation petition, paragraph 21 contains an allegation by implication that the Chief Justice showed undue honour to Dr H K. Mahtab by conducting him with the Governor round the High Court premises on the date of the function.

Similarly paragraph 22 alleges that the Chief Justice over-emphasised the part played by Dr H K. Mahtab in bringing about the creation of a new High Court for Orissa in 1948 ignoring the part played by Sri Nityananda Kanungo the then Law Minister who was the person mainly responsible for its creation. Paragraph 23 takes exception to the statement in the speech of the Chief Justice in which he expressed that his dream of having a Tower over the High Court was realised with the co-operation and help of the Chief Minister Sri R. N. Singh Deo and makes comments suggesting that by making this statement the Chief Justice was indirectly saying that the previous (Congress) Ministry did not help him to realise that dream.

28 Before dealing with the alleged offending paragraphs it is appropriate here to give the background in which certain matters referred to in the representation petition of Sri Santosh Kumar Sahu which, according to him, raised certain misapprehensions and misunderstandings in the mind of the public, have to be dealt with. These matters were within the knowledge of myself as the Chief Justice, and the reasons for taking the particular course of action in connection with such matters—which are alleged to have led to the alleged misapprehensions in the mind of the public—have to be stated in the judgment itself following the practice in such cases, referred to by the Lahore Full Bench as mentioned above.

In fact, the Chief Justice did clarify these matters in open Court on February 15 1968 when the affidavit of Sri Dinabandhu Sahu was placed before the Court in the course of hearing. It is admitted by the opposite parties that the clarifications made by the Chief Justice on that day to a great extent allayed the alleged fears and misapprehensions from the mind of the public present in Court on that day.

29^c The few matters in the said representation petition about which the Chief Justice stated his reasons for taking a particular course of action are stated to be these: (After stating the reasons, the judgment proceeded)

30 Then we come directly to the merits of the charge of alleged contempt contained in paragraphs 20, 24 and 25, quoted above, which are said to be the most offending portions of the representation petition filed by Sri Santosh Kumar Sahu. These paragraphs have a direct reference to the pending writ petition O J C No 418 of 1968 which was heard by Mr Justice C. K. Misra and Mr Justice S. K. Ray and judgment remained reserved therein at all material times.

In paragraph 20 Sri Santosh Kumar Sahu expressed his apprehension that the Court which was to decide the pending writ petition was likely to be influenced for the reasons stated in the said paragraph. The allegations in paragraphs 24 and 25 of the representation petition were with particular reference to the following sentence in the speech of the Chief Justice quoted in paragraph 23, namely—

"I had always thought of the Tower, but it was not until 1967 that my dream was realised with the co-operation and help of the Chief Minister Sri R. N. Singh Deo." It was with reference to this sentence in the speech of the Chief Justice that it was alleged in the said two paragraphs 24 and 25 of the representation petition that it created a belief in the mind of the public that the Orissa High Court feels obliged to Sri R. N. Singh Deo for the co-operation and help sought for by the Court and that an ordinary citizen stands at a disadvantage in getting a remedy against the present Government, if he has it in law from this Court. It was also alleged that this Court is already under obligation to Sri R. N. Singh Deo for his co-operation and help it was further mentioned that Sri R. N. Singh Deo was a party in the said O J C No 418 of 1967 in which he had filed a counter and the counter is challenged as false and motivated that the aforesaid sentence in the speech created an impression in the public that the previous Ministry refused co-operation and help to this Court which, by "canvassing for its popularity" could be obtained only from the present Ministry which is alleged by representationist to have a "direct bearing" on the decision in the pending O J C. No. 418 of 1967.

In the show cause notice the charge against Sri Santosh Kumar Sahu is that the aforesaid derogatory statements made by him against the Orissa High Court in general and the Chief Justice in particular scandalised or had the tendency to scandalise the Orissa High Court and the Honourable Judges constituting the same, undermining its dignity in the estimation of the public and impeaching its impartiality in the dispensation of justice.

31 The question is: Apart from any other paragraphs do the allegations contained in the above quoted paragraphs 20, 24 and 25 of the representation petition amount to

contempt of court? In my opinion, the answer is yes.

The point for examination is whether the offending passages are of such character and import or made in such circumstances as would tend to hinder or obstruct or interfere with the due course of administration of justice by the Court. To begin with, the representation petition dated January 30, 1968 containing these offending passages was written by Sri Santosh Kumar Sahu who was himself a petitioner in one of the writ petitions O. J. C. No. 418 of 1967 then pending for judgment. The said writ petitions were heard by two of the Hon'ble Judges of this Court from January 9 to January 17, 1968 and judgment was reserved. The actual timing of filing the said representation petition containing the offending passages is of significance. The manner of publication, i.e. by means of a "representation petition" filed in the High Court is also not without significance.

32. What was the real meaning—the purpose—of the offending passages in the so-called representation petition?

33. The gist of what was argued on behalf of the opposite parties, purporting to have been by way of explanation, was, in substance, this:

There are 25 paragraphs in the representation petition. Apart from inferences, the facts stated therein with regard to what took place at the function of First Flag Hoisting over the Tower held in the High Court premises on January 26, 1968 are not controverted by anybody. Paragraphs 1 to 11 are said to provide the key to understanding the nature of the grievances made from paragraph 12 onwards. It was submitted that the impugned representation petition, if read as a whole, was nothing more than a complaint that the representationist and those who think like him were rightly apprehensive of the powerful likely effect of the words and actions of the Chief Justice, entertained a fear that the claims made by or on behalf of Dr. Mahtab in the pending O. J. C. No. 418/67 as mentioned in the impugned representation petition might influence the mind of the Judges who heard the writ petitions in the light of the impressions formed by them at the function that it was this apprehension which was given expression to in the impugned petition.

As regards paragraph 24, it was argued that that portion of the speech of the Chief Justice in which he referred to the help and co-operation of the present Chief Minister Sri R. N. Singh Deo created a feeling in the mind of the public that the Court felt obliged to the Chief Minister Sri Singh Deo and that an ordinary citizen stands at a disadvantage in getting remedy from this High Court against the present Government; in other words, paragraph 24 speaks of the possible effect of the speech on the public mind, and should not fairly be read as an

independent allegation by the representationist; that in paragraph 24 the representationist merely reproduced the belief in the mind of the public created by the said statement in the speech and that there is no extraneous element to bring it within the law of contempt.

It was submitted that the grievances expressed in the petition are, *inter alia*, that Dr. H. K. Mahtab was entertained in the distinguished guests' table for Lunch, that there was no apparent justification for giving him such undue distinction or for specially addressing him in the speech of the Chief Justice which was heard by the audience among whom were the two Hon'ble Judges who were in seisin of the writ petitions. It was further submitted that paragraph 20 merely expressed the apprehension in the mind of the persons present that the distinction offered to Dr. Mahtab on the occasion had the effect of undermining the confidence in the court of the public and it was likely to influence the mind of the said two Hon'ble Judges in whose presence the speech was delivered.

34. It was argued on behalf of the opposite parties that it was only criticism of the speech of the Chief Justice and expression of the terrific anxiety of those identified with the feelings of the people thrown out of power (referring to Congressmen). It was stated that the whole object of the alleged offending passages, namely paragraphs 20, 24 and 25 in the representation petition was to put forth their grievance and anxiety to show that the previous Ministry (referring to the Congress) did not discourage the construction of the Tower.

It was submitted that where a particular action or speech of a Judge is the basis for contempt alleged either by way of criticism or otherwise, then if the facts stated are true, an allegation that such words or acts create a lack of confidence or faith in the administration of justice will remain within the limits of the exercise of the normal right of freedom of speech or expression and that it is only when these facts are denied and any improper motive is imputed, that the Court can legitimately say that one cannot exercise such right of freedom of speech at all; and that when the alleged contemner pleads or believes that he has not committed contempt, there is nothing wrong if he pleads innocence so that he may get the matter of law settled.

35. Thus, the entire trend of the arguments, urged on behalf of the opposite parties, in substance, purports to be in justification of what was stated in the offending paragraphs on their own interpretation thereof which, however, in our opinion, is not tenable. In fact all their efforts to justify the said offending paragraphs cannot succeed in view of the settled position in law. The Supreme Court in *Brahma Prakash v. State of Uttar Pradesh*, AIR 1954 SC 10 and *Hira-*

lal v State of U P., AIR 1954 SC 743 laid down that in order to constitute contempt, it is not necessary that there should in fact be an actual interference with the course of administration of justice but it is enough if the offending publication is likely, or if it tends in any way to interfere with the proper administration of law. Such insinuations as are implicit in a passage in question are derogatory to the dignity of the Court and are calculated to undermine the confidence of the people in the integrity of the Judges. Whether the passage is read as fulsome flattery of the Judges, or is read as containing insinuations, or the rest which contain an attack on a party in the pending proceedings is taken separately, it is equally contemptuous of the court in that the object of writing it and the time and place of its publication were or were calculated, to deflect the Court from performing its strict duty either by flattery or by a veiled threat or warning or by creating prejudice in its mind against a party to the proceedings.

55 This Court is also conscious of the position in law that the power of committal for contempt must be wielded with the greatest of care and caution, should be exercised with the greatest of reluctance and the greatest of anxiety and only with the object of seeing that the dignity and authority of the Court be not impaired. Courts in India derive their authority from the Constitution which the people of this country have themselves adopted and given unto themselves and hold it in trust for the security and benefit of the people. The power that the Judges are called upon to exercise is but the authority of the people themselves vested by the Constitution in law courts. Contempts against law courts are insults to the authority of the people and their Constitution and not to their humblest agents the Judges. Wherever there is substantial exhibition of such contumacious conduct towards law courts Judges must uphold the Constitution and the majesty of the courts. The extreme proposition that Judges can never be influenced or embarrassed by extraneous publication is not correct. A prejudicial publication concerning a pending proceeding may amount to contempt and is risky business, but the trained mind of the Judge is likely to ignore extraneous matters and may not be embarrassed or influenced by each and every prejudicial publication. If however the publication be so grossly improper that it embarrasses the Judge then it may be treated as contumacious and dealt with accordingly.

57 Learned counsel for the opposite parties maintained that the passages in question were perfectly innocuous and were only by way of a representation expressing grievance towards the court, and that such expression of grievance could not have the slightest effect on the minds of the Judges of the High Court.

58 We are unable to accept the argument that a mere ventilation of grievance was the sole or even the main object with which these offending paragraphs were written or with which the representation petition was filed at the time when the judgment in the pending writ petitions was reserved. In fact, the representation petition was written and given publication by presentation to the High Court at a time when O J C No 418 of 1967 filed by the very representationist and allied O J Cs were pending before the two Hon'ble Judges of this Court for delivery of judgment after hearing.

59 What then, we ask, was the purpose of writing these offending paragraphs and what was the object of the filing of the representation petition in the High Court itself at a time when the court had reserved judgment in the pending writ petitions including O J C No 418 of 1967 to which the representationist was himself a party? Surely, there was hidden in the representation petition with the offending passages a warning indeed, it was by way of a sinister move, a hidden threat to blackmail the Orissa High Court and its Judges with reference to a particular proceeding pending decision in this Court, all with an ulterior motive as so obvious. The object of writing these offending paragraphs and particularly of filing the representation petition in the High Court at the time it was actually done was quite clearly to influence or affect the minds of the Judges and to deflect them from the strict performance of their duties the offending paragraphs and the time and place of their publication certainly tended to hinder or obstruct the due administration of justice the Court and its Judges were scandalised with a view to diverting the due course of justice. This clearly amounts to contempt of this Court.

40 We shall now deal with the role of the Advocates who were impleaded as opposite parties Nos 2, 3 and 4 in this contempt case (Orl Crl Misc Case No 4 of 1968). Sri Dinabandhu Sahu Advocate signed and presented the impugned representation petition filed on January 30 1968 by Sri Santosh Kumar Sahu (opposite party No 1 in this proceeding) containing allegations which, we hold, amount to contempt of court for reasons aforesaid. Sri Raghunath Das did not sign the impugned petition and denied having presented it which was drafted by Sri Dinabandhu Sahu (Sri Das) however admitted that he was engaged by Sri Santosh Kumar Sahu to appear for him, along with the senior counsel Sri Dinabandhu Sahu to render him professional assistance. Sri Das in his affidavit in reply to the impugned petition stated that he was satisfied that the matters in which he was engaged were prima facie true and that the statements made in the representation petition were never meant to be and were not derogatory to the High Court in gene-

ference with the due course of justice. But I must consider whether the offending publication has the tendency of prejudicing the case of the petitioner in the criminal revision applications which are pending in this Court so as to amount to technical contempt.

16. In the offending publication itself it has been indicated that the question as to whether the criminal case pending against the petitioners and others should be permitted to be withdrawn or not is pending before this court. It is manifest that in dealing with the two criminal revision applications this court will have to be guided by the principles laid down in various decisions of this Court and other High Courts in India for deciding whether an application for withdrawal under Section 494, Code of Criminal Procedure, should be granted or not. In *King v. Parmanand*, 50 Cri LJ 474=(AIR 1949 Pat 22) a Full Bench of this Court pointed out that giving or withholding the consent to the withdrawal of the public prosecutor from the prosecution is judicial act and the discretion conferred on the Court under Section 494 must be exercised judicially. In *King v. Moule Bux*, 50 Cri LJ 488=(AIR 1949 Pat 233) another Full Bench of this Court reiterated the same principle and observed:

"It is well settled now by a number of decisions of this Court as also other High Courts in India that an order of acquittal or discharge passed under Section 494 Criminal Procedure Code, consequent on the withdrawal of the public prosecutor from the prosecution of any person with the consent of the Court, is a judicial order and liable to revision by this Court, if the discretion vested in the Magistrate to give consent has been improperly or arbitrarily exercised. Ordinarily, this Court is reluctant to interfere with the discretion given, but undoubtedly has power to do so, and will do so in special circumstances where the withdrawal appears to be manifestly improper."

17. It follows that the question which this court will have to decide in the two pending criminal revision applications will be whether the discretion which the learned Magistrate of Jamui has exercised in refusing his consent to the withdrawal of the criminal case pending before him against the petitioners and others has been properly exercised or not. In dealing with this question this Court will have to bear in mind that Section 494, Code of Criminal Procedure, is couched in very general terms and does not lay down any fixed rule as to the reasons for withdrawal. But for consenting to the withdrawal, the Court must be satisfied that it is a bona fide application and supported by reasons of State or public policy. It must also be convinced about the inexpediency of

continuing the prosecution. These aspects of the question will have to be considered in the light of the materials which have already been brought on the records of the case. I have given a careful consideration to the offending matter and I have kept in mind both the points of view. It must be conceded that nothing has been said in it about the merits of the case which is sought to be withdrawn.

At the same time there can be no doubt that certain facts have been incorporated therein which gave rise to the impression that the petition for withdrawal of the prosecution which was filed before the learned Magistrate was not at all bona fide. It was filed in the teeth of opposition of the District Magistrate and the Law Secretary who had carefully examined the matter and recommended against the withdrawal of the prosecution and wanted the case to be thrashed out in court in the interest of justice. It has been stated in the offending matter that Sri Hasibur Rahman, who was then the Law Minister, had ignored the advice of the District Magistrate as well as of the Law Secretary and had passed an order that the case should be withdrawn and that was how the petition for withdrawal was filed in court. These statements of facts must convey the impression that the withdrawal petition was the outcome of the personal action of the then Law Minister and not supported by reasons of State or public policy. On the contrary, it was filed although the concerned officers were of the view that justice demanded that the case should be proceeded with and thrashed out in Court. It may be that it was sought to be made out that the then Law Minister, who had ordered that the case should be withdrawn, had acted in breach of the usual rules of procedure applicable to such matters.

I should refer in this connection to item no. 20 of the Third Schedule at page 44 of the Rules of Executive Business, 1965 which indicates that any proposal for the institution or withdrawal of a prosecution against the advice tendered by the Judicial Department (Legal Remembrancer's Branch) must be referred to the Council of Ministers for discussion, and final orders of the Government. It was indicated in the offending matter that the then law Minister had passed orders in the matter without obtaining the approval of the Council of Ministers and had thereby misused his official position and power with a view to interfere with the administration of justice in a serious case of rioting and murder. But anybody who reads the allegations contained in the offending matter must be led away with the impression that the withdrawal petition was not at all a bona fide one.

It also conveys the impression that Sri Hasibur Rahman had taken undue personal interest in the case pending in court and had got the withdrawal petition filed with a view to prevent the administration of justice from taking its due course. In the face of such facts and circumstances which have been made public by reason of publication both in the official gazette and in the newspaper, the petitioners in the revision applications pending in this court, must feel embarrassed in presenting their case in this court and find it difficult to persuade this court to interfere with the order of the learned Magistrate who has declined to consent to the withdrawal from the prosecution. In other words, the offending publication has undoubtedly the effect of creating an atmosphere of prejudice against the case of the petitioner in the two criminal revision applications which are pending in this Court. In my opinion therefore, the offending publication does amount to technical contempt of this Court.

18. On behalf of the contesting respondents it was urged that the offending matter had been drawn up for the purpose of being placed before a commission constituted under the Commission of Inquiry Act so that the conduct of the Law Minister Sri Hasibur Rahman might be examined and as such the act was committed in good faith and did not amount to contempt of Court. It is true that the mere submission of such allegations against Sri Hasibur Rahman before a Commission of Inquiry would not have amounted to contempt of Court. It is well settled that an authority or a Tribunal holding an enquiry in good faith in exercise of powers vested in it by statute is not guilty of contempt of court. If the allegations against Sri Hasibur Rahman would not have been publicised but merely submitted to the Commission of Inquiry for investigation, no exception could have been taken. But the mischief in this case was committed by publicising the said allegations with full knowledge that the two criminal revision petitions were pending in this court and the question as to whether the withdrawal petitions were bona fide or not was still to be considered by this Court.

I have not been shown any statutory provision which lays down that allegations of the nature contained in the offending matter must be printed in the official gazette or in the public press. It has also not been suggested, and it cannot be suggested, that every decision of the Council of Ministers must be published in the official gazette or in the public press. From the offending publication itself it is clear that the Council of Ministers were aware that the criminal revision applications were still pending in this Court. Therefore, the offending matter

should not have been released for publication either in the official gazette or in the public press at least until the disposal of the criminal revision applications aforesaid.

19 The first question which I have formulated for decision in this case must, therefore, be answered in the affirmative. The question then arises whether all the respondents or any one of them have rendered themselves liable to committal for contempt of court. In paragraph 10 of the petition of the petitioners it has no doubt been stated that all the members of the Council of Ministers must be deemed to have abetted the commission of contempt of Court since they are alleged to have issued directions for the publication of the offending matter and that Sri Shambhu Nath Jha, respondent no 3 in particular, was liable since it was he who had handed over the offending matter to the press for publication in the newspaper. But paragraph 10 must be read along with paragraph 4 of the petition wherein it has been clearly alleged that it was respondent no 3 who had issued the offending matter for publication in the Searchlight. Reading these two paragraphs of the petition I am of the opinion that the entire Council of Ministers cannot be held responsible for the publication in the newspaper.

In paragraph 10 the petitioners have merely alleged that the members of the Council of Ministers "are alleged to have issued directions for publication of the offending matter. This is not clear averment of the fact that in point of fact all the members of the Council of Ministers had issued any such directions. But so far as Shri Shambhu Nath Jha, respondent No 3 is concerned it is clear that it was he who had issued that offending matter for publication in the press. This has not been denied by Sri Shambhu Nath Jha, respondent no 3 in his counter affidavit. On the other hand, it has been stated in his counter-affidavit that the allegations were printed both in the Bihar Gazette and in the press as a matter of formality. Sri Shambhu Nath Jha, respondent no 3 was undoubtedly responsible for releasing the offending matter for publication in the newspaper. But the remaining members of the Council of Ministers cannot be saddled with the responsibility of releasing the offending matter for publication in the newspaper.

20 I have already referred to the stands taken by the Chief Secretary respondent no 25 and the Superintendents of the Secretariat Press and Stationery Stores and Publications (respondents 23 and 24). In view of regret expressed by respondent no 25 and the unqualified apology tendered by respondents 23 and 24 learned counsel for the petitioners

fairly conceded that these respondents need not be proceeded with. In my opinion, these three respondents took a very fair stand. Accordingly by my order dated 29th July, 1968, I discharged the rule as against these three respondents. Therefore, the situation emerging from publication of the offending matter in the official gazette needs no further consideration.

21. The case of the Editor and the Printer-cum-publisher of the Searchlight, respondents nos. 21 and 22 remains to be considered. They were both responsible for the publication made in the Searchlight of the 14th March 1968, but they claim to have done so in good faith and in ordinary course of business without knowing the truth or otherwise of the facts contained therein. Their further plea is that the matter was published in the official gazette. It is manifest that a publication of such a character should not have been made in the Searchlight as a matter of routine. The mere fact that it was published in the official gazette is no justification for the publication made by respondents 21 and 22 in their newspaper. These two respondents cannot be heard to say that because some wrongful act was committed by the officers responsible for the publication in the official gazette, they were also free to commit similar wrongful act. Both of them must have known from the offending matter itself that the two criminal revision applications relating to the withdrawal matter were pending in this court. That should have made them circumspect and they should have refrained from publishing the matter in the ordinary course of business without ascertaining the implications involved therein. Since they did not exercise the care which they ought to have exercised, Respondents nos. 21 and 22 cannot take the plea of good faith. It is clear that both these respondents were responsible for giving wide publicity to something which amounted to contempt of this Court.

22. Upon a careful consideration of the material on the record I have come to the conclusion that Sri Shambhu Nath Jha (respondent No. 3) and the Editor and the Printer-cum-publisher of the Searchlight (respondents nos. 21 and 22) are guilty of contempt of this Court in relation to the two criminal revision applications pending in this court. But so far as the remaining respondents are concerned, the guilt has not been brought home to them beyond doubt. Therefore, the rule is made absolute against respondents nos. 3, 21 and 22 only and it is discharged against the remaining respondents.

23. In view, however, of the fact that the contempt which respondents nos. 3,

21 and 22 have been found to have committed is of a technical character, I do not propose to impose any sentence upon them either of imprisonment or of fine. Accordingly, I let them off with a warning, in the hope that they will not repeat such act of indiscretion in future.

SSG/D.V.C.

Order accordingly.

AIR 1969 PATNA 147 (V 56 C 38)

U. N. SINHA AND B. N. JHA, JJ.

Employers in Relation to Patherdih Colliery of Messrs. Patherdih Sudamdih Colliery Private Ltd., Petitioner v. General Secretary, Bihar Koyla Mazdoor Sabha and others, Respondents.

Civil Writ Jurisdiction Cases Nos. 108 and 140 to 169 of 1967, D/- 17-8-1968.

Industrial Disputes Act (1947), Ss. 33C (2), 2(s) — "Workman" under S. 33C(2) includes ex-workman.

An application under Section 33-C(2) may be made by a person who, on the date of the application, was not a "workman", but was a "workman" during the period in respect of which he was entitled to any benefit.

The meaning of the expression "workman" in Section 33-C(2) should be, that, before a person can make a claim under that provision of law, it is necessary that he should have been a workman within the definition clause, for the period for which he claims to be entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money. The restrictive meaning of the expression "workman" according to its definition, would nullify the very purpose of enacting section 33C. (Para 4)

Section 33C occurs in chapter 7 which has the heading "Miscellaneous" and if the word "workman" meant only a workman still in service and not an ex-workman, then the same meaning must be given to this word whenever it occurs in Section 33C. It is clear that if this meaning is given to the word "workman" in Section 33C (1), under the first paragraph of which even an assignee or heirs of a deceased workman can apply in certain matters covered by that provision of law, then that provision of law would be unworkable in many cases. AIR 1961 Mad 307 & 1961-1 Lab LJ 592 (Mad), Rel on; 1964 BLJR 82, Referred to.

(Para 4)

Cases Referred: Chronological Paras (1964) 1964 BLJR 82=(1964) 2 Lab LJ 198, Management of Navashakti Publishing Co. Ltd. v. The State of Bihar

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KL/LL/F162/68

(1961) AIR 1961 Mad 307 (V 48)=

(1961) 1 Lab LJ 729, Management of Tiruchi Srirangam Transport Co (Pvt.) Ltd. v Labour Court, Madurai 4

(1961) 1961-1 Lab LJ 592=(1960-61) 19 FJR 408 (Mad), Manicka Mudaliar (M) v Labour Court, Madras 4

Sushil Kumar Mazumdar, for Petitioners S Ali Ahmad, for Opposite Party (No 1 in C W J C. No 108/67 only)

U N SINHA, J. — This is a batch of thirty-one writ applications filed under Articles 226 and 227 of the Constitution of India by the same petitioners, namely, Employers in relation to Patherdih Colliery of Messrs. Patherdih Sudamdih Colliery Private Limited. The main application is C. W J C. 108 of 1967 and the other applications are said to have been filed as a matter of abundant caution. This judgment and order will govern all these thirty-one cases. The petitioners' prayer is that this Court should quash the order passed by the Presiding Officer, Central Government Labour Court, Dhanbad, dated the 30th January, 1967, by a writ of Certiorari. The impugned order had been passed by the Labour Court in connection with applications filed by certain persons under Section 33C(2) of the Industrial Disputes Act 1947 (Central Act 14 of 1947) for determining some money said to have been due to the petitioners before the Labour Court. The Labour Court has allowed these applications holding that the petitioners before it were entitled to the amounts of money mentioned in a schedule attached to the order which is the subject matter of these writ applications.

2. The relevant facts are as follows: Opposite Party Nos 3 to 33 of C. W J C. 108 of 1967 had been employed by the present petitioners as miners on piece rate basis. For the sake of convenience, I will describe the petitioners, henceforth, as the employers and opposite party nos. 3 to 33 as the employees. In 1958, the employers introduced tubs of the capacity 40½ cubic feet for carrying coal cut by the miners. The employees' case before the Labour Court was that they had always carried coal loading the tubs to their full capacity and they were entitled to receive Rs. 361 per tub, but the employers had been paying at the rate of Rs. 322 per tub only. Thus each of the employees claimed the difference for the years 1958 to 1965. The contention of the employers was that the employees were no longer in service from the 15th July, 1965 and as such, they were not "workmen" within the meaning of the Industrial Disputes Act and, therefore, the applications were not maintainable. On facts the employers' case was, that two types of tubs were in use in their mines, one having a capacity of 40½ cubic

feet and the other of 36 cubic feet. But, as the seam was very much inclined, the tubs used to be filled up upto a line 2½ inches below the top edge of the 40½ cubic feet tubs. Therefore, it was contended that proper payments had always been made to the employees as long as they were in service. The employers also contended that there was an agreement between them and the Koila Mazdoor Sangh, the recognised union of this colliery on the 19th January, 1958 to the above effect of carrying only 38 cubic feet of coal in the 40½ cubic feet tubs.

3. On these contentions raised by the parties, the Labour Court framed several points, of which the following three points (which were points nos. 1, 2 and 6 before the Labour Court) have been re-agitated by Sri S. K. Mazumdar appearing for the employers.—

(1) "Did the opposite party take the load from the applicants only upto a demarcating line 2½ inches below the top edge of 40½ C. ft. capacity tubs? If so, what is its effect?"

(2) "Was there any agreement on 19-1-1958 between the parties as pleaded by the opposite party? If so, what is its effect?"

(3) "What is the effect of the applications not being in service of the opposite party from 15-7-1965?"

On taking evidence and hearing the parties the Presiding Officer has come to the conclusion that the case of the employees was correct that they had always filled up the 40½ cubic feet tubs to their fullest capacity. The employers' contention that these tubs used to be loaded upto a line 2½ inches below the top edge was not accepted. Secondly, the Presiding Officer has come to the conclusion that the alleged agreement between the parties relied upon by the employers dated the 19th January, 1958 could not be accepted as binding on the employees, because, Bihar Koila Mazdoor Sangh could not have represented these employees, as there was no evidence to the effect that during the time of the alleged agreement these employees were members of Koila Mazdoor Sangh. In substance, it has been held that there was no binding agreement between the employers and these employees which could affect the claim of the latter. It may be mentioned at this stage that the employees had made out a case that they had been paid for only 36 cubic feet of coal per tub. But this point has been decided in favour of the employers and it has been held that they had paid their employees for 38 cubic feet of coal per tub. On the question of maintainability of the applications raised by the last point quoted above, it has been held that the employers' case based on the meaning of "workmen" could not be accepted and

that the employees were entitled to obtain the various amounts calculated upto the 30th June, 1965. It has been held that the fact that the employees were not in service when these applications were filed did not make any difference, as they were admittedly in service during the period for which claims had been allowed.

4. Sri S. K. Mazumdar has re-agitated the question of the alleged agreement dated the 19th January, 1958 and he has referred to Exhibits A2 and O3, mentioned by the Presiding Officer in his order. But, these documents are only letters and they have been considered along with the oral evidence adduced by both the parties and various other documents, and it is not possible to interfere with the finding of fact arrived at by the Labour Court, to the effect that there was no binding agreement between these employees and the employers in 1958. The second contention raised by Sri Mazumdar, as to whether the 40½ cubic feet tubs used to be filled up to their full capacity or whether only 38 cubic feet of coal used to be carried in each of these tubs, is also covered by the conclusion based on oral and documentary evidence on record, and I do not think that this matter can be re-investigated in a writ application. The question raised as to whether these employees were entitled to apply at all after they had ceased to be in service of the employers is a matter of general importance and requires consideration. The relevant provisions of the Industrial Disputes Act are sections 33C(2) and 2(s), the latter giving a definition of the expression "workman" as it now stands. These provisions are quoted below:—

Section 33C(2) — "Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government."

Section 2(s). — "'Workman' means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person —

(i) who is subject to the Army Act, 1950 or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934, or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature".

Sri Mazumdar has contended that when these employees filed their applications before the Labour Court, they were not "workmen" within the definition given in the Act and, therefore, they were not entitled to apply. According to him, "workman" means a person described under Section 2(s), who is still in service, including, in relation to an industrial dispute, any person falling within the categories mentioned in the first part of the definition, who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, excluding the persons mentioned in Cls. (i), (ii), (iii) and (iv) mentioned at the end of the definition. In substance, Sri Mazumdar's contention on the facts and circumstances of these particular cases is that these claims of the employees were not maintainable as they were not in actual employment of the employers at the time when they had filed their claims.

According to Sri Mazumdar, these employees were ex-workmen and, therefore, their cases did not fall within the purview of section 33C(2) of the Industrial Disputes Act. In this connection, reference has been made to the form under which applications under Section 33C(2) have to be made by virtue of Rule 62 of the Rules framed by the Central Government under the Industrial Disputes Act, and Sri Mazumdar has urged that the form also contemplates that an applicant must be a present workman and not an ex-workman. Sri S. Ali Ahmad appearing for opposite party no. 1 of C. W. J. C. 108 of 1967 has argued that there is no validity in the contentions of Sri Mazumdar and all that has to be looked into is whether an applicant under section 33C(2) was a workman or not at the relevant time covered by the claim, and as there is no dispute that these employees were "workmen" within the definition of that expression for the period for which claims were made, the claims have been rightly accepted. I am of the opinion that it is not possible to accept the contention of Sri Mazumdar and hold

that as these employees were not in actual service when they had filed their applications, they were not entitled to apply under section 33C(2). Section 33C occurs in Chapter VII, which has the heading "Miscellaneous", and if Sri Mazumdar's contention regarding the meaning of the word "workman" is accepted, then the same meaning must be given to this word wherever it occurs in section 33C and it is clear that if this meaning is given to the word "workman" in Section 33C(1) that provision of law would be unworkable in many cases. Section 33C(1), runs as follows.—

"Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter VA, the workman himself or any other person authorised by him in writing in this behalf, or in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue:

Provided that every such application shall be made within one year from the date on which the money became due to the workmen from the employer"

Provided further that any such application may be entertained after the expiry of the said period of one year if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period."

Under the first paragraph of Section 33C(1) even an assignee or heirs of a deceased workman can apply in certain matters covered by that provision of law. It is clear that the meaning of the word "workman" in Section 33C(1) cannot possibly mean a workman still in service and cannot cover an ex-workman. In my opinion, the meaning of the expression "workman" in Section 33C(2) should be, that, before a person can make a claim under that provision of law, it is necessary that he should have been a workman within the definition clause, for the period for which he claims to be entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money. The restrictive definition of the expression "workman" according to its definition, as contended for, by Sri Mazumdar, would nullify in my opinion, the very purpose of enacting Section 33C. Sri S. Ali Ahmad has drawn our attention to two decisions of the Madras High Court, which are, *Management of the Tiruchi Srirangam*

Transport Co. Private Ltd. v. Labour Court, Madurai, AIR 1961 Mad 307, and *Manicka Mudaliar (M) v. Labour Court, Madras*, 1961-1 Lab LJ 592 (Mad). A Division Bench of the Madras High Court in *Manicka Mudaliar's* case came to the conclusion that an application under Section 33C(2) may be made by a person who, on the date of the application, was not a "workman", but was a "workman" during the period in respect of which he was entitled to any benefit and I respectfully agree that this broad meaning should be given to the word "workman" occurring in Section 33C of the Industrial Disputes Act.

Sri S. Ali Ahmad has also referred to the case of *Management of Navashakti Publishing Co. Ltd. v. State of Bihar*, 1964 BLJR 82, which was a case of retrenchment followed by application under Section 33C(2) of the Act. According to the learned counsel, if a retrenched workman cannot be considered to be a workman for the purpose of Section 33C(2) unless he raised an industrial dispute, referred to in the second half of the definition of a "workman" in Section 2(s), then the decision in *Navashakti Publishing Company's* case was an erroneous one. There is force in the contention of the learned counsel although this particular point had not been raised in *Navashakti Publishing Company's* case. Be that as it may, for the reasons given earlier, I am of the opinion that the Labour Court was right in holding that these employees were "workmen" within the meaning of section 33C(2) of the Act, to be entitled to file their applications which were under consideration before that Court.

5 These applications must, therefore fall and they are dismissed. An order was passed by this Court in C. W. J. C. No. 103 of 1967 on the 12th April, 1967 staying the operation of the order of the Labour Court during the pendency of the case, on an undertaking given by Sri Mazumdar, that, if the application fails, the petitioners of that case will be liable to pay interest at the rate of six per cent per annum from the date of the award, on the various amounts payable to opposite party nos. 3 to 33 of that case. In that view, it must be held that opposite party nos. 3 to 33 of C. W. J. C. No. 103 of 1967 will now be entitled to interest at that rate on the various amounts mentioned in the schedule of the order of the Presiding Officer of the Labour Court which is under consideration, from the 30th January, 1967 upto the date of realisation. In view of this consideration, I will pass no order for costs in these cases.

6 B. N. JHA, J. — I agree.

GDR/D.V.C

Petitions dismissed.

AIR 1969 PATNA 151 (V 56 C 39)

TARKESHWAR NATH, J.

Ramroop Yadav, Petitioner v. State of Bihar and others, Opposite Party.

Misc. Judl. Case No. 142 of 1967, D/- 29-8-1968.

Contempt of Courts Act (1926), S. 1 — Grant of stay of proceeding by High Court — Certificate by advocate intimating stay should ordinarily be accepted.

A letter of an advocate intimating the order for stay of any proceeding passed by the High Court should not be disbelieved and discarded by the Court in which it is produced, unless it has any reason to suspect the genuineness of that letter, in the sense that either the said letter was not sent by the Advocate who purported to have sent it or it did not bear his signature. In other words, if an Advocate gives a certificate that the High Court has granted stay of one proceeding or the other in a particular case, that certificate should be ordinarily accepted to be correct, inasmuch as an advocate is an officer of the court and he has taken upon himself full responsibility before giving that certificate. It may, however, be that in a particular case, the Court may have some special reason for not accepting that certificate, but in that case, it is open to the court to ask the party producing that certificate to file an affidavit in support of that certificate and then the court can pass a suitable order, if an affidavit is filed. AIR 1951 Pat 494, Foll. (Para 10)

Cases Referred: Chronological Paras (1951) AIR 1951 Pat 494 (V 38) =

52 Cri LJ 638, Harkishun Singh v.

Chhotan Mahton

S. Sarwar Ali (Addl. G. P.), for alleged contemnors, (for Opp. Party Nos. 4 & 5 in CWJC No. 307/67); Kameshwari Nandan Singh, for the State; Prem Shankar Sahay, for Petitioner (in C. W. J. C. No. 307/67).

ORDER :— The facts giving rise to this case are these:

A notice was issued on the Sub Divisional Officer, Sadar Bhagalpur, and the Block Development Officer of Pirpainty, acting as the Election Officer, Pirpainty Block, Bhagalpur, (opposite party nos. 4 and 5) in pursuance of an order dated the 17th July 1967, passed in Civil Writ Jurisdiction case no. 307 of 1967 (Ramroop Yadav v. The State of Bihar and others) to show cause, why a proceeding for contempt should not be started against them.

2. Ramroop Yadav had filed an application under Articles 226 and 227 of the Constitution of India, against (1) The State of Bihar, (2) The District Magistrate of Bhagalpur, (3) The District Pan-

chayat Officer, Bhagalpur, (4) The Sub-divisional Officer, Bhagalpur and (5) The Block Development Officer, acting as the Election Officer, Pirpainty Block, Bhagalpur, for a writ in the nature of certiorari for quashing the notification no. 5411/G.P. dated the 26th April, 1967, published in the Bihar Gazette on the 10th May, 1967 and issued under sub-section (3) of Section 3 of the Bihar Panchayat Raj Act, 1947, with regard to the addition and subtraction of some areas to and from the jurisdiction of the Gram Panchayat in pursuance of which the election of the Gram Panchayat was to be held, and he had made a prayer for staying the election of the Parasurampur Gram Panchayat which was to be held on the 28th May, 1967. That application was registered as Civil Writ Jurisdiction case no. 307 of 1967. That application was admitted on the 25th May, 1967, and an ad interim stay of the holding of the election was granted pending the final hearing of the application. On the same day (i. e., the 25th May, 1967), the Deputy Registrar of this Court sent a copy of that order, along with a copy of the writ petition to the Block Development Officer, Pirpainty (Bhagalpur), for his information and guidance and for immediate communication of the said order to all concerned, vide memo no. 5652 dated the 25th May, 1967. On the same date, Mr. Prem Shankar Sahay, Advocate for the petitioner in Civil Writ Jurisdiction case no. 307 of 1967, sent a letter to Ramroop Yadav, informing him that the High Court had passed an order staying the election of the Parasurampur Gram Panchayat and the stay order would be communicated in course of the day. He asked Ramroop Yadav to inform the Block Development Officer (Election Officer) Pirpainty, to stop the election. A copy of this letter is enclosed with the application filed on the 7th June, 1967, and marked Annexure '2'. On the same day, the said learned Counsel sent a telegram (Annexure '1') to one Shivanand Tiwary (the petitioner in Civil Writ Jurisdiction Case no. 306 of 1967), informing him that the High Court had stayed the election of Parasurampur and Kali Prasad Panchayats. The learned counsel asked the addressee to inform the Election Officer about the said order. On the 26th May, 1967, Ramroop Yadav, who was a candidate for the Mukhiyaship of the Parasurampur Gram Panchayat, filed an application (copy marked Annexure '3') before the Election Officer, Pirpainty, bringing to his notice that the High Court had stayed the election of the Parasurampur Gram Panchayat, scheduled to be held on the 28th May, 1967. In support of this version, he enclosed true copies of the letter and the telegram sent by Mr. Prem Shankar Sahay, and made a prayer to stay the election of the

Parasurampur Gram Panchayat. On the 27th May, 1967, the Block Development Officer who was acting as the Election Officer, sent a letter to the Sub-divisional Officer Bhagalpur, informing him that Ramroop Yadav and Shivanand Tiwary, candidates for the Mukhiyaship of the Gram Panchayats Parasurampur and Kaliprasad, respectively, had produced before him a telegram and a letter received by them from an Advocate of the High Court, Patna, stating therein that the High Court had stayed the election of those Panchayats in cases nos 306 and 307 of 1967 and, there was a request on their behalf to stay the election, which was to be held on the 28th May, 1967, and the 30th May, 1967 respectively. The Block Development Officer enclosed the copies of the letter and the telegram with his letter and sought for instructions for taking further steps in the matter of the election. He, however, pointed out that he had not received any order from the High Court or from any other higher authority. The Sub-Divisional Officer made a note on this letter that the opinion of either the Public Prosecutor or the Government Pleader should be taken. Opinion of the Government Pleader was obtained on the 27th May, 1967, and that was to the following effect—

"From the letter of the Advocate, Patna, it appears that election has been stayed but no official information has been received. No copy of the H. C. order has been filed. Election Party has already (?) (been) deputed with necessary materials. Election works may therefore, proceed till any communication is received as it is not practicable to stay the election at this stage."

In view of this opinion of Shree R. N. Tewary, Government Pleader, the Sub-divisional Officer (opposite party no 4) sent instructions to the Block Development Officer who was the Election Officer, Pirpaunty (opposite party no 5) to act according to the said opinion. The election of the Mukhiya of the Parasurampur Gram Panchayat was thus held on the 28th May, 1967.

3 A copy of the order of this Court, passed in Civil Writ Jurisdiction Case No 307 of 1967, staying the election was received by opposite party no 5 on the 29th May, 1967, but by that time the election of the Mukhiya of Parasurampur Gram Panchayat was already over, and one Govind Mandal was elected as the Mukhiya of the said Gram Panchayat. On receipt of the said order of this Court, election of the other Gram Panchayat (Kali Prasad) scheduled to be held on the 30th May, 1967, was stayed.

4. On the 7th June, 1967, Ramroop Yadav filed an application in Civil Writ Jurisdiction case no 307 of 1967 for maintaining the status quo of the Para-

surampur Gram Panchayat which was before the holding of the election on the 28th of May, 1967, and permitting him (the old Mukhiya) to continue in office till the hearing of that application. He stated in that application that the holding of the election after it had been stayed by this court was completely illegal and the newly elected Mukhiya Govind Mandal should not take charge of the office. He further indicated in that application that the Election Officer did not stay the election in spite of the fact that the order of this court was communicated to him and the letter and telegram of the learned counsel were shown to him. That application filed on the 7th June, 1967, was put up before the Bench on the 17th July, 1967 and an order was passed for the addition of Govind Mandal as opposite party no 6 to Civil Writ Jurisdiction Case no 307 of 1967, and a further order was passed for issuing notices to opposite party nos 4 and 5 of the main application to show cause why a proceeding for contempt should not be started against them.

5 In answer to the said notice, the Sub-divisional Officer, opposite party no 4, has shown cause stating that the order of the High Court staying the election was not communicated to him before the holding of the election and in fact a copy of the stay order was received by opposite party no 5 on the 29th May, 1967. He has referred to the opinion of the learned Government Pleader which was given to him on the 27th May, 1967 for proceeding with the election on the 28th May, 1967, and has submitted that in accordance with that opinion, he sent instructions to opposite party no 6 to act according to that opinion. It further appears from the show-cause application that on receipt of the order of this Court opposite party no 5 did not hold any election of the Kali Prasad Gram Panchayat on the 30th May, 1967. Moreover, Govind Mandal was, no doubt, elected as the Mukhiya of the Parasurampur Gram Panchayat, but he was not allowed to take oath on the 3rd June, 1967, in view of the order of this court dated the 20th May, 1967. He has further mentioned that he again sought for the opinion of the Government Pleader on the receipt of the order of this Court and the Government Pleader advised him to stay further proceedings till the order of injunction was in force. It further appears from the petition that the old Mukhiya of the Parasurampur Gram Panchayat was still functioning and no prejudice has been caused to him (Ramroop Yadav, the previous Mukhiya) and the order of this Court had been respected. His point of view is that the certified copy of the order of this Court not having been filed

either by Ramroop Yadav or Shivanand Tiwary, he had no alternative but to seek the opinion of the Government Pleader and act according to that opinion. Towards the close of his petition, he has mentioned that he never showed any disrespect to any order of this Court and in case this court took a different view, then he tendered unqualified apology. Inasmuch as he never intended to disobey the order of this Court.

6. Opposite party no. 5 also has shown cause on the same lines and he was acting according to the instructions of opposite party no. 4. He also has tendered unqualified apology in case this Court would come to the conclusion that he had committed any contempt.

7. Learned Counsel for opposite party nos. 4 and 5 submitted that a copy of the order of this court dated the 25th May, 1967, was not received either by opposite party no. 4 or 5 until the 29th May, 1967, and that being so, they had to be guided by the opinion of the Government Pleader with regard to the facts contained in the letter and the telegram sent by Mr. Prem Shankar Sahay, and on obtaining his opinion, the election of Parasurampur Gram Panchayat was held on the 28th May, 1967. Learned Counsel submitted that these two officers did not at all disobey the order of this Court and they acted bona fide in holding the election on the 28th May, 1967. He pressed that as soon as the copy of the order of this court was received by them, they did not allow the newly elected Mukhiya, Govind Mandal, to take oath and the election of the other Gram Panchayats to be held on the 30th May, 1967, was stayed. I find great force in this submission of learned Counsel for opposite party nos. 4 and 5.

8. Learned Counsel for the State of Bihar, on the other hand, urged that the letter and telegram, referred to above indicated clearly that this court had passed an order for stay of the holding of election and on the production of those documents, the Sub-divisional Officer or the Election Officer ought to have stayed their hands.

The question for consideration is as to whether opposite party nos. 4 and 5 can be held to be guilty for contempt of Court.

9. Learned counsel for the contemnors referred to Harkishun Singh v. Chhotan Mahton, AIR 1951 Pat 494. The relevant observations in that case were the following:—

"When an order of stay or other such prohibitory order has been made by this court and when the Subordinate Judge or Magistrate is informed of the order by an advocate or pleader, he ought, I consider, ordinarily to accept what is stated

by the advocate or pleader, and stay further proceedings. Certainly, he ought to do so, if the advocate or pleader is in a position to satisfy him as to the source of his information and is prepared to support it by an affidavit. The reason why the Subordinate Judge or Magistrate should invariably take such a course is that an advocate or a pleader is an officer of the court and is not likely to supply information as to the correctness of which he is not himself completely satisfied. If an advocate or pleader acts improperly or carelessly and it eventually turns out that no prohibitory order has been made by this court, suitable action can be taken against him. If, on the other hand, the Subordinate Judge or Magistrate disregards such information and continues the proceeding, he may find it a matter of difficulty to satisfy this court that he believed in good faith that no prohibitory order had been made."

10. A letter of an Advocate intimating the order for stay of any proceeding passed by this court should not be disbelieved and discarded by the court in which it is produced, unless it has any reason to suspect the genuineness of that letter, in the sense that either the said letter was not sent by the Advocate who purported to have sent it or it did not bear his signature. In other words, if an Advocate gives a certificate that this Court has granted stay of one proceeding or the other in a particular case, that certificate should be ordinarily accepted to be correct, inasmuch as an Advocate is an officer of the Court and he has taken upon himself full responsibility before giving that certificate. It may, however, be that in a particular case, the court may have some special reason for not accepting that certificate, but, in that case, it is open to the Court to ask the party producing that certificate to file an affidavit in support of that certificate and then the court can pass a suitable order, if an affidavit is filed. It happens in more than one case that whenever an order for stay is passed by this court, a certificate is granted by an Advocate indicating the order passed by this Court and the litigant carries that certificate and produces it before his lawyer appearing in the courts below, so that he may make use of it. Such step is taken inasmuch as some delay is likely to be caused in obtaining a certified copy of the order passed by this court. The litigant is always anxious to inform the courts below about the orders for stay passed by this court, so that the proceedings in the Courts below may be stayed and with that end in view he rushes to the courts below with the certificate of the Advocate.

11. In the present case, the letter and the telegram sent by Mr Prem Shankar Sahay were undoubtedly produced before opposite party no. 5 but he had to be guided by his superior officer opposite party no. 4. Opposite party no. 4 in his turn, took the advice of the Government Pleader and I have already referred to the said advice. It would have been more advisable for the Government Pleader on being informed of the letter of Mr Prem Shankar Sahay, to ask the Sub-divisional Officer to stay the election which was to be held on the 28th of May 1967 instead of proceeding with the election work, particularly when there was no proper material before him for doubting the genuineness of the letter of Mr Prem Shankar Sahay. In any event, the fact remains that opposite party nos 4 and 5 were guided in this case by the opinion of the Government Pleader and, in the circumstances of the present case it cannot be held that they wilfully disobeyed the order of this court. Their conduct was bona fide and, in fact, on receipt of the order of this court, they stayed their hands and did not allow the elected Mukhya, Govind Mandal, to take oath. I am satisfied with the explanations given by them and no further action is necessary against them.

12. In the result, the rule for contempt is discharged but there will be no order for costs.

DGB/DVC.

Order accordingly

AIR 1969 PATNA 154 (V 56 C 40)

H MAHAPATRA, J

Union of India, Appellant v New India Assurance Co Ltd. and others, Respondents

A. F. A. D No 363 of 1966 D/- 2 9-1968 against decision of Dist. J of Singhbhum at Chaibasa, D/- 19 2-1966

Limitation Act (1908) Art. 31 — Consignment of goods by Railway on 8-2-1962 — Goods arrived and unloaded at destination station on 12 2 1962 to the knowledge of consignee-plaintiff — Plaintiff finding goods in damaged state and taking open delivery on 12 3 1962 — Limitation — Limitation starts from the date of arrival of the goods and not from the date of open delivery — Fact that plaintiff came to know that there was short delivery only on 12 3 1962 is not relevant for computing period of limitation though it may give cause of action for claiming compensation for such short delivery 1964 BLJR 882 & AIR 1962 SC 1716 Foll. (Paras 2 3)

Cases Referred Chronological Paras (1964) 1964 BLJR 882, Mukhi Lal Prasad v Union of India 2

(1962) AIR 1962 SC 1716 (V 49) =

(1963) 1 SCR 70, Bootamal v Union of India 2

P K. Bose, for Appellant; Sidheshwar Pr. Singh and Madhusudan Singh, for Respondent.

JUDGMENT — This is defendant's appeal against whom the suit was brought for compensation on account of short delivery of certain goods sent from Calcutta to Tatanagar. The consignment was booked on the 8th February 1962, and arrived and was unloaded at the destination station Tatanagar on the 12th February 1962 when the wooden box in which the consignment came was found to have been damaged. The plaintiffs took open delivery on the 12th March, 1962, and after serving the notice under Section 80 of the Civil Procedure Code they instituted the suit on the 11th May 1963. The plaintiffs suit was decreed by the trial Court and affirmed by the appellate Court. Both the courts took the view on the question of limitation against the defendant and held that under Article 31 of the Limitation Act (old) corresponding to Article 11 of the new Act the suit was not barred by limitation. Against this the defendant Union of India has come in appeal before this Court.

2. Learned counsel appearing for the appellant contended that in this case on the facts found, the consignment arrived at the destination on the 12th February, 1962. That was therefore the date on which the goods ought to have been delivered. The mere fact that the plaintiff asked for open delivery and took such delivery on the 12th March, 1962 will not change the time when the goods ought to have been delivered. I find great force in this contention. In a case where the date of delivery is not stipulated in the contract itself, what would be the reasonable time for such delivery ought to be gathered from the circumstances of a particular case. Here the actual receipt of the consignment at the destination is not known, the date when delivery was taken, whether it is open or otherwise may afford the clue as to the time when the goods ought to have been delivered so as to indicate the starting time of the period of limitation within Article 31 of the Limitation Act (old). In the instant case there can be no doubt whatsoever and that was also to the knowledge of the plaintiffs as deposed to by their witness No. 2 that the consignment arrived at the destination on the 12th February 1962, that date therefore on the facts of the present case is the time when the consignment ought to have been delivered to the consignee and that would be the starting time of the period of limitation of one year.

Learned counsel referred to the case of Mukhi Lal Prasad v Union of India.

1964 BLJR 882 to support his contention. There the consignment was booked on the 28th April, 1961 and it had reached the destination on the 18th May, 1961. The consignee refused to take delivery on that day when he found that there had been damage to the consignment. He asked for open delivery which was given on the 1st July, 1961. The suit for compensation was instituted on 1st September 1961. Following the principles laid down in the case of Boota Mal v. Union of India, AIR 1962 SC 1716 it was held that the period of limitation under Article 31 ran in that case from the 18th May, 1961 when the consignment reached the destination and not from the date when open delivery was taken. In my view that case is on all fours with the facts of the present case.

3. Learned counsel appearing for the plaintiff-respondent contended that the plaintiffs came to know of the short delivery only when they went to take open delivery on the 12th March, 1962. The knowledge that there was a short delivery is not relevant for the purpose of computing the period of limitation. It may give the cause of action for claiming compensation for such short delivery but the period of limitation will run from the time after the lapse of reasonable period, after the booking of the consignment, when the goods ought to be delivered at the destination.

4. As to when, in the present case, the goods ought to have been delivered at the destination there can be no doubt inasmuch as it is admitted by both sides that the consignment arrived at the destination and was unloaded there on the 12th February, 1962. In my view, therefore, the court below was in error in law in holding that the period of limitation under Article 31 ran from the date of the open delivery and not from the date of the arrival of the goods at its destination which was on the 12th February, 1962. The plaintiffs' suit was therefore barred by limitation.

5. In the result the appeal is allowed. The judgment and decree of the court below are set aside and the plaintiffs' suit stands dismissed, but in the circumstances of the case the parties will bear their own costs throughout.

MVJ/D.V.C.

Appeal allowed.

AIR 1969 PATNA 155 (V 56 C 41)

SHAMBHU PRASAD SINGH, J.

The Chairman, Jugsalai Notified Area Committee, Appellant v. Mukhram Sharma, Respondent.

Criminal Appeal No. 64 of 1966, D/- 28-8-1968, against decision of a First Class Munsif Magistrate, Jamshedpur, D/- 2-6-1966.

LL/LJ/F807/68

(A) Prevention of Food Adulteration Act (1954), Ss. 2(xiii), 10, 12, 16 — 'Sale' includes sale for analysis to public or to Food Inspector — Sale to member of public can be only voluntary but sale to Food Inspector may be voluntary or non-voluntary — Tea vendor storing milk for tea — No evidence to show that it was kept for sale — Food Inspector taking sample for analysis against protest of tea vendor — Vendor accepting its price and granting receipt without any coercion — Transaction held to be sale within S. 2 (xiii).

A sale of an article of food for analysis whether to the member of a public or to the Food Inspector is undoubtedly a 'sale' within the definition of that term in S. 2(xiii) of the Act. In the former case the sale can only be a voluntary sale but in the latter case it may be voluntary or non-voluntary. While section 16 (1)(b) provides that any person who prevents a Food Inspector from taking a sample as authorised by this Act shall be liable to be punished, there is no similar provision in the Act for refusal to sell a person other than a Food Inspector for the purposes of getting the article of food analysed by a public analyst. Therefore, transfer of any article of food by a vendor to a person other than a Food Inspector for the purpose of getting analysed by a public Analyst ordinarily, cannot but be voluntary sale, inasmuch as, if the vendor refuses to transfer the goods no action can be taken against him. (Para 6)

The word "selling" in section 10(1)(a)(i) and the word 'sale' in sub-section (2), do not mean sale for analysis to a Food Inspector, inasmuch as, these words refer to state of affairs which must be in existence before taking of the sample by the Food Inspector which may amount to sale as defined under Section 2(xiii) of the Act. If the person from whom the Food Inspector wants to take the sample readily agrees to it, allows him to take the sample and accepts the price, it will be a case of voluntary sale. In case he does not agree to the sample being taken, the Food Inspector may take the sample even against his wishes. In that case it will also amount to a sale as defined in the Act, but a non-voluntary one. AIR 1966 SC 128 & Cr. A. No. 32 of 1962, D/- 1-7-1964 (Pat), Rel. on; 1962 (1) Cri LJ 452 (Ker), Diss. (Para 7)

A Food Inspector took sample of milk for analysis against the wishes of the accused tea vendor even though the milk was stored for purposes of tea and not for sale. Though there was evidence to show that the taking of sample was under some coercion by the Food Inspector there was nothing to indicate that there was coercion also in accepting the price of the milk and granting receipt.

Held that the transaction between the Food Inspector and the accused was a sale within S 2(xiii) of the Act, AIR 1964 All 199 Ref. (Para 8)

(B) Prevention of Food Adulteration Act (1954), S 13(5) — Report of public analyst — Evidentiary value — Examination of public Analyst not essential unless he is called by either party — Prevention of Food Adulteration Rules (1955), R. 20 — Addition of adequate quantity of preservative to sample of milk — Non-compliance — Delay of two months and a half in examination of sample—Report of Public Analyst can be relied upon as basis of conviction.

A report of a public analyst is evidence even without the examination of the Analyst and ordinarily it cannot be brushed aside on the ground of non-examination of the Analyst by the prosecution. Even if there was some delay in the examination of the milk by the Analyst and the quantity of preservative mixed in the sample of milk was less than the quantity as required by R. 20 of the rules, it cannot be laid down as a general rule that in all such cases of delay in the examination of the milk, the prosecution must examine the Analyst and if it fails to do so the report cannot be relied on. After the report of the public Analyst is brought on the record by the prosecution, it is open either to the court or to the accused to take appropriate steps for his examination if either of the two wants the Public Analyst to be examined as a witness. If the Public Analyst is not examined in spite of the request of the accused it can be argued that he has been prejudiced by his non-examination. But it is incorrect to say that even if no request is made by the accused for examination of the Public Analyst his report cannot be relied on if the prosecution does not examine him. Observations made in AIR 1951 Nag 191 leading to this view held not good law in view of decision in AIR 1966 SC 128, AIR 1933 All 837, Dist.

(Para 9)

The sample of milk taken by the Food Inspector was not mixed with adequate quantity of preservative as required by R. 20 and the sample was examined by the Public Analyst two months and a half after it was taken. The report of the Public Analyst without mentioning that the milk was decomposed stated that the milk was adulterated. The accused did not take any step either for the examination of the Public Analyst or for sending the sample with him to the Director of Central Food Laboratory for examination.

Held that in the circumstances of the case the finding of the lower Court that as the required quantity of formalin was not added to the sample the accused

could not be convicted on the basis of the report was erroneous and the order of acquittal of the accused must be set aside. AIR 1967 SC 970 & AIR 1967 Andh Pra 131, Rel. on, 1964 (2) Cri LJ 97 (Mad), Dist. AIR 1965 Madh Pra 180, Criticised. (Para 11)

(C) Prevention of Food Adulteration Act (1954), S. 16(1)(a)(i), Proviso — Sentence — Offence of adulteration of milk by tea vendor only of technical nature — Sentence of fine of Rs. 5/- only would meet requirements of justice as offence is covered by proviso to S. 16(1) and a sentence of imprisonment is not compulsory. (Para 11)

Cases Referred: Chronological Para

- (1967) AIR 1967 SC 970 (V 54) = 1967 Cri LJ 939, Municipal Corporation of Delhi v Ghisa Ram 10
- (1967) AIR 1967 Andh Pra 131 (V 54) = 1967 Cri LJ 603, Public Prosecutor v. E. Venkataswami 10
- (1966) AIR 1966 SC 128 (V 53) = 1966 Cri LJ 106, Mangaldas Raghavji v State of Maharashtra 7, 8
- (1965) AIR 1965 Madh Pra 180 (V 52) = (1965) 2 Cri LJ 220, Municipal Corporation Gwalior v Kishan Swaroop 10
- (1964) AIR 1964 All 199 (V 51) = 1964 (1) Cri LJ 502, Municipal Board Falzabad v Lalchand Surajmull 8, 11
- (1964) 1964-2 Cri LJ 97 = (1964) 2 Mad LJ 428, Velu Konar v State of Madras 10
- (1964) Cri App No 32 of 1962, D/- 1-7-1964 (Pat), Jamshedpur Notified Area Committee v Prabhu Dayal 7
- (1962) 1962 (1) Cri LJ 152 = 1961 Ker LT 308, Food Inspector, Calicut v Parmeshwaran Parmeshwar Chettiar 7
- (1951) AIR 1951 Nag 191 (V 38) = 1952 Cri LJ 471, Dattappa Mahadappa v Secy. Municipal Committee Buldana 8
- (1933) AIR 1933 All 837 (V 20) = 35 Cri LJ 280, Happu v Emperor 9
- L. K. Choudhary, for Appellant.

JUDGMENT :— This is an appeal by special leave under Section 417(3) Criminal Procedure Code by the Chairman, Jugsalai Notified Area Committee, against a judgment and order of a First Class Munsif Magistrate at Jamshedpur acquitting the respondent of the charge under Section 16(1) of the Prevention of Food Adulteration Act, 1954, (hereinafter to be referred to as 'the Act')

2. According to prosecution case, on 31-5-1965 a Food Inspector of the Committee (P. W. 1) went to the shop of the respondent and took sample of cow's milk weighing 3/4th Seer, after observ-

ing the necessary formalities and on payment of price. He divided the milk into three parts and kept each part measuring 8 oz. in three bottles. He also added 8 drops of formalin (a kind of preservative) in each bottle and thereafter sealed and packed them. He gave one of the bottles to the respondent and took two of them with him. Out of those two, one was sent to the public analyst, who found the milk adulterated (vide his report Ext. 5). Thereafter a prosecution report was filed against the respondent and he was put on trial.

3. The defence of the respondent is that he does not sell milk; rather has got a tea and pakauri shop and the Food Inspector took the sample of the milk which he had kept at his shop for preparing tea and paid the price of it against his wishes. He claims that he has not committed any offence.

4. The prosecution examined two witnesses, the Food Inspector (P. W. 1) and another employee of the Notified Area Committee (P. W. 2). A third witness, a peon of the Notified Area Committee, was merely tendered. The defence also examined a witness.

5. The learned Munsif Magistrate did not find any defect in launching of the prosecution or with the taking of the sample of the milk by P. W. 1 but has acquitted the respondent on the grounds (i) that as the required quantity of formalin was not mixed up with the specimen, the respondent could not be convicted on its analysis, (ii) that as the Public Analyst was not examined in the case, the defence could not get an opportunity to cross-examine him and the respondent could not be held guilty on the basis of his report; and (iii) that as the accused had a stall of tea and pakauri and was not a seller of milk, he could not have been found guilty of adulteration of milk.

6. P. W. 1 in his cross-examination has admitted that the respondent has a shop of tea and he did not sell the milk in the former's presence. P. W. 2 has also admitted that he did not see the respondent, who sells tea, pakauri, singhara, etc. selling milk. The defence witness has said that the respondent has got a tea and pakauri stall, that milk is not sold at his stall and that the Food Inspector took the sample and paid price for it against the wishes of the respondent. On this evidence the question would arise whether the respondent can be held guilty for selling milk which was adulterated. It was contended by learned counsel for the appellant that a sale for analysis is a sale for the purposes of this Act. Reliance was placed on the definition

of 'sale' in Section 2(xiii) of the Act which runs as follows:—

"'Sale' with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article."

A sale for analysis is undoubtedly a sale according to the definition; but the question which arises for consideration is whether transfer of articles of food for analysis in all cases, whether voluntary or non-voluntary, amounts to a 'sale', for the purposes of the Act. According to provisions of the Act, transfer of articles of food for analysis may be to Food Inspector or to a purchaser other than a Food Inspector, i.e. to a member of the public. Section 12 of the Act provides that any purchaser of any article of food other than a Food Inspector may have the article analysed by the Public Analyst on payment of the prescribed fees provided he informs the vendor at the time of the purchase of his intention to have such article so analysed and follows provisions of sub-secs. (1), (2) and (3) of section 11 so far they may apply. These sub-sections, inter alia, lay down that before taking a sample of any article of food for analysis written notice of the intention to have it analysed must be given to the vendor; the sample should ordinarily be separated into 3 parts and thereafter sealed, one of which should be delivered to the vendor, another should be sent to the Public Analyst for analysis and the third should be retained by the purchaser; in case where the vendor declines to accept any of the parts of the sample, it should be divided then only into two parts, one for being sent to the Public Analyst and the other for being retained by the purchaser; and, in sending the sample to the Public Analyst rules prescribed for the purpose should be followed.

While section 16(1)(b) provides that any person who prevents a Food Inspector from taking a sample as authorised by this Act shall be liable to be punished, there is no similar provision in the Act for refusal to sell a person other than a Food Inspector for the purposes of getting the article of food analysed by a public analyst. Therefore, transfer of any article of food by a vendor to a person other than a Food Inspector for the purpose of getting analysed by a Public Analyst ordinarily, cannot but be voluntary sale, inasmuch as, if the vendor refuses to transfer the goods no action can be taken against him.

7. But, as the Act makes preventing a Food Inspector from taking a sample as authorised by the Act penal, the transfer of an article of food to the Food Inspector may be either voluntary or non-voluntary. Section 10(1)(a) of the Act empowers the Food Inspector to take samples of any article of food from (i) any person selling such article; (ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee; and (iii) a consignee after delivery of any such article to him. Sub-section (2) of that section empowers the Food Inspector to enter and inspect any place where any article of food is manufactured, stored or exposed for sale and take samples of such articles of food for analysis. Sub-section (3) of that section lays down that the Food Inspector after taking sample under either of the two preceding sub-sections should pay to the person from whom the sample is taken price of the article calculated at the rate at which it is usually sold to the public. The word "selling" in Section 10(1)(a)(i) and the word 'sale' in sub-section (2) it is obvious, do not mean sale for analysis to a Food Inspector, inasmuch as, these words refer to state of affairs which must be in existence before taking of the sample by the Food Inspector which may amount to sale as defined under Section 2(xii) of the Act. If the person from whom the Food Inspector wants to take the sample readily agrees to it, allows him to take the sample and accepts the price it will be a case of voluntary sale. In case he does not agree to the sample being taken, the Food Inspector may take the sample even against his wishes. In that case it will also amount to a sale as defined in the Act, but a non-voluntary one. In *Food Inspector, Calicut v. Parmeshwaran Parmeshwar Chettiar*, 1962 (1) Cri LJ 152 (Ker), a learned Single Judge of Kerala High Court took the view that there was no sale when a Food Inspector obtained a sample under Section 10 of the Act and the person from whom the sample was taken could not be convicted for an offence under Section 16(1)(a)(ii) of the Act. In *Mangaldas Raghavi v. State of Maharashtra*, AIR 1966 SC 128, however, it was observed that it was difficult to appreciate the reasons of the learned Single Judge of Kerala High Court in the case referred to above that a transaction with which he had to deal did not amount to a sale and that it did not necessarily follow that the other person had no choice but to accept the proposal, the transaction would never amount to a contract and there would be no sale. A learned single Judge of this court in *Jamshedpur Notified Area Committee v. Prabhu Dayal*, Criminal Appeal No. 32 of 1962, judg-

ment dated the 1st, July, 1964 unreported (Pat) has also held that a non-voluntary transfer to a Food Inspector in cases he is empowered to take sample would amount to sale.

8. The instant case, however, is not a case where the Food Inspector was empowered to take sample for the evidence on the record does not show that the respondent was selling milk or that he was in the course of conveying, delivering or preparing to deliver milk to a purchaser or consignee or that he was a consignee to whom milk had been delivered or that milk was manufactured for sale, stored for sale or exposed for sale in his shop. Mere storing of milk of quality below the prescribed standard is not an offence according to the Act. The storing must be for sale, and if the respondent would have refused to transfer the milk and accept the price for it from the Food Inspector, he would not have been guilty of an offence under Section 16(1)(b) of the Act. This view is supported by a Bench decision of the Allahabad High Court in *Municipal Board, Faizabad v. Lalchand Surajmull*, AIR 1964 All 199. That too was a case of sale for analysis of milk by a tea vendor and it was held there that the accused of that case could have very well told the Food Inspector that he might take the sample but they were not going to sell the milk and accept its price, but as they accepted the price it was a case of sale and they were guilty of an offence under Section 7 read with Section 16 of the Act. In the instant case, as it appears from the evidence of P W 1, at first the respondent was not willing to accept the price but ultimately did accept it. Of course the witness has also said that the respondent had objected to the taking of the sample of the milk on the ground that it was not for sale and thereupon the Food Inspector insisted for it and threatened to file a case against the respondent if he would not allow him to take the sample. According to this witness, the Food Inspector also insisted that the respondent must accept the money and grant a receipt. Can on this evidence it be said that the respondent accepted the price under coercion and, therefore, the transaction would not amount to a sale because non-voluntary transfer of an article of food in cases where the Food Inspector is not empowered to take the sample is not a sale? There is something in the evidence of defence witness no. 1 to show that there was element of coercion in the matter of taking of the sample, but there is nothing in it to indicate that there was coercion also in the matter of acceptance of price and granting of a receipt by the respondent. Therefore, on the evidence on record as it is, it has to be held that the transaction between the Food Inspecto-

tor and the respondent is a sale for the purposes of the Act.

9. According to sub-section (5) of Section 13 of the Act, any document purporting to be a report signed by a Public Analyst, unless it has been superseded under sub-section (3) of that section by a certificate issued by the Director of the Central Food Laboratory, can be used as evidence of the fact stated therein in any proceeding under the Act. A report of a public analyst, therefore, is evidence even without the examination of the Analyst and ordinarily it cannot be brushed aside on the ground of non-examination of the Analyst by the prosecution. True it is that there was some delay in the examination of the milk by the Analyst and the quantity of preservative mixed in the sample of milk was less than the quantity as required by the rules; but, it cannot be laid down as a general rule that in all such cases of delay in the examination of the milk, the prosecution must examine the Analyst and if it fails to do so, the report cannot be relied on. After the report of the Public Analyst is brought on the record by the prosecution, it is open either to the court or to the accused to take appropriate steps for his examination if either of the two wants the Public Analyst to be examined as a witness. If the Public Analyst is not examined in spite of the request of the accused it can be argued that he has been prejudiced by his non-examination. In this case, however, it appears that there was no request by the respondent for examining the Public Analyst and the court below has, therefore, erred in observing that the respondent could not be held guilty on the basis of the Analyst's report because of his non-examination. It has relied on the decisions in (i) Dattappa Mahadappa v. Secretary Municipal Committee, Buldana, AIR 1951 Nag 191 and (ii) Happu v. Emperor, AIR 1933 All 837. In Nagpur case the accused did make an application to the trial court for examining the Public Analyst as a witness and the prayer was disallowed without assigning any reason for it. The Allahabad case was not a case of Food adulteration. It was a case under Section 302 of the Indian Penal Code. In Mangaldas's case, AIR 1966 SC 128, already referred to above, while considering this aspect of the matter the Supreme Court observed as follows :—

"As regards the failure to examine the public analyst as a witness in the case no blame can be laid on the prosecution. The report of the Public Analyst was there and if either the Court or the appellant wanted him to be examined as a witness appropriate steps would have been taken. The prosecution cannot fail

solely on the ground that the Public Analyst had not been called in the case."

It is noteworthy that the judgment of the Supreme Court was delivered by Mudholkar, J., who himself had given the decision in Dattappa's case as Judge of Nagpur High Court. Certain other observations made in that case which may lead one to think that even if no request is made by the accused for examination of the Public Analyst his report cannot be relied on if the prosecution does not examine him, after the decision of the Supreme Court in Mangaldas's case, AIR 1966 SC 128, cannot be taken as good law.

10. The Food Inspector (P. W. 1) in his evidence has said that he added 8 drops of formalin in each bottle which contained 8 ozs. of milk. According to Rule 20 of the Prevention of Food Adulteration Rules, 1955, as it stood after amendment on the date of the taking of the sample, two drops of formalin were required to be mixed to 25 grms. of milk. Therefore, about 16 drops of formalin should have been mixed by the Food Inspector to the 8 ozs of milk instead of only 8 drops. The sample though taken on the 31st of May, 1965, was not sent to the Public Analyst before the 5th of July, 1965 and it was examined only on the 17th of August, 1965. The court below has accepted the defence contention that the analysis of the sample could not be relied upon because milk itself got spoiled due to late analysis. In support of this view it has relied on the decisions in (i) Velu Konar v. State of Madras, 1964 (2) Cri LJ 97 (Mad) and (ii) Municipal Corporation Gwalior v. Kishan Swaroop, AIR 1965 Madh Pra 180. In Velu Konar, 1964 (2) Cri LJ 97 (Mad) the milk was examined by the Analyst after 10 months of the taking of the sample. In the other case of Municipal Corporation Gwalior there was not much delay in the examination of the milk by the Analyst, even then it was observed that as the preservative added was not adequate to prevent disintegration or damage in composition of the milk, the report of the Public Analyst could carry weight only if it could be shown that the mandatory requirements of Rule 20 were fulfilled. The decision of that case, however, did not rest only on this ground.

In Municipal Corporation of Delhi v. Ghisa Ram, AIR 1967 SC 970 the Supreme Court had occasion to consider the decision in the case of Municipal Corporation Gwalior and approved it on certain points. In the case before the Supreme Court it appears that no preservative at all was mixed to the sample of curd. There was also delay in launching of the prosecution with the result that when at the request of the accused the sample

given to him was sent to the Director of the Central Food Laboratory he reported that the sample of curd sent to him had become highly decomposed and no analysis of it was possible. The accused was acquitted by the trial court and the appeal by the Municipal Corporation was also dismissed by the Delhi Bench of the Punjab High Court. It was argued before the Supreme Court that though under the Act a certificate of the Director of the Central Food Laboratory had the effect of superseding the report of the Public Analyst, the absence of such a certificate whatsoever would not affect the value and efficacy of the certificate given by the Public Analyst. Their Lordships accepted the correctness of this proposition and observed that if in case the accused did not choose to exercise his right of sending the sample with him to the Director of the Central Food Laboratory the case against him could be decided on the basis of the report of the Public Analyst. But as their Lordships found that the accused did choose to exercise this right and the right frustrated because of the conduct of the prosecution, they maintained the order of acquittal. They observed that different considerations might arise if the right got frustrated for reasons for which the prosecution was not responsible. From some of these observations of their Lordships of the Supreme Court it appears that in appropriate cases prosecution is possible even if no preservative is at all mixed which is against the dictum of the Madhya Pradesh High Court in the case of Municipal Corporation Gwalior, AIR 1965 Madh Pra 180 that the report of the Public Analyst could carry weight only if it could be shown that the mandatory requirements of Rule 20 were fulfilled. In Public Prosecutor v F Venkataswami, AIR 1967 Andh Pra 131, a case where required quantity of preservative was not mixed to the sample, it was observed.—

"nor there is any data on record to hold that merely because an insufficient quantity of preservative was added, the opinion of the Public Analyst on that account was liable to be ignored. I am inclined to hold that the complaint should have emanated from the Public Analyst viz., that as insufficient quantity of the preservative had been added the sample had deteriorated or that decomposition had set in with the result that the analysis could not proceed on a safe footing. There is no such complaint by the Public Analyst nor the respondent has chosen to examine the Public Analyst from this point of view."

The learned Judge further observed that if it was the case of the accused that on account of insufficiency of preservative the sample had deteriorated, he

could have availed of the provisions under Section 13 of the Act and sent the sample to the Central Food Laboratory for an opinion and he having not followed that course, there was no justifiable reason to arrive at the finding that merely because of the insufficiency of the preservative the sample had undergone a further decomposition. In the instant case also the respondent did not take any step either for the examination of the Public Analyst or for sending the sample with him to the Director of the Central Food Laboratory for examination. In his report the Public Analyst has not said that at the time of the analysis the milk was decomposed and not fit for analysis. Therefore the finding of the court below that as the required quantity of formalin was not mixed with the sample the respondent could not be convicted on its analysis appears to be erroneous. It, therefore, appears to have erred in acquitting the respondent of the charge.

11 For the foregoing reasons, the order of acquittal passed by the Court below is set aside and the respondent is convicted under Section 16(1)(a)(i) of the Act. The offence however as observed in the case Municipal Board, Faizabad, AIR 1964 All 189 is technical in nature and as was done in that case a sentence of fine of Rs 5/- will meet the ends of justice in this case. The offence is covered by the Proviso to sub-section (1) of Section 16 and a sentence of imprisonment is not compulsory. I accordingly sentence the respondent to pay a fine of Rs 5/- in default to undergo simple imprisonment for one week. The appeal is accordingly allowed.

12. Before closing the judgment, however, I would like to observe that though the respondent has been found technically guilty of an offence and convicted and sentenced, it was not a case at all where the Food Inspector should have insisted on taking sample of milk from the respondent, or the authorities of the Notified Area Committee should have sanctioned the prosecution. It has resulted in nothing but waste of courts' time and public money in the hands of the Committee. The money in the hands of the Notified Area Committee being public money should not be wasted in such a manner.

KSB

Appeal allowed.

AIR 1969 PATNA 160 (V 56 C 42)

H. MAHAPATRA, J

Baikunth Narain Mishra, Petitioner v Mt. Kesar Kall Kuer and another, Opposite Party

Civil Revn. No 1400 of 1967 D/- 9-9-1968 against decision of 1st Addl. Sub J. Arrah, D/- 7-9-1967

LL/LL/F808/68

(A) Limitation Act (1908), S. 18 — Computation of period of limitation — When computation is to be made from particular date, such date is excluded from computation. (1967) 2 QB 899, Dist. (Para 2)

(B) Limitation Act (1908), S. 21 — Acknowledgment by one of two joint executors of promissory note — Limitation will be saved against him only. (Para 3)

Cases Referred: Chronological Paras
(1967) 1967-2 QB 899=1967-2 All
ER 900, Trow v. Ind. Coope
(West Midlands) Co. Ltd. 2

Jagdish Pandey, for Petitioner; Devendra Pd. Sharma and Vishambhar Sharma, for Opposite Party.

ORDER :— Defendant No. 2 is the petitioner. A money suit based on a promissory note was filed against the two defendants. The promissory note was executed on the 7th January, 1957 for Rs. 500/-. There was a payment of Rs. 18/- on the 5th January, 1960 and an endorsement to that effect was made by one of the executants defendant No. 2 on the back of the promissory note. When the suit was filed, several pleas were taken in defence against it. It was pleaded that the suit was barred by limitation and by Section 4 of the Bihar Money Lender's Act, besides the denial of the loan and part payment. Both courts have held the promissory note to be genuine and valid and to have been executed by the defendants 1 and 2 for Rs. 500/- advanced to them as a loan by the plaintiff. The trial court however dismissed the plaintiff's suit on the ground that it was barred by limitation because in its view, the date given in the endorsement of part payment was interpolated inasmuch as the year '60' appeared to have been over-written. While the case came in appeal before the lower appellate court it gave very cogent reasons for differing from the view taken by the trial court on the date in the endorsement of part payment made on the 5th January, 1960. Although the promissory note filed in court had been examined by the defendants before they filed their written statement, nothing was said in the written statement to say that the date of endorsement had been interpolated or to say which year other than '60' had been given by defendant No. 2. On the other hand, there was a complete denial of making the endorsement and giving the thumb-impression which were found to be false by both courts. I have myself looked into the endorsement including the year given by defendant no. 2 (Ext.3/A) and I do not think that the lower appellate court was wrong in any way in observing that there had been no interpolation or over-writing in the date as put in that endorsement (Ext. 3/A).

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2. Learned counsel for the petitioner however urged that even if that endorsement is taken to be genuine, still the suit was barred by limitation. According to him, the date of endorsement and acknowledgment of debt being 5th January, 1963, was to be included while computing the fresh period of limitation under Section 18 of the Indian Limitation Act. It is well known that when computation of a period is to be made from a particular date, that date is excluded from such computation. Learned Counsel however contended that that date from which computation of the period is to be made should be included in the computation. In support of his contention, he referred to a case Trow v. Ind. Coope (West Midlands) Co., Ltd., (1967) 2 QB 899. There a writ had been issued and the question arose whether it had been served within a period of twelve months "beginning with the date of" its issue. Interpreting the phrase "beginning with the date" it was held that the date of issue was to be included in computing the period of 12 calendar months. I cannot see how that case will go in support of the petitioner here. In our Limitation Act the period of three years is from the date of acknowledgment of debt and not that, that period of three years is to begin with the date of acknowledgment.

3. Learned counsel further contended that there have been contradictory decrees in the same suit inasmuch as it has been held to be barred by limitation as against defendant no. 1 and has been held to be within time as regards defendant No. 2. I also do not see any substance in this. An acknowledgment will save limitation against the person who makes such acknowledgment. If it would have been found that defendant No. 2 was authorised to make acknowledgment on behalf of defendant No. 1 that would have also saved the limitation against defendant No. 1. The court below has rightly held that when defendant No. 1 was present in the village on the date of acknowledgment and endorsement in Ext. 3/A by defendant No. 2, the endorser (defendant No. 2) would not be taken to have been authorised by defendant No. 1 to make such acknowledgment. That was purely a question of fact. Since the acknowledgment has saved the limitation against defendant No. 2 the suit has been decreed against him. I do not see any error in law in that respect.

4. Another argument by learned counsel was that both the defendants being members of the same Hindu joint family the suit should have been decreed or dismissed against both of them as both of them were the executants of the handnote and recipients of the loan as held by the courts below. This again in my view cannot

succeed. They were joint executants, each being liable for the entire loan. In that view the suit having failed on the ground of limitation against one of the executants, can succeed against the other on account of fresh period of limitation being available against him from the date of acknowledgment of his debt.

5. For the reasons given above this application is dismissed with costs. Hearing fee is assessed at Rs 25/-

DGB/DVC.

Application dismissed.

AIR 1969 PATNA 162 (V 56 C 43)

N L. UNTWALLA, J

Syed Shah Safiul Alam, Appellant v
Syed Shah Mohammad Aminul Alam
and another Respondents.

A. F. A. O No 126 of 1965 D/ 8-9-1967 against order of Addl. Dist. J. II and Court, Bhagalpur D/ 10-3-1965

(A) T P Act (1882) Ss 100 73 — Charge on property — Charge created by decree other than a compromise decree is not charge within the meaning of S 100 — Person getting decree for maintenance payable from income of certain property — Decree creates charge against property — Decree-holder has same rights as a simple mortgagee under S 73.

A charge created by a decree other than a compromise decree is not a charge created by the act of parties or by operation of law within the meaning of Section 100 of the T P Act. The main distinction between the rights of a holder of a charge under Section 100 of the Act and a simple mortgagee that the former cannot proceed against a subsequent bona fide purchaser for value without notice of the charge while the latter can proceed against him, does not apply to a case of a charge created by a decree other than a compromise decree. A compromise decree creates a charge by an act of parties and such a charge cannot be enforced against a subsequent transferee for value without notice. A person, who has got a charge of maintenance decree against certain properties can have the same right as that of a simple mortgagee to enforce the charge against the substituted security such as the compensation money payable in respect to the zamindari properties. AIR 1945 Pat 278 & AIR 1948 Pat 199 & AIR 1945 Pat 434, Rel. on. (Para 4)

(B) Bihar Land Reforms Act (1950) S 4(d) — Scope — Suit for arrears of maintenance out of income of certain property claiming only money decree without enforcing charge on the property — Suit is not barred by S 4(d)

Obiter — Where a person brings a suit for arrears of maintenance against a

BL/FL/A502/68

Mutawalli holding Wakf property and claims a money decree only without asking for a decree to enforce charge against the property S 4(d) does not bar the suit 1958 BLJR 796, Rel. on. (Para 4)

(C) Bihar Land Reforms Act (1950), S. 33 — Ad interim compensation — It is not compensation in lieu of property — It is interest on compensation — Ad interim compensation is income which is attachable — Mutawalli in charge of wakf property — Beneficiary having charge on income for maintenance — Property later vesting in Government — Ad interim compensation paid to Mutawalli is income attachable by the beneficiary

A Mutawalli holding Wakf property was liable to pay maintenance to beneficiaries out of its income. Beneficiaries obtained a decree against mutawalli for arrears of maintenance. During the proceedings property became vested in Government under Bihar Land Reforms Act (1950) Government granted ad interim compensation to Mutawalli. Decree-holders wanted to attach the ad interim compensation.

Held the ad interim compensation, which is payable under section 33 of the Bihar Land Reforms Act, is not really the amount of compensation in lieu of the vested property itself but it is paid by way of interest on the amount of compensation, the payment of which has been deferred. The ad interim compensation is income from the property which stands in a different form now in that, in place of the zamindari properties the amount of compensation payable is the property in the hands of the person receiving it and he is deriving income from that property in the shape of ad interim compensation. The amount of ad interim compensation payable to the judgment-debtor can be attached and paid to a decree-holder in satisfaction of the decree. The amount of ad interim compensation, as soon as it becomes payable to the intermediary becomes a debt and can be attached and realised in satisfaction of even a money decree. If the charge is on the income, the decree-holder holding such a charge cannot be in a worse position. Even without attachment he can enforce his charge against the income irrespective of the fact that the character and nature of the Wakf property has changed. Whatever may be the form and character of the property it is impressed with the trust and does exist for the benefit of the beneficiaries, in the hands of the Mutawalli, who is under an obligation to distribute the income in accordance with the trust, 1964 BLJR 234, Explained. AIR 1953 Bom 101, Rel. on. (Para 5)

(D) Civil P. C. (1908) O 21 R. 15 — Joint decree — Decree specifying amount

due to each plaintiff separately, but damages and cost given cumulatively — Decree is joint decree — One decree-holder can execute it for the benefit of others.

Where in a single suit two plaintiffs obtained a decree in which the Court ordered the judgment-debtor to pay to the plaintiffs amounts specified separately for each but did not specify separately the amounts of damages and costs awarded to them.

Held, it was a joint decree and could be executed by one decree-holder for the benefit of the other also. AIR 1932 Pat 261, Rel. on. (Para 6)

Cases Referred: Chronological Paras

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| (1963) Misc. Appeal No. 56 of 1959,
D/- 2-5-1963=1964 BLJR 234,
Ramsaran Das Kashyap v. Kabiraj
Basudavanand | 3, 5 |
| (1961) Misc. Appeal No. 368 of 1961,
D/- 27-7-1962 (Pat) | 2, 4, 5 |
| (1958) 1958 BLJR 796=ILR 38 Pat
138, Rani Padma Sundari Sahiba
v. Rani Prabhawati Devi | 4, 5 |
| (1953) AIR 1953 Bom 101 (V 40)=
54 Bom LR 757, Fatehchand Tara-
chand v. Parashram Maghanmal | 5 |
| (1948) AIR 1948 Pat 199 (V 35),
Mt. Prem Kuer v. Ram Lagan
Rai | 2 |
| (1947) First Appeal No. 57 of 1947
(Pat) | 2 |
| (1945) AIR 1945 Pat 278 (V 32)=
ILR 24 Pat 245, Debendra Nath
Giri v. Smt. Trinayani Dasi | 2 |
| (1945) AIR 1945 Pat 434 (V 32)=
ILR 24 Pat 345, Sheo Narain Sahu
v. Lakhan Sahu | 2 |
| (1932) AIR 1932 Pat 261 (V 19)=
ILR 11 Pat 445, Chandra Chur
Deo v. Mt. Shyam Kumari | 6 |
- Balbhadra Prasad Singh and J. K. Prasad, for Appellant; S. Sarwar Ali and Matur Rahman, for Respondents.

JUDGMENT:— This case illustrates the dictum of the Privy Council that the difficulties of a decree-holder in India really start after he has obtained a decree.

2. This is a Miscellaneous Second Appeal by the judgment-debtor arising out of a proceeding under Section 47 of the Code of Civil Procedure hereinafter to be referred to as the Code. The respondent obtained a decree against the appellant in money suit No. 33 of 1943 on the 11th October 1947. The appellant was the Mutawalli of waqf under which the respondents were entitled to maintenance from the properties of the waqf as some of the beneficiaries. The respondents prayed in the suit that a decree be passed for Rs. 8203/10/- against the appellant, who was the defendant in the suit, with costs and future loss and damage and if necessary a receiver may

be appointed for the realisation of the amounts to which the respondents may be found entitled from the property entered in schedule 1 of the plaint. As many as 30 items of Zamindari properties were mentioned in Schedule 1. The decree which was passed by the trial Court was in the following terms:—

"It is ordered that defendant do pay to the plaintiffs (Rs. 4,354-0-6 to the plaintiff no. 1 and Rs. 1849-13-6 to the plaintiff no. 2 plus Rs. 1237-15-4 as damages) the sum of Rs. 7,441-10-4 with interest thereon at the rate of 6 per cent per annum from the date of judgment to the date of realization of the said sum and do also pay Rs. 990-14-0 the proper cost of this suit with interest at the rate of six per cent per annum from this date to the date of realisation."

The defendants filed first appeal no. 57 of 1947 in this court which was dismissed some time in the year 1958. Thereafter the decree-holders proceeded to realise their decretal dues by an execution case in which they made a prayer for arrest of the judgment-debtor. The judgment-debtor objected to the said mode of execution. The Courts below rejected his objection and he came up in miscellaneous Appeal No. 368 of 1961 in this court. This appeal was allowed by Choudhary J. on the 27th July, 1962. On an interpretation of the decree with reference to the plaint and judgment in the suit it was held that the judgment-debtor was not personally liable for the payment of the decretal dues, as under the decree the decree holder had a right to realise the same only from the income of the properties mentioned in schedule 1 of the plaint. In other words it was held that there was no personal liability of the Mutawalli to pay any money to the beneficiaries except out of the income of the waqf property.

3. Thereafter respondent no. 1 filed execution case no. 12 of 1963 in execution court under Order 21, Rule 15 of the Code for the benefit of respondent no. 2 also. Since all the Zamindari Properties, which had been mentioned in Schedule 1 of the plaint were vested in the State of Bihar on or before the 1st January, 1956 under the Bihar Land Reforms Act, 1950, in the present execution a prayer was made for the attachment of the amount of ad interim compensation payable to the Appellant under the said Act. The appellant filed Miscellaneous case no. 45 of 1963 under Section 47 of the Code. Only two points of objection were taken into the execution court— (i) that the compensation money in question was not a debt and so it was not attachable in execution of the money decree and (ii) that the decree which had been passed in favour of the respondents was not a joint decree within the meaning of Order 21, Rule 15 of the Code and hence res-

pendent no 1 had no right to execute the decree for realisation of the decretal dues payable to respondent no 2.

Both these points were decided against the appellant by the learned Additional Subordinate Judge in whose court the execution case was pending. The first point was decided on the authority of a Bench decision of this court to which I was a party in Miscellaneous Appeal No 56 of 1959 which after the execution is reported in 1964 BLJR 234, Ramsaran Das Kashyap v Kaburaj Basudavand. The second point was repelled on the ground that the decree in favour of the respondents was a joint decree. The judgment-debtor went up in appeal, in regard to the first point a different stand was taken. There it was contended that the decree was for arrears of maintenance which was to be realised out of the income of certain properties mentioned in schedule 1 of the plaint and since those properties had been lost to the judgment debtor as the same had vested in the State, it could not be realised from compensation money payable to him as that money was not the income of the property. Therefore it could not be attached.

The learned Additional District Judge has held that the decree was realisable from property itself and when that property has ceased to exist it could be realised from the compensation that is payable on account of the same, no matter whether the compensation is treated as profit arising out of that property or not. The lower Appellate Court has agreed with the execution court with regard to second question. The judgment debtor has preferred this miscellaneous appeal.

4. In this court Mr Balbhadra Prasad Singh learned counsel for the appellant, pressed the first point again in a somewhat different form. He submitted that in view of the decision of Choudhary J., in Miscellaneous Appeal No. 368 of 1951 (Pat), the decree for maintenance was a charge on the Zamindari properties within the meaning of Section 100 of the Transfer of Property Act hereinafter called the Act. Hence the remedy which could be available to a mortgagee under Sec. 73 of the Act to claim compensation amount could not be available to a person who had a charge on the property within the meaning of Section 100 of the Act. I may make it clear here that it was neither argued in either of the courts below nor before me that the execution case cannot proceed in view of the provisions of law contained in Section 4(d) of the Bihar Land Reforms Act. As a matter of fact neither Mr. Justice Choudhary decided that decree in question created any charge over the properties nor the decree expressly said so. It

was not the stand of the appellant in the courts below that the decree had created a charge on the Zamindari properties which could not be executed after their vesting.

I may only point out in this connection that a charge created by a decree other than a compromise decree, is not a charge created by the act of parties or by operation of law within the meaning of Section 100 of the Act vide Debendra Nath Giri v. Smt. Trinayani Das, AIR 1945 Pat 278 and Mt. Prem Kuer v. Ram Lagan Rai, AIR 1948 Pat 199. It has been pointed out in those cases that the main distinction between the rights of a holder of a charge under Section 100 of the Act and a simple mortgagee, that the former cannot proceed against a subsequent bona fide purchaser for value without notice of the charge while the latter can proceed against him, does not apply to a case of a charge created by a decree other than a compromise decree. A compromise decree as has been held in the case of Sbeo Narain Sahu v. Lakhan Sahu, AIR 1945 Pat 434, creates a charge by an act of parties and such a charge cannot be enforced against a subsequent transferee for value without notice. On principle, therefore, I do not see any reason as to why a person, who has got a charge of maintenance decree against certain properties, cannot have the same right as that of a simple mortgagee to enforce the charge against the substituted security, as the compensation money payable in respect to the zamindari properties. I may also add that it has been pointed out in the case of Rani Padma Sundari Sahiba v. Rani Prabhawati Devi, 1958 BLJR 796 that where the plaintiff does not ask for a decree to enforce the charge but has brought the suit merely for a money decree for the arrears of allowance, section 4(d) of the Bihar Land Reforms Act is not a bar to the suit. But, in my opinion this question does not arise in this case.

5. In the present case, the decree-holder proceeded to execute the decree as a money decree. He wanted to realize the amount by attachment of the ad interim compensation payable to the judgment-debtor. On the authority of the Bench decision of this Court in the case reported in 1964 BLJR 234 this objection was squarely repelled by the execution court. There was no further scope to agitate this point in that form and that is the reason why the judgment-debtor pressed the point in the court of appeal below as also in this Court in quite a different form. The answer to the point in that form is very simple. Firstly, the decision of Choudhary, J. that the decree that was passed against the defendants gave a right to the decree-holder to realise the same only from the income of the pro-

perties mentioned in Schedule 1 of the plaint, was an obiter dictum. The point as to whether the decree could be realised only from the income of the properties or the properties themselves did not fall for decision in the proceeding out of which Miscellaneous Appeal No. 368 of 1961 (Pat) had arisen. The only point canvassed before and decided by his Lordship, Mr. Justice Choudhary, was as to whether the judgment-debtor was personally liable.

In the present execution case also the point has not been raised in that form nor is it necessary to decide it. The ad interim compensation, which is payable to the judgment-debtor under Section 33 of the Bihar Land Reforms Act, is not really the amount of compensation in lieu of the vested property itself but it is paid by way of interest on the amount of compensation, the payment of which has been deferred. This point has been discussed in R. S. Das's case, 1964 BLJR 234 referred to above. That being so, the ad interim compensation payable to the judgment-debtor is income from the property which stand in a different form now, in that, in place of the zamindari properties, the amount of compensation payable to the Mutwali judgment-debtor is the property in his hands and he is deriving income from that property in the shape of ad interim compensation. In any view of the matter the amount of ad interim compensation payable to the judgment-debtor can be attached and paid to the decree-holder in satisfaction of the decree in question. I find no difficulty in taking this view in this case.

It is unnecessary to go to the question of charge, the principle of substituted security or the question as to whether the decree could be realised from the corpus of the property which in the same form is no longer available. The argument on behalf of the appellant was that the charge created by the decree in this case was on the income of the property. If it was so, Shah J. has decided in the case of Fatehchand Tarachand v. Parashram Maghanmal, AIR 1953 Bom 101, applying the principles of many English decisions, that even in this country a charge on future property operates upon such property as soon as it comes into existence. In R. S. Das's case, 1964 BLJR 234 it has been held that the amount of ad interim compensation, as soon as it becomes payable to the ex intermediary, becomes a debt and can be attached and realised in satisfaction of even a money decree. If the charge is on the income, the decree-holder, holding such a charge cannot be in a worse position. Even without attachment he can enforce his charge against the income irrespective of the fact that the character

and nature of the Waqf property had changed. Whatever may be the form and character of the property, it is impressed with the trust and does exist, for the benefit of the beneficiaries, in the hands of the Mutwali, who is under an obligation to distribute the income in accordance with the trust.

6. The second point has no substance in view of a Bench decision of this Court in the case of Chandra Chur Deo v. Mt. Shyam Kumari, AIR 1932 Pat 261 where Fazl Ali J. (as he then was) has pointed out at p. 265 that the term "joint decree" is wide enough to apply to a case where the rights of several parties have been determined by one and the same decree. The facts and views of the court below in this regard were quoted with approval on that page which indicate that almost under identical circumstances the decree was held to be a joint decree for the purpose of Order 21, Rule 15 of the Code. I may also point out in this case that although the amounts of maintenance was specified separately as payable to plaintiffs 1 and 2, there was no such specification made in regard to the amount of damages and costs decreed in favour of the two plaintiffs. Even in regard to the amounts of maintenance and damages, the total amount of Rs. 7000/- and odd was mentioned. In my opinion, the decree in question was clearly a joint decree which could be executed by one decree-holder for the benefit of the other also.

7. In the result, I find that there is no merit in this appeal and it is accordingly dismissed with costs.

BDB/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 165 (V 56 C 44)

TARKESHWAR NATH AND
B. N. JHA, JJ.

Sayedabad Tea Co. Ltd., Purnea, Appellant v. State of Bihar, Respondent.

A. F. O. O. Nos. 283 and 285 of 1963, D/- 17-5-1968, against order of Dist. J., Purnea, D/- 9-7-1963.

Bihar and West Bengal (Transfer of Territories) Act (40 of 1956), Ss. 47 and 17 — Applicability of S. 47 — Land Acquisition case — Acquired lands transferred from Bihar State to State of West Bengal — Appeal against compensation claim pending in Patna High Court decided after the appointed date under Act — Execution of decree by Court in Bihar State refused — Refusal valid — (Civil P. C. (1908), Preamble and S. 47).

Where lands acquired by Bihar State had been transferred to the State of West

IL/KL/D634/68

Bengal by the Bihar and West Bengal (Transfer of Territories) Act and an appeal against the compensation claim, pending in Patna High Court on the appointed date under the Act, had been decided after such date, refusal to execute the decree by a court in Bihar State is correct. (Para 12)

Where a deeming provision is made in a statute, the State of things will have to be assumed though such things do not exist and the rights of the parties will have to be determined on such imaginary things. AIR 1953 SC 244 & 1952 AC 109. & AIR 1959 SC 352, Foll. AIR 1936 PC 49 & (1959) ILR 38 Pat 177 & AIR 1958 Pat 630 (FB) Rel. on. (Para 10)

Since the decree passed in the land acquisition case had been appealed against, the decree was subjudice in Patna High Court, and did not become final till the High Court decided the appeal. Therefore it cannot be said there was no legal proceeding pending at the appointed date. The Patna High Court had jurisdiction under S 17 to decide the appeal pending before it on the appointed date and therefore the decree passed by the High Court was a good decree to be given effect to. (Para 11)

Though the executing court has no jurisdiction to go behind the decree and has to execute it as it stands, for the purpose of execution it has to construe the decree.

The executing court while refusing to execute the decree did not go behind it but considered whether the decree holder had a right to execute it against Bihar State construing the decree in the light of S 47. The executing court was right in holding that the State of West Bengal would have to be read in the decree under execution in place of Bihar State, by a legal fiction. (Paras 3 and 12)

It is not necessary that a provision has to be made in the Act as to the liabilities of the State of West Bengal in such circumstances. The rights and liabilities as to any property transferred to the State of West Bengal are created by the decree of the High Court under the Civil P C. and by the relationship of decree-holder and judgment-debtor between the parties. Since on the construction of S 47 the State of West Bengal will be deemed to be the judgment-debtor, it is that State which is liable to pay the decretal dues. (Para 13)

Under the Act there is nothing to indicate that the liabilities of the two States in such a case will be joint and several. AIR 1964 Madh Pra 213, Dist. and Expt. AIR 1964 SC 1658 & AIR 1967 SC 40, Dist. (Para 14)

Thus the decree cannot be executed in a court in Bihar State and as such the refusal to execute is correct. (Para 12)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 SC 40 (V 54)=		
(1966) Supp SCR 81, Firm Bansidhar Premasukhdas v. State of Rajasthan		16
(1964) AIR 1964 SC 1658 (V 51)=		
(1965) 1 SCJ 243, Amar Chand Butai v Union of India		15
(1964) AIR 1964 Madh Pra 213 (V 51)=1964 MPLJ 854, State of Madhya Pradesh v Akbar Ali		14
(1959) AIR 1959 SC 352 (V 46)=		
(1959) Supp (1) SCR 394, Commr. of Income Tax, Delhi v S. Teja Singh		5
(1959) 1959 BLJR 61=ILR 38 Pat 177 Md. Obais v The State		7
(1958) AIR 1958 Pat 630 (V 45)=1958 BLJR 569 (FB), Sukhdeo Das v Kashi Prasad		2
(1953) AIR 1953 SC 244 (V 40)=1953 Cri LJ 1094, State of Bombay v Pandurang Vinayak		1
(1952) 1952 AC 109=1951-2 All ER 587, East End Dwelling Co Ltd. v Finsbury Borough Council		1
(1936) AIR 1936 PC 49 (V 23)=63 Ind App 47, K. C. Mukherjee v Ramratan Kuer		6
R. S. Chatterji and H. R. Das, for Appellant K. P. Verma (Standing Counsel), for Respondent.		

B. N. JHA, J. :— These three miscellaneous first appeals by the decree-holder, which arise out of three execution cases, are directed against the order of the District Judge, Purnea, dated July 8 1963, dismissing the execution cases filed by the appellants.

2. Proceedings were started sometime before 1951 by the Special Land Acquisition officer, North Bihar Range, Muzaffarpur, for the acquisition of three pieces of land belonging to the decree-holder for the purposes of the Assam Access Road. The lands appertained to touzi No 30 of the Purnea Collectorate, situated in village Madati. The Land Acquisition Officer determined the compensation payable to the appellant in respect of its lands but it was not satisfied with the valuation made by the said officer. Hence it filed three applications under Section 18 of the Land Acquisition Act for making reference to the court for the determination of the amount of compensation which gave rise to the three lands acquisition cases Nos. 22, 23 and 24 of 1951 of the Court of the Additional District Judge, Purnea. The appellant withdrew the compensation money as determined by the Land Acquisition Officer.

The Additional District Judge increased the compensation in respect of the lands of the appellant by his judgment and decree dated May 7 1954. The State of Bihar filed three first appeals; namely, F A. Nos. 358, 360 and 359 of 1954 in the High Court against the judgment and de-

crees passed in the aforesaid three land acquisition cases. Thereafter, the Bihar and West Bengal (Transfer of Territories) Act, 1956 (Act XL of 1956) was passed by the Parliament by virtue of which the portion of Purnea district where the acquired lands are wholly situated, was transferred to the State of West Bengal with effect from the appointed date i. e. November 1, 1956. The aforesaid three first appeals of the State of Bihar were pending in the Patna High Court on the appointed date. They were subsequently decided by the High Court on March 8, 1960 and the appeals were dismissed with costs. The appellants, thereafter, filed money execution cases Nos. 1, 2 and 3 of 1951 in the Court of the Additional District Judge, Purnea, for the recovery of the amount of compensation which was determined by the Additional District Judge, payable to the appellant over and above the compensation as determined by the Land Acquisition Officer together with costs and interest as allowed by the Additional District Judge and the High Court.

The respondent, State of Bihar, filed objections to the execution of the decrees under Section 47 of the Code of Civil Procedure which gave rise to miscellaneous cases Nos. 85, 86 and 87 of 1962. The contention of the respondent was that the territory within which the acquired lands lay, had been transferred to the State of West Bengal and, as such, the State of Bihar was not liable for the amount of compensation and costs in respect of those lands. The learned District Judge upheld the contention of the respondent, allowed the miscellaneous cases and dismissed the three execution cases filed by the decree-holder appellant. Hence the decree-holder has filed the three miscellaneous appeals in this Court.

As common question of law and facts arose to be determined by the Court below in the three miscellaneous cases, they were tried together and one Judgment was passed in respect of all of them. In this Court also the three appeals have been heard together and this judgment will govern them all.

3. Learned counsel for the appellant submitted that the executing court had no jurisdiction to go behind the decrees. The three decrees under execution show that the appellant is the decree-holder and the State of Bihar is the judgment-debtor which is liable to pay the decretal amount to the appellant. Hence the court below should have executed the decrees as they are, and it is not justified in refusing to execute the decrees. It is difficult for me to accept this contention of learned counsel for the appellants. It is no doubt true that the executing court has no jurisdiction to go behind the de-

cree and it has to execute it as it stands, but for the purpose of executing the same, the court has to construe the decree.

The court below has construed the decree in the light of Sections 17 and 47 of the Bihar and West Bengal (Transfer of Territories) Act, 1956, (hereinafter referred to as the Act) and has come to the conclusion that though the State of Bihar figured as the judgment-debtor in the decrees under execution and is liable for the payment of compensation but in substance, the State of West Bengal is the actual judgment-debtor under the three decrees and the appellant should have executed the decrees in a Court within the jurisdiction of the State of West Bengal and not in a court in the State of Bihar. Section 47 of the Act runs as follows:—

"Where immediately before the appointed day the State of Bihar is a party to any legal proceedings with respect to any property, rights or liabilities transferred to the State of West Bengal under this Act, that State shall be deemed to be substituted for the State of Bihar as a party to those proceedings, or added as a party thereto, as the case may be, and the proceedings may continue accordingly."

4. Learned counsel for the respondent submitted that the use of the words "shall be deemed to be substituted for the State of Bihar" is very significant. An imaginary state of things was created by making such provision in the Act. Though the State of Bihar was the appellant in the first appeals before the High Court on November 1, 1956, it would be read as the State of West Bengal by legal fiction. Fiction, as defined in Corpus Juris, Volume 25, page 1036, is:

"A legal assumption that a thing is true which is either not true or which is probably false as true; as assumption or supposition of law that something which is or may be false is true, or that a State of fact exists which has never really taken place, an allegation in legal proceedings that does not accord with the actual facts of the case, and which may be contradicted for every purpose, except to defeat the beneficial and for which the fiction is invented and allowed."

By such legal fiction the executing Court has to treat the decrees as decree between the appellant as decree-holder and the State of West Bengal as the judgment-debtor and, thereafter, all the consequences of the imaginary state of things would follow. Hence, learned counsel for the respondent submitted that the court below was right in giving effect to the deeming provision made under Section 47 of the Act. Such deeming provision, as made here, has been the subject matter

of judicial interpretation in many cases. Learned counsel referred to the decision of the Supreme Court in *State of Bombay v Pandurang Vinayak*, AIR 1953 SC 244 at p. 246 wherein it was pointed out that when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The Supreme Court quoted with approval, the famous pronouncement of Lord Asquith in *East End Dwellings Co Ltd. v Finsbury Borough Council*, 1952 AC 109 which reads as follows—

"If you are bidden to treat an imaginary state of affairs as real, you must surely unless prohibited from doing so also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs. It does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

5 Learned counsel for the respondent drew our attention to another decision of the Supreme Court in *Commissioner of Income Tax, Delhi v S Teja Singh*, AIR 1959 SC 352 where it was pointed out that it is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

6 The provision of Section 26N of the Bihar Tenancy (Amendment) Act, 1934 (B & O Act VIII of 1934) runs as follows—

"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the first day of January, 1923 and in the case of the transfer of a portion of a holding to have accepted the distribution of the rent of the holding as stated in the instrument of transfer or if there is no such instrument, as settled between the transferor and the transferee."

Before the amendment, occupancy holding was not transferable and the landlord was not bound to accept the transfer or the distribution of rent if any portion of the holding was transferred. By the aforesaid provision of section 26N even though the landlord had not given his consent to the transfer, or to the distribution of rent, but the Act provided that

if the transfer was before January 1, 1923 consent of the landlord to such transfer or distribution of rent, as the case may be, would be assumed by legal fiction. In *K. C. Mukherjee v Ramratan Kuer*, 63 Ind App 47= (AIR 1936 PC 49) their Lordships of the Privy Council interpreted the aforesaid provision on the basis of such deeming provision as retrospective in effect and it was held therein that after the amendment of 1934, the landlord must be assumed to have given his consent to the transferor and his suit for effectment against the transferee must fail in limine.

7. Such deeming provision is very often made when the legislature creates rights or liabilities on imaginary existence of facts which never existed in fact or when the Act is intended to give retrospective effect to the provisions of the Act. The words 'shall be deemed to be substituted' came for consideration before a Division Bench of this court in *Md. Obais v The State*, 1959 BLJR 61 in connection with the effect of the amendment made in the Bihar Panchayat Raj Act (7 of 1948) Original Section 50 of the Panchayat Raj Act provided three years from the date of his election as the term of office of every panch. On April 18, 1957 the Governor of Bihar promulgated Bihar Ordinance No 1 of 1957 Section 3 of the Ordinance runs as follows—

'Substitution of new section for section 50 of Bihar Act VII of 1948. For Section 50 of the said Act, the following section shall be substituted and shall be deemed always to have been substituted namely—

50 Term of office of Panches: The term of office of every Panch shall be three years from the date of election of the Mukhiya of the Gram Panchayat and shall include any further period which may elapse between the expiration of the said three years and the date of election of the next mukhiya'."

Lakhminia Gram Panchayat was the subject matter of the criminal revision, the panches of which ceased to exist after June 28 1953 on the expiry of their term. On the interpretation of the words 'shall be deemed always to have been substituted' this court held that though the term of the office of the panches of Lakhminia Gram Cutchery had expired and ceased to function on June 28, 1953, a legal fiction was created and, as such, it was assumed that the Gram Cutchery had continued to function all along because the term of office of the panches stood extended. It was further held in that case that the newly substituted section was intended to give retrospective effect.

8. Section 6(1) of the Bihar Land Reforms Act, 1950 provides:

"On and from the date of vesting all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting, including shall, subject to the provisions of sections 7A and 7B be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner"

Though the State, after the vesting did not settle the lands in khas possession of the intermediary but the provision is made in the section that such settlement in favour of the ex-intermediary by the State of Bihar will be assumed by the words "shall be deemed to be settled by the State" and a new relationship of landlord and tenant between the State of Bihar and the ex-intermediary was created.

9. While interpreting the provision of Section 6(1) of the Bihar Land Reforms Act the Full Bench of this court in *Sukhdeo Das v. Kashi Prasad*, AIR 1958 Pat 630 held that a statutory settlement with the intermediary by the State of Bihar of the bakasht land in his khas possession on the date of the vesting of the estate is assumed to be made.

10. Learned counsel for the respondent placed before us several decisions wherein the question of legal fiction was considered. It is not necessary to refer them here. It is now well settled that where deeming provision is made in the statute, the state of things will have to be assumed, though such things do not exist and the rights of the parties will have to be determined on such imaginary things.

11. It is not disputed that the Patna High Court had jurisdiction to decide the first appeals Nos. 358, 359 and 360 of 1954 pending before it on November 1, 1956, by virtue of Section 17 of the Act. Therefore, the decrees passed by the High Court in the aforesaid first appeals are good decrees to be given effect to. Learned counsel for the appellant submitted that there was no legal proceeding pending at the appointed date. The land acquisition cases Nos. 22, 23 and 24 of 1951 had been already decided on May 7, 1954 and as such, section 47 of the Act has got no application in the present case.

This argument of learned counsel loses sight of the fact that the decrees passed in the land acquisition cases Nos. 22, 23 and 24 of 1951 were still sub judice in the High Court as the State of Bihar filed first appeals against the aforesaid decrees and as such, the decrees had not become

final till the High Court pronounced its judgment on March 8, 1960. It is true that the High Court dismissed the appeals with costs but the decrees of the court below merged into those of the High Court which are now to be executed.

12. For the reasons stated above, in my opinion, the learned District Judge while refusing to execute the decrees did not go behind them but considered whether the decree-holder has got a right to execute the decree against the State of Bihar on the construction of the decree in the light of Section 47 of the Act and he was right in holding that the State of West Bengal will have to be read in the decrees under execution in place of the State of Bihar.

13. Learned counsel for the appellant contended that there is no provision in the Act as to the liabilities of the State of West Bengal in such circumstances. In my opinion, it is not necessary to make any such provision in the Act. The rights and liabilities with regard to any property transferred to the State of West Bengal are created by the decrees of the High Court, under the provisions of the Code of Civil Procedure and by the relationship of decree-holder and judgment-debtor between the parties. The appellant being decree-holder is entitled to recover the decretal dues from the judgment-debtor but now the question arises as to who is the judgment-debtor in these cases. On the construction of Section 47 of the Act I have held above that the State of West Bengal would be deemed to be the judgment-debtor in these cases and as such, it is the State of West Bengal which is liable to pay the decretal dues of the appellant decree-holder.

14. Learned counsel for the appellant lastly submitted that the liabilities of the State of Bihar and the State of West Bengal are joint and several and the appellant is entitled to recover the decretal dues from either of them. In this case, it is admitted that the territory within which the acquired lands fall, has been wholly transferred to the State of West Bengal. Under the scheme of the Act, there is nothing to indicate that the liabilities of the two States in such a case would be joint and several. Learned counsel drew our attention to the observation made while construing section 87 of the States Reorganisation Act, 1956, by V. R. Newaskar, J., in *State of Madhya Pradesh v. Syed Akbar Ali Syed Ahmad Ali*, AIR 1964 Madh Pra 213 at p. 214 which runs as follows:—

"It may be that the deposit made by the plaintiff can fall in the category of civil deposit and the liability of the depositor State may also arise by reason of the very wide language used in the section but that does not exclude the liability which is created by S. 87. All that

it will mean is that the depositor may either go to the existing deposittee State and claim back the deposit under S 84 or may go to the successor State and claim back the deposit on performance of the contract which had at least partly been performed after the Sironj Sub Division had been included in the successor State on the strength of S 87. There are no words in either Section 87 or Section 84 to exclude the liability of the successor State with reference to a contract regarding deposits made in the existing State. After the plaintiff is given his dues it is open for the two States to adjust their mutual rights and obligations. The plaintiff ought not to be made to go from post to pillar for this."

In that case, their Lordships of the Madhya Pradesh High Court were construing the effect of Sections 84 and 87 of the States Reorganisation Act in regard to the contract made before the appointed date by the Divisional Forest Officer of Rajasthan State and under the terms of the contract a sum of Rs. 5130/- was deposited by way of cash security in the Rajasthan Treasury. After the appointed date, that territory fell in the State of Madhya Pradesh. The plaintiff brought a suit for the recovery of the aforesaid sum of Rs. 5130/- against the successor State of Madhya Pradesh. The matter came up for consideration before the High Court of Madhya Pradesh. The main judgment in that case was delivered by Sharma J with which Newaskar, J. agreed, Sharma J held as follows:

"Section 87 clearly lays down that where before the appointed day an existing State has made any contract in the exercise of its executive power for any purposes of the State, that contract shall be deemed to have been made in the exercise of the executive power of the successor State, in a case where there is only one successor State. The result would be that by a legal fiction the State of Madhya Pradesh is substituted as a party to the present contract from the point of time when the contract was made on behalf of the State of Rajasthan, in this context it appears to be clear that all the rights and liabilities which had accrued under the contract before the appointed day have thereafter become the rights and liabilities of the State of Madhya Pradesh."

It was held in the case that the State of Madhya Pradesh was the successor State under the terms of Section 87 of the States Reorganisation Act. The observation made by Newaskar, J is in the nature of obiter. Moreover, Newaskar, J was considering the effect of Section 84 of that Act which provided as to which of the States would be liable for the deposit made before the appointed day.

No question of joint and several liabilities arises in the present case on the construction of the decrees under execution. The decision cited by learned counsel does not support his contention rather it supports the contention of the respondent that by legal fiction, the State of West Bengal is to be regarded as the judgment-debtor and the decree-holder has to execute the decree against the State of West Bengal in a court of competent jurisdiction and the decrees could not be executed in the court of the District Judge, Purnea.

15. Learned counsel drew our attention to a decision of the Supreme Court in *Amar Chand Butail v Union of India*, AIR 1964 SC 1658 wherein it was pointed out that recognition of the claim made against the former Indian State by the successor State i. e. the Union of India can be proved by the claimant either by express acknowledgment or recognition or may even be established on relevant facts and circumstances which may lead to the inference of such recognition. In other words, recognition of such a claim can be either express or implied and in the latter class of cases the inference as to recognition may be drawn legitimately from facts and circumstances which reasonably support such an inference.

In that case, the question arose how far the claim against the former Indian State of Jabalpur could be enforced against the Union of India after its merger. It was held therein that it all depended upon how far the claim of the plaintiff was recognised by the Union of India which was the successor State. In the present case, the decree-holder's claim has not been recognised by the State of Bihar. It was submitted on behalf of the appellant that in the High Court, the State of Bihar never repudiated its liability in the three first appeals. In my opinion, it was not necessary to do so because the State of Bihar was fighting the battle of the State of West Bengal. The State of Bihar was disputing the claim of the decree-holder for increasing the amount of compensation and that was the subject matter of the first appeals. The mere fact that the State of Bihar did not repudiate the claim of the decree-holder, it cannot be said that the State of Bihar acknowledged the liability of the decree-holder. Hence, this case has got no application to the facts of the present case.

16. Learned counsel for the appellant also placed before us a decision of the Supreme Court in *Firm Bansidhar Prem-sukhdas v State of Rajasthan*, AIR 1967 SC 40 where also a similar question arose as to the enforcement of claim against the native State of Bharathpur which subsequently merged in the Union of India against the successor State i. e.

Union of India. It was held therein that the claim could only be enforced to the extent the successor State was prepared to honour the liability of the former State under the contracts entered into by it. Hence, this case has also got no application in this case.

17. In the result, all the contentions raised by learned counsel for the appellant fail and, accordingly, the appeals are dismissed but in the circumstances of the case, there will be no order as to costs.

18. **TARKESHWAR NATH, J :—** I agree.

JRM/D.V.C.

Appeals dismissed.

AIR 1969 PATNA 171 (V 56 C 45)

U. N. SINHA, J.

Jadunandan Mandal and others, Appellants v. Hitlal Mandal and another, Respondents.

A. F. A. D. No. 734 of 1963, D/- 16-5-1968, from decision of 1st Addl. Sub. J., Purnea, D/- 29-5-1963.

T. P. Act (1882). S. 60 — "A" put in possession of mortgage property by mortgagee after purported redemption of usufructuary mortgage — A claiming as being in possession not only of mortgagee's right but also adverse to mortgagor — B claiming declaration of his title to and confirmation of his possession of mortgage property but his possession of property not accepted although his title to property by virtue of auction purchase accepted — Held, B being purchaser of equity of redemption of usufructuary mortgage, was entitled to obtain possession of mortgaged property as against A without redeeming mortgage in favour of mortgagee: AIR 1960 Pat 174 & (1902) ILR 27 Bom 43, Rel. on: AIR 1923 Pat 592 & AIR 1929 Pat 639, Ref.

(Paras 4, 6)

Cases Referred: Chronological Paras
(1960) AIR 1960 Pat 474 (V 47),

Sarjug Devi v. Dulhin Kishori Kuer

(1947) AIR 1947 Bom 471 (V 34)=
49 Bom LR 281, Digamber Sridhar v. Ramratan Raghunath

(1929) AIR 1929 Pat 639 (V 16),

Dubraj Mahto v. Lalji Sahai

(1923) AIR 1923 Pat 592 (V 10)=
4 Pat LT 659, Binanand Sawase v. Thuroo Mahto

(1905) ILR 32 Cal 296=32 Ind App
23 (PC), Khia Rajmal v. Daim

(1902) ILR 27 Bom 43=4 Bom LR
721, Tarubai v. Venkatarao

J. C. Sinha and Kameshwari Nandan Singh, for Appellants: Shreenath Singh, Bishwa Mohan Bahadur and Shilesh Chandra Mishra, for Respondents.

HL/JL/D661/68

JUDGMENT :— This appeal has been preferred by the plaintiffs and it has been placed for hearing before me on a difference of opinion between two of the learned Judges of this Court, Ramratna Singh, J. has held that the plaintiffs cannot recover possession of the suit land without redeeming a mortgage of the year 1917, and Anwar Ahmad, J. has held that the suit cannot be defeated on the ground that it was not framed as a suit for redemption. The learned Judges has stated the point of difference thus:—

"As there is difference of opinion between us regarding a legal question, viz., whether the purchaser of equity of redemption of a usufructuary mortgage can obtain possession of the mortgaged property without redeeming the mortgage or not and the result of the present case depends on that question, it may be placed before the Hon'ble the Chief Justice for being heard and decided by another Hon'ble Judge."

2. The relevant facts are as follows: The plaintiffs alleged that one Kanchan Mandal, father of defendants 1 and 2, was the occupancy raiyat of Cadastral Survey Khata No. 1485, consisting of Cadastral Survey Plots Nos. 2440 and 2443. He had sold plot no. 2440 to Anuplal Mandal, father of the plaintiffs and plot no. 2443 to one Madhuram Singh by oral transactions. The vendees had come in possession, but the landlord, namely, Raj Darbhanga had instituted a rent suit in 1925 against the present defendants as tenants, as the holding was not transferable without the landlord's consent and no consent of the landlord had been obtained for the oral transfers. A decree had been obtained by the landlord in 1926 which was put in execution. In 1928 the holding was sold and it was purchased by Anuplal and Madhuram. The sale was confirmed and Anuplal continued in possession of plot no. 2440. It was alleged that rent had again fallen due and the landlord brought another rent suit in 1929, impleading defendant no. 1 and the purchasers of 1928. This suit was again decreed and was put into execution. It was alleged that no auction purchasers had paid the decretal amount to the Raj Pleader and obtained a receipt from him. But their names were not mutated in the landlord's Sherista, because of illegal demands of nazrana by the employees of the Raj and rent used to be paid in the name of Kanchan Mandal. Anup Mandal is said to have died in 1955 and the present plaintiffs contended that they remained in possession of plot no. 2440. It was alleged that during the recent survey and settlement operations Anuplal was recorded as a tenant with respect to plot no. 2440, with a note made in the remarks column as against revisional survey plot no. 6711

that it was in wrongful possession of defendant no 1. Thereupon an objection was raised by this defendant under section 103A of the Bihar Tenancy Act and decision was given in his favour, holding that he was in possession of revisional survey plots nos. 6710 and 6711, corresponding to Cadastral Survey Plot No. 2440. Hence the plaintiffs instituted this suit, after draft publication of revisional survey records. During the pendency of the suit there was final publication and the defendants were shown in the survey record-of-rights to be occupancy raiyats of revisional survey plots nos. 6710 and 6711 of revisional Khata no. 3303. The plaint was accordingly amended and the suit at the time of trial became a suit for a declaration that the entry in the record of rights was incorrect and for a declaration of the plaintiffs' title to and confirmation of their possession of the disputed land. In the alternative, the plaintiffs claimed a decree for recovery of possession. There was also a claim for permanent injunction restraining the defendants from interfering with the possession of the plaintiffs.

3. In substance, the defendants' case was as follows:

The alleged purchase by the predecessor-in-interest of the plaintiffs at the auction sale of 1928 was denied. The alleged transactions in execution of the rent suit of 1929 were denied. It was contended that in 1917 Kanchan Mandal had executed a registered Sudbharna bond in respect of plot no. 2440 to one Govind Singh and put him in possession. It was alleged by the defendants that they redeemed this Sudbharna in 1947 and since then they were in possession. The rent suits of 1925 and 1929 were said to be collusive and fraudulent transactions. It was contended that the case under section 103A had been rightly decided. They also claimed that even if the plaintiffs had any title, it had been extinguished by lapse of time, as they were never in possession.

4. This suit was decreed by the trial Court and the plaintiffs' possession was confirmed and the defendants were restrained from going upon the disputed land, but on appeal, the decree has been set aside and the suit has been dismissed. The conclusions of the court of appeal below on the facts and circumstances of the case have been mentioned *seriatim* by Ramratna Singh, J in paragraph 2 of his judgment. The main findings are that Kanchan Mandal had given the disputed land in usufructuary mortgage to Govind Singh on the 15th May, 1917, and the mortgagee was in possession until 1947, when the present defendants had purported to redeem that mortgage. The plaintiffs' possession was not accepted al-

though their title to the disputed land by virtue of the auction purchase in 1928 (not by the alleged earlier oral sale) was accepted. In short, the defendants have been held to have come in possession by the purported redemption of the year 1947.

5. Upon these conclusions of the court of appeal below, Ramratna Singh, J has held that the defendants had not legally redeemed the mortgage in 1947, although they were in possession since then. The usufructuary mortgage of the year 1917 has thus been held to be an obstacle to the success of the plaintiffs' claim for possession in this suit. His Lordship has distinguished a decision of Kanhaiya Singh, J., in the case of Sarjug Devi v Duhlin Kishori Kuer, AIR 1960 Pat 474, by citing other decisions in his judgment. Anwar Ahmad, J has, on the other hand, relied upon Sarjug Devi's case, holding, that, the plaintiffs are entitled to a decree for possession, ignoring the purported redemption by the defendants and without impleading Govind Singh, the mortgagee.

6. Sri J C. Sinha, appearing for the appellants has contended that the principle laid down in Sarjug Devi's case should be followed and he has also relied upon the case of Digamber Sridhar v Ramratna Raghunath, AIR 1947 Bom 471, wherein a decision of the Privy Council reported in (1905) ILR 32 Cal 296, *Khairajmal v Daim* has been referred to Sri Shreenath Singh appearing for the respondents has contended that Ramratna Singh, J. has rightly distinguished Sarjug Devi's case, AIR 1960 Pat 474 and that on two other decisions referred to by Ramratna Singh, J., namely, the cases of Bhananand Sawase v Thuroo Mahto, AIR 1923 Pat 592, and Dubral Mahto v Lalji Sahai, AIR 1929 Pat 639, the plaintiffs' suit for possession in the absence of Govind Singh is bound to fail, on the assumption that the Sudbharna mortgage of 1917 was still outstanding. Having heard the learned counsel for the parties I am of the opinion that the principle enunciated by Kanhaiya Singh, J in Sarjug Devi's case, AIR 1960 Pat 474 should be followed, even if the original mortgagee namely, Govind Singh is not a party to this litigation. According to Sri Shreenath Singh, there is another distinction between the instant case and Sarjug Devi's case and it is this that the plaintiffs' case of dispossession has been negatived. But, in my opinion, this distinction will not make any difference in the facts of this case, as the defendants have contended in this suit that they were put in possession by Govind Singh, after a purported redemption. According to the defendants, the mortgage bond had also been made over to them in 1947 by Govind Singh on this

purported redemption. The fact that the plaintiffs had never come in actual possession can also make no difference, as the case of the defendants before the Revenue authorities as also in this suit have consistently been a denial of the right of the plaintiffs as holders of the equity of redemption. It is clear from Exhibit E, the order under Section 103A of the Bihar Tenancy Act, that, the defendants had claimed to be tenants in possession by virtue of redemption of the usufructuary mortgage of the year 1917. The plaintiffs' title by auction sale was challenged, but of course, the question of title was left open by the Revenue authorities. In my opinion, there was no other alternative for the plaintiffs than to institute this suit for confirmation or recovery of possession as against the defendants. In my opinion, neither the decision reported in AIR 1923 Pat 592, nor the one reported in AIR 1929 Pat 639 negatives this conclusion. Both these decisions have been considered by the Bombay High Court in the case reported in AIR 1947 Bom 471 and the true criterion has been laid down therein. It has been stated that if the true owner of a property is not in possession, and his mortgagee is, the possession of another person following that of the mortgagee cannot be presumed to be without any right. He may be an assignee of the mortgagee or he may be an adverse claimant to the mortgagee's right. But, in the instant case, the defendants have always been claiming as being in possession not only of the mortgagee's right but also that of the mortgagor. That is to say, the defendants claim to be in possession adverse to the mortgagor and this the holders of the equity of redemption came to know in the proceeding before the Revenue authorities. Therefore, there was no alternative for them than to institute this suit against the present defendants for appropriate reliefs. In my opinion, the principle laid down in the case of Tarubai v. Venkatarao, (1902) ILR 27 Bom 43, and followed by Kanhaiya Singh J. in Sarjug Devi's case is fully applicable to the instant case. The defendants' claim of the ouster of the present plaintiffs as holders of the equity of redemption has certainly made it incumbent upon the plaintiffs to institute this suit, as was stated in Tarubai's case. Having given due consideration to the contentions of the learned counsel for the parties arising on the difference of opinion enumerated by the learned Judges of this Court in this case, I am of the opinion that the plaintiffs being purchasers of the equity of redemption of the usufructuary mortgage are entitled to obtain possession of the mortgaged property as against the defendants, without redeeming the mortgage in favour of Govind Singh of the

year 1917, on the other facts established in this case.

7. Although I have held that the plaintiffs are entitled to obtain possession of the disputed property. The decree of the trial court cannot be affirmed, because the court of appeal below has come to the finding of fact that the plaintiffs had never come in actual possession and that the defendants were in possession since 1947. I am of the opinion, that, there is no bar to allowing the alternative prayer of the plaintiffs for recovery of possession. The appeal is, therefore, allowed and the plaintiffs' suit decreed for recovery of possession of the disputed property. According to the views of both the learned Judges of this Court, the parties will bear their own costs throughout.

MBR/D.V.C.

Appeal allowed.

AIR 1969 PATNA 173 (V 56 C 46)

S. N. P. SINGH AND K. B. N. SINGH, JJ.

State of Bihar, Appellant v. Amulya Ratan Pathak, Respondent.

Govt. Appeals Nos. 1 and 2 of 1966, D/- 7-5-1968, from decision of Addl. S. J., Dhanbad, D/- 25-9-1965.

(A) Penal Code (1860), S. 409 — "Entrusted with property" — Loans advanced by bank to members of co-operative society — Loans realised by society to be repaid to bank — Secretary of society failing to deposit realised amounts — Secretary liable under S. 409.

Where loans advanced by a bank to members of a co-operative society, are to be realised by the society and repaid to the bank and the secretary of the society fails to deposit the amounts realised, he is liable under S. 409, Penal Code.

(Para 17)

The secretary works merely as an agent of the bank for advancing and realising the loans. The amounts received by him from the loanes are an entrustment on behalf of the bank and his failure to account for those amounts renders him liable under S. 409. It cannot be said that the relationship between the bank and the society is that of a creditor and debtor and that the secretary will be liable civilly and not criminally. Criminal Appeal No. 606 of 1959 D/- 21-11-1961 (Pat), Dist.

(Para 17)

(B) Co-operative Societies — Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 40 — Prosecution of secretary of Co-operative society for offence under S. 409, Penal Code — Prosecution initiated by Assistant Registrar of Co-operative Societies — Prosecution legal. Criminal Appeal No. 163 of 1964, D/- 5-5-1966

HL/KL/D668/68

(Pat), FOLL. — (Penal Code (1860), S. 409).
(Para 18)

(C) Penal Code (1860), Ss. 21(10) and 409 — "Public servant" — (Quaere) — Whether office-bearer of co-operative society, while discharging his duties as such, is public servant — (Co-operative Societies — Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 40).

(Para 19)
Cases Referred: Chronological Paras
(1966) Cri. Appeal No 163 of 1964,
D/- 5-5-1966 (Pat), Badri Narayan Chaudhary v The State 18
(1961) Cri. Appeal No. 606 of 1959,
D/- 21-11-1961 (Pat), Ram Sakal Singh v. State of Bihar 17, 18

Bajrang Sahay, Govt. Advocate and
M. P. Ambastha, for Appellant, Jugal Kishore Prasad (No 2), for Respondent.

K. B. N. SINGH, J. :— Both the Government appeals have been heard together with the consent of the parties as common questions of fact and law are involved. This judgment will, therefore, govern both the appeals. These appeals are for setting aside the orders of acquittal passed by Shri Rash Behari Prasad Sinha, Additional Sessions Judge, Dhanbad, in Criminal Appeals Nos 207 and 208 of 1963, reversing the findings of Shri N. N. Chakravarty, Assistant Sessions Judge, Dhanbad, in Sessions Trials Nos. 24 and 24/A of 1963, who convicted the respondent of the offence under Section 409 of the Indian Penal Code in both the cases.

2. Respondent Amulya Ratan Pathak was the Secretary of Radha Nagar Multi-purpose Co-operative Society (hereinafter referred to as the Co-operative Society), a Society registered under the Bihar and Orissa Co-operative Societies Act, 1935, during the years 1958-62 and co-accused Dharendra Nath Chatterjee was its President. The allegation against respondent Amulya Ratan Pathak and co-accused Dharendra Nath Chatterjee was of having committed criminal breach of trust in respect of a sum of Rs. 810 85 P. collected from loanes as agents of the Central Co-operative Bank between 13-3-59 to 26-3-60 Both were put on trial by a common commitment order dated the 1st May, 1963, under section 409 of the Indian Penal Code. The learned Assistant Sessions Judge at the trial by the order dated 19th September, 1963, split up the trial on the ground that one charge of embezzlement could not embrace a period exceeding one year. Accordingly, one trial (Sessions Trial No 24 of 1963) for criminal breach of trust in respect of a sum of Rs. 729 96 paise, committed during the period 13th March, 1959 to the 28th December, 1959, and another trial (Sessions Trial No. 24A of 1963) with regard to the remaining period, i. e. from the

20th March, 1960, to the 31st March, 1960, in respect of a sum of Rs. 73.33 Paise, were started.

In both the sessions trials, the learned Assistant Sessions Judge, by separate judgments, convicted respondent Amulya Ratan Pathak under Section 409 of the Indian Penal Code and in sessions trial No. 24A of 1963, sentenced him to undergo rigorous imprisonment for six months and a fine of Rs. 50/-, in default to suffer rigorous imprisonment for a further period of one month, and in sessions trial No 24 of 1963 sentenced him to undergo rigorous imprisonment for two years and a fine of Rs. 700/- and in default to rigorous imprisonment for a further period of six months. The learned Assistant Sessions Judge acquitted the co-accused Dharendra Nath Chatterjee in both the sessions trials.

3. Respondent Amulya Ratan Pathak filed two criminal appeals before the Sessions Judge, Dhanbad, against his conviction in both the sessions trials. The appeal arising out of sessions trial No 24 of 63 was numbered as Criminal Appeal 207 of 63, while the appeal filed from Sessions Trial No 24A of 63 was numbered as Criminal Appeal 208 of 63. Both the appeals were heard by the Additional Sessions Judge, Dhanbad, who allowed both the appeals by his judgments dated the 25th of September, 1965 acquitted respondent Amulya Ratan Pathak and set aside the convictions and sentences under Section 409 of the Indian Penal Code passed against him in both the sessions trials. It is against these two orders of acquittal that the State of Bihar has filed both the present Government appeals. Government Appeal No 1 of 66 arises out of an order of acquittal in Criminal Appeal No 208 of 63 which arose out of Sessions Trial No 24A of 63 while Government Appeal No 2 of 66 arises out of an order of acquittal in Criminal Appeal No 207 of 66 which arose out of Sessions Trial No 24 of 63.

4. The prosecution case, in short, is that Radha Nagar Multi-purpose Co-operative Society, which is a Society registered under the Bihar and Orissa Co-operative Societies Act, 1935, is affiliated to the Central Co-operative Bank, Dhanbad (hereinafter referred to as the Co-operative Bank) During the relevant period, i. e., from 13-3-59 to 31-3-60 respondent Amulya Ratan Pathak was the Secretary of the Society and Dharendra Nath Chatterjee was the President of the Co-operative Society. The society is affiliated to the Central Co-operative Bank, Dhanbad, and the Bank advances loan to the members of the co-operative Society for agricultural purposes. In the year 1958, the bank advanced short-term loans amounting to Rs. 3190/- and medium term loans amounting to Rs. 2200/- to the

members of the Society through the society. During the period between 13-3-59 to 26-3-60 a sum of Rs. 810.85 P. was realised from the members of the Society in respect of the loans advanced to them which was not deposited by respondent Amulya Ratan Pathak, the secretary of the Society.

In course of auditing of the accounts of the Society, Mangal Das Toppo, Assistant Auditor, and Rameshwar Singh, Auditor, of Co-operative Societies, Dhanbad, found that the aforesaid sum of Rs. 810-85 P. was not deposited in the Central Co-operative Bank. Thereafter time was granted to respondent Amulya Ratan Pathak for depositing the aforesaid amount which he failed to do and by a letter dated 8-12-61 (Ext. 7) prayed for more time for making the deposit. Thereafter, B. B. Ghosh, General Manager of the Co-operative Bank, (P. W. 2 in both the cases), after obtaining permission dated 15-2-62 of the Assistant Registrar, Co-operative Societies, filed a written report dated 21-3-62 before the Officer-in-charge of Baghmara police station alleging that the respondent had committed criminal breach of trust in respect of a sum of Rs. 810-85 P. On the basis of the written report, Sheo Janam Singh, Sub Inspector of Baghmara police station, drew up a formal F. I. R. and after investigation submitted charge sheet against the respondent and co-accused Dharendra Nath Chatterjee. After usual commitment enquiry under Chapter XVIII, Criminal Procedure Code, respondent Amulya Ratan Pathak and Dharendra Nath Chatterjee were committed to the court of session, as stated above.

5. The defence of the respondent Amulya Ratan Pathak in both the sessions trials was common. The respondent admitted having made collection of the loan amounts from the members, but he thereafter, handed over the sum collected to Dharendra Nath Chatterjee, the President of the Co-operative Society, for depositing the aforesaid amount in the Co-operative Bank, Dhanbad, on 31-3-60 for which the latter granted him a receipt. The defence of the respondent further was that the said receipt was granted in the meeting of the Managing Committee of the Society held on 31-3-60. The respondent, accordingly, pleaded not guilty to the charge and submitted that he had not committed any criminal breach of trust.

The defence of the co-accused Dharendra Nath Chatterjee, who was separately defended, was that the receipt purported to have been granted by him was a forged document. His case was that his signature was obtained on some printed prescribed form of the Society which he used to sign in the capacity of the Pre-

sident of the Co-operative Society, and one of them had been converted by respondent Amulya Ratan Pathak into a forged receipt which is the receipt in question. His further defence was that the records of the Society were kept in the custody of the Secretary and that he had fabricated false entries in the proceedings book with regard to the meeting dated the 31st March, 1960. Thus, he denied that the respondent Amulya Ratan Pathak handed over the disputed amount of Rs. 810.85 P. to him and the fact of his having granted receipt for the same. He thus pleaded not guilty to the charge.

6. The trial of both the sessions cases Nos. 24 and 24A of 1963 proceeded simultaneously for the facility and convenience in examining witnesses most of whom were common witnesses. In sessions trial No. 24 of 1963 (out of which Government Appeal No. 2 of 1960 arises), 26 witnesses were examined on behalf of the prosecution. Out of them, P. W. 22, Shri N. K. Kachhap, is Sub-Deputy Magistrate in whose presence specimen writings of respondent Amulya Ratan Pathak were taken and P. W. 23, Shri S. B. Tripathi, is the B. D. O. in whose presence specimen signatures of co-accused Dharendra Nath Chatterjee were taken for comparison with the writings on the receipt which, according to Amulya Ratan Pathak, was granted in token of payment of Rs. 810.85 P. by Dharendra Nath Chatterjee on the 31st March, 1960. These writings were compared by P. W. 1, Santosh Kumar Chatterji, Examiner of questioned documents, working under the State of Bihar. According to the evidence of the expert, the body portion of the receipt was in the writing of Amulya Ratan Pathak and it bore the signature of Dharendra Nath Chatterjee.

This receipt has been marked in both the sessions trials (Nos. 24 and 24A of 1963) as Exhibit 16 and the signature of Dharendra Nath Chatterjee as Exhibit B/a. As a matter of fact, all the relevant documents, which we will have to deal with in these two appeals, have same exhibit numbers. P. W. 2 is Bibhuti Bhushan Ghosh, the General Manager of the Co-operative Bank, who has lodged the first information in this case. P. W. 5 is Bhairab Prasad Lala, Supervisor of the Co-operative Society. He has been examined to prove that respondent Amulya Ratan Pathak realised a sum of Rs. 810.85 P. from the loanes and did not deposit the same in the Central Co-operative Bank. P. W. 10 Mangal Das Toppo and P. W. 11 Rameshwar Singh are auditors of the Co-operative Society who had audited the account of Radha Nagar Co-operative Society and found that a sum of Rs. 810.85 paise was outstanding as cash balance which was not produced by Amulya Ratan Pathak for physical veri-

fication and they submitted their reports to the Bank and gave copies of the same to the respondent as well.

P. W. 25 is Kritibas in whose presence the respondent handed over the proceeding book of the Co-operative Society to the Investigating Officer who is P. W. 26 in this case. The said proceeding book has been marked as Ext. 11. P. W. 19, Ashwini Kumar Pathak, and P. W. 20, Gutu Napit, are members of the Managing Committee of the Co-operative Society. They were declared hostile and cross-examined on behalf of the prosecution as they went back on their previous statements. All these witnesses have also been examined as prosecution witness in Sessions Trial No. 24A of 1963. The expert (P. W. 1) and the informant (P. W. 2) in Sessions Trial No. 24 of 1963 are also P. Ws. 1 and 2 respectively in Sessions Trial No. 24A of 1963. P. W. 5, Bhairab Prasad Lala, the Supervisor, P. W. 10, Mangal Das Toppo and P. W. 11, Rameshwar Singh, auditors, P. W. 19, Ashwini Kumar Pathak, P. W. 20, Gutu Napit, P. W. 22, N. Kachhap, Sub-Deputy Magistrate, P. W. 23, Shri S. B. Tripathi, Block Development Officer, P. W. 25, Kritibas Singh P. W. 26, Sheoanand Singh, the Investigating Officer, are P. Ws. 3, 4, 5, 7, 8, 10, 11, 12 and 13 respectively in Sessions Trial No. 24A of 1963 and the evidence of these witnesses are same in both the sessions trials.

P. Ws. 3, 4, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 21 and 24 are members of Radha Nagar Co-operative Society who had taken loans and have been examined on behalf of the prosecution to prove that Amulya Ratan Pathak realised the amounts in question from these persons. Some of these P. Ws. have also deposed that Amulya Ratan Pathak made over the sum of Rs. 810.85 P. to Dharendra Nath Chatterjee which is the subject matter of the charge in both the sessions trials. Out of these 15 witnesses examined in sessions Trial No. 24 of 1963, only two, namely, Bodhu Singh (P. W. 18) and Ramlal Sahu (P. W. 21) have been examined as P. Ws. 6 and 9 respectively in Sessions Trial No. 24A of 1963. It may be relevant to point out that these two witnesses are the loanees in respect of the amount (Rs. 73.35 P.) covered in the charge in Sessions Trial No. 24A of 1963, while larger amount (Rs. 729.96 P.) was involved in Sessions Trial No. 24 of 1963, and hence large number of loanees have been examined in that case.

7. On behalf of the accused no witness was examined, but certain challans which have been marked as Ext. A series in Sessions Trial No. 24 of 1963 and signature of Dharendra Nath Chatterjee on the receipt (Ext. B) and a receipt (Ext. C) dated the 31st of March, 1963, by the Block Development Officer, Baghmara to

Amulya Ratan Pathak for a sum of Rs. 200/- have been exhibited. The learned Assistant Sessions Judge, on a consideration of the oral and documentary evidence in both the sessions trials, accepted the prosecution case and held that Amulya Ratan Pathak had committed the offence of Criminal breach of trust in respect of the aforesaid amounts for which he was charged in both the cases and convicted and sentenced him under Section 409 of the Indian Penal Code, as stated above. He, however, acquitted the co-accused Dharendra Nath Chatterjee of the charge as he held that the receipt (Ext. 16) was not a genuine document.

8. It will be relevant at this stage to refer to certain findings and admitted facts before the learned Assistant Sessions Judge. He held, (i) that Amulya Ratan Pathak and Dharendra Nath Chatterjee in their capacity as Secretary and President of the Co-operative Society were public servants; (ii) that the body portion of the receipt in question (Ext. 16) was in the handwriting of Amulya Ratan Pathak and it bore the signature of Dharendra Nath Chatterjee. He, however, held that this receipt was not a genuine document and was not granted by Dharendra Nath Chatterjee after receiving a sum of Rs. 810.85 P. (iii) In Ext. 11 page 1 against the name of Dharendra Nath Chatterjee after the word 'Sabbhapati', the word 'Koshadhayaksha' was an interpolation and had been added at the instance of respondent Amulya Ratan Pathak who had the custody of the documents including the proceeding book; (iv) that the minutes of the proceeding book of the meeting held on the 31st March, 1960 on which date the receipt in question is said to have been granted was not recorded in due course of business, nor were the signatures of the members obtained on it properly and as such no reliance could be placed on it; and (v) that it appeared from the evidence of the loanees as well as from documents that Amulya Ratan Pathak realised Rs. 729.96 P. and Rs. 73.35 P. total Rs. 803.31 P. from the loanees. This fact is also admitted by Amulya Ratan Pathak.

Amulya Ratan Pathak also admitted that he had not deposited this money in the Central Co-operative Bank, but that he had paid it to Dharendra Nath Chatterjee as per receipt dated the 31st March, 1960. Dharendra Nath Chatterjee, while admitting his signature on the receipt, characterised it as a forged document having been written out on blank space on a form of the Society bearing his signature. In the two appeals preferred by the respondent, as stated above, the learned Additional Sessions Judge, Dhambad, set aside the convictions and sentences passed against the respondent

notice specified in Section 111 (g) of the Transfer of Property Act cannot be waived by contract and must prevail. The ratio of the judgment of the Calcutta High Court in Chandra Nath Mukherjee's case, AIR 1960 Cal 40 (supra), goes against the tenant so far as the point before us is concerned. The basic principle which is relevant in this connection is that if a statutory provision itself provides that a person sought to be benefited by it can contract out of it, the protection granted by that provision can be waived by the person concerned, but if contracting out of the statutory protection is either expressly or impliedly prohibited, the protection of such a provision cannot be waived. It appears that the judgment of Sen, J., was obviously based on the above said principle. Section 106 of the Transfer of Property Act contains the clause "in the absence of a contract or local law or usage to the contrary". That being so, contracting out of the protection afforded by that section is expressly permitted by the provision itself. It cannot, therefore, in our opinion, be argued successfully that the protection granted by Section 106 of the Transfer of Property Act cannot be waived.

32. Mr. Gokal Chand Mittal, learned Counsel for the landlord, on the other hand invited our attention to the judgments in Vellayan Chettiar v. Government of the Province of Madras, AIR 1947 PC 197, Charu Chandra v. Snigdhendu Prosad, AIR 1948 Cal 150, Province of Bihar v. Kamakshya Narain Singh, AIR 1950 Pat 366, and the District Board Banaras v. Churhu Rai, AIR 1956 All 680, in all of which cases it has been held that it is open to a defendant for whose benefit the notice is prescribed by Section 80 of the Code of Civil Procedure to waive the same. In the case of the District Board Banaras, AIR 1956 All 680 it was further held that where the plea of defect in or want of notice was not pressed in the trial Court nor was it raised in the memorandum of first appeal and of second appeal, the High Court, in the circumstances of the case was justified in holding that the right based on the ground of notice had been waived.

The learned Counsel for the petitioner could not possibly contest the proposition of law relating to the legality of waiving an objection as to non-service or validity of notice under Section 80 of the Code of Civil Procedure, but submitted that whereas the notice under that provision of the Code is not a part of the cause of action of a suit as held in Union of India v. Firm Balwant Singh Jaswant Singh, AIR 1957 Punj 27, a notice under Section 106 of the Transfer of Property Act is a part of cause of action and,

therefore, the latter cannot be waived though the former may be. So far as the provisions referred to above are concerned, the distinction pointed out by the learned Counsel for the petitioner appears to be without any practical difference. Section 80 of the Code of Civil Procedure is really couched in much stronger and more mandatory terms than Section 106 of the Transfer of Property Act. If notice under Section 80 of the Civil Procedure Code does not form part of cause of action of a suit, there is nothing to show that the notice under Section 106 of the Transfer of Property Act which cannot be required to be served at all in certain contingencies, is necessarily a part of a cause of action for eviction.

The basic principles governing waiver have been authoritatively laid down by their Lordships of the Supreme Court in Bhasheshwar Nath v. Commissioner of Income-tax Delhi and Rajasthan, AIR 1959 SC 149. The question that arose for decision before the Supreme Court in that case was whether an assessee of income-tax can waive his fundamental right guaranteed under Article 14 of the Constitution, and the answer given by their Lordships was in the negative. The decision was given regarding fundamental right under Article 14 of the Constitution and about no other fundamental rights. It was held that the doctrine of waiver could have no application to provisions of law which have been enacted as a matter of constitutional policy. Distinction was drawn by the Supreme Court (i) between rights conferred on citizens by statutes, commonly known as statutory rights; (ii) rights conferred by the Constitution, i.e., the constitutional rights; and (iii) fundamental rights.

Their Lordships did not specifically consider the question whether statutory rights can or cannot be waived, but went to the length of holding that even non-fundamental constitutional rights could be waived by citizens and it is only when rights conferred are put on the highest pedestal and are given the status of fundamental rights as distinguished from other constitutional rights that they become inviolable, and cannot, therefore, be waived by a citizen. In this state of law there appears to be absolutely no doubt that an objection as to non-service or invalidity of a notice under Section 106 of the Transfer of Property Act can be waived by a tenant as he is entitled by the express provision of that section to contract out of its requirements. We particularly so hold because in the Punjab the requirement of the notice in question is not even a statutory requirement in the strict sense, but is invoked as a principle of equity, justice and good conscience.

33. For the foregoing reasons we hold that the judgment of the earlier Division Bench of this Court in *Bawa Singh v Kundal Lal*, 1952 Pun LR 358, is no longer good law in view of the chain of subsequent Supreme Court judgments already referred to and that the ratio of the judgment of the subsequent Division Bench in 1968-70 Pun LR 720= (AIR 1969 Punj 26), lays down the correct law. Our answer to question No. 1, therefore, is:—

(i) An application for ejectment of a monthly tenant under Section 13 of the East Punjab Urban Rent Restriction Act (3 of 1949) cannot succeed without the contractual tenancy being first determined by a notice under Section 106 of the Transfer of Property Act,

(ii) No notice under Section 106 of the Transfer of Property Act is required to be served as a condition precedent for filing an application for eviction of a mere statutory tenant whose contractual tenancy has already been terminated by an appropriate notice, or whose tenancy has already come to an end by efflux of time or forfeiture or for any other valid reason under any of the clauses of Section 111 of the Transfer of Property Act, and in whose favour no new contractual tenancy has thereafter been created,

(iii) A fifteen days' notice under Section 106 of the Transfer of Property Act is not required to be served even to terminate a contractual monthly tenancy when there is an express stipulation to the contrary in the contract of tenancy or when the service of such notice is rendered unnecessary by any local law or usage. At the same time a notice of a longer period will have to be served to terminate a contractual tenancy where a specific term in the contract so requires,

(iv) Want of service of notice under Section 106 of the Transfer of Property Act continues to be a good defence despite the enforcement of East Punjab Urban Rent Restriction Act (3 of 1949) in every case in which such a defence would have been valid and available under the general law of the State if the Rent Restriction Act had not been enacted as the Punjab Act has not impliedly repealed or abrogated Sections 106 and 111 (h) of the Transfer of Property Act or the principles of those provisions in so far as they have been applied in Punjab as principles of equity, justice and good conscience,

(v) Nothing contained in the Rent Restriction Act or this judgment can be deemed to require the service of a notice under Section 106 of the Transfer of Property Act in a case where such a notice would not have been required if the Rent Restriction Act was not in force;

(vi) The notice required to be served in the Punjab (where the statutory provisions

of Section 106 of the Transfer of Property Act do not apply and merely its equitable principles have been applied) has to be a notice to quit or a notice terminating the tenancy and such notice must give reasonable time to quit. Considering the law laid down in various decided cases, fifteen days appear to be the minimum reasonable period of such a notice. In the Punjab, however, such a notice need not necessarily terminate strictly with the end of a month of the tenancy.

Our answer to questions Nos. 2 and 3 is:—

(i) Plea of want of notice under Section 106 of the Transfer of Property Act is not such that cannot be waived by a tenant. A tenant is entitled to waive the objection regarding non-issue of such a notice if he likes. Waiver is however, a deliberate and conscious act as distinguished from estoppel which may be created by law. Whether the objection has in fact been waived or not in a particular case is a question of fact which has to be decided like any other such question on the direct and circumstantial evidence available in a given case,

(ii) Objection as to validity of a notice is merely a part of the main objection as to non-issue of the requisite notice and can also be waived by a tenant, if he so likes, e.g., a tenant may accept a shorter notice than that of fifteen days to be sufficient notice. But the mere denial of receipt of notice by a tenant may not, on proof of service of a notice by itself amount to waiver of objection as to the period of the notice not being reasonable.

34. With the above answers this revision petition will now go back to the learned Single Judge for bearing and disposal in accordance with law.

35. SHAMSHER BAHADUR, J.:— I agree.

36. GOPAL SINGH, J.:— I agree.

ORDER

37. P. C. PANDIT, J.: (28-10-1968)— This may be read in continuation of my order dated 23-7-1968 by which, after disposing of one of the two contentions raised by the learned Counsel for the petitioner, I had referred three points of law to a Full Bench for decision in order to decide the second contention of the learned Counsel. The Full Bench has answered those three points of law by their decision dated 3rd October 1968 and the revision petition has now been again placed before me for final disposal.

38. In view of the Full Bench decision, learned Counsel for the petitioner has conceded that there was no merit left in his second contention as well.

39. The result is that this petition fails and is dismissed, but with no order as to costs. The tenant is allowed a period of one month to vacate the premises.

GGM/D.V.C. Petition dismissed.

AIR 1969 PUNJAB & HARYANA 131 (V 56 C 22)

R. S. NARULA, J.

Harbans Lal Nihal Chand, Petitioner v. Superintendent of Police, Karnal and others, Respondents.

Civil Writ No. 404 of 1964, D/- 2-4-1968.

(A) Constitution of India, Art. 311 — Reversion on account of unfitness to hold high officiating post — Order not being by way of punishment, reversion does not amount to 'reduction in rank' within meaning of Art. 311. AIR 1966 SC 1529 & AIR 1962 SC 794 & AIR 1967 Punj 139, Foll. (Para 3)

(B) Police Act (1861), Ss. 7 and 12 — Rules under, R. 16.3 (Punjab) — Proceedings in Criminal Court against police officer for defalcation of government money — Magistrate while acquitting official stating that "I admit that none else would have dared to sign this entry in T. A. bill but since it has not been proved" and also recording that all prosecution witnesses had resiled — Held, case was covered by clauses (a), (b) and (c) and the official could not claim protection of sub-rule (1): 1965 Cur LJ 509 (Punj), Disting. (Para 6)

(C) Police Act (1861), Ss. 7 and 12 — Rules under, R. 16.38 (1) (Punjab) — Criminal offence not connected with official relations of delinquent official with the public — Rule has no application. (Para 8)

(D) Police Act (1861), Ss. 7 and 12 — Rules under, R. 16.24 (1) Cls. (ii) and (iii) (Punjab) — Police Official not admitting misconduct alleged against him — Cl. (iii) applies and not Cl. (ii). (Para 7)

(E) Police Act (1861), Ss. 7 and 12 — Rules under, R. 16.24 (1) Cl. (i) (Punjab) — Summary of allegations — Names of witnesses and summary of statements which those witnesses are expected to make need not be detailed in summary of allegations. (Para 10)

(F) Constitution of India, Art. 311 (2) — Police Rules under Police Act (1861), Ss. 7 and 12, R. 16.24 (Punjab) — Delinquent official already having requisite copies of statements of witnesses to be examined in departmental enquiry and neither disputing the fact nor asking for another set — Another set of those very

copies is not required to be furnished.

(G) Civil Services — Civil Services (Classification, Control and Appeal) Rules, 1930 — Prima facie, Rules do not apply to constables employed in Punjab Police (Obiter). (Para 11)

(H) Police Act (1861), Ss. 7 and 12 — Rules under, R. 16.24 (Punjab) — Scope — It envelopes requirements of Art. 311 of Constitution and Rule 7 of Punjab Civil Services (Punishment and Appeal) Rules, 1952. (Para 11)

Cases Referred: Chronological Paras

(1967) AIR 1967 Punj 139 (V 54)=
L. P. A. No. 346 of 1965, D/- 21-7-1966, State of Punjab v. Appar Apar Singh 4

(1967) 1967 SLR 759 (SC), Tirlok Nath v. Union of India 11

(1966) AIR 1966 SC 1529 (V 53)=
(1966) 3 SCR 106, Divisional Personnel Officer, Southern Railway v. Raghavendrachar 3

(1965) 1965 Cur LJ 509=(1966) 1 Lab LJ 226, Amin Lal v. State of Punjab 7

(1965) 1965 Pun LR (S. N.) 89=
1965 Cur LJ 509, Amin Lal v. State of Punjab 7

(1962) AIR 1962 SC 794 (V 49)=
1962 Supp (1) SCR 92, State of Bombay v. F. A. Abraham 3, 4

(1961) AIR 1961 SC 1623 (V 48)=
1961 Jab LJ 702, State of M. P. v. Chitaman Sadashiv Waishampayan 11

(1958) AIR 1958 SC 300 (V 45)=
1958 SCR 1080, Khem Chand v. Union of India 11

(1954) AIR 1954 Nag 229 (V 41)=
ILR (1954) Nag 371, M. A. Waheed v. State of M. P. 3

Hans Raj Aggarwal, for Petitioner; Anand Sarup. Advocate-General (Haryana) and Net Ram, for Respondents.

JUDGMENT:— Harbans Lal petitioner, a permanent constable in the Punjab Police Force, while officiating in the selection grade as Assistant Moharrir, Police Lines, Karnal, was reverted to his time-scale by the order of the Superintendent of Police, Karnal, dated October 26, 1960, (Annexure 'H') on the ground that he "could not perform the duty of Naib Moharrir in Police Line efficiently". On January 30, 1961, the petitioner was sent up for trial under Sections 468/420/470-A/471/465, Indian Penal Code, on the allegation that on May 18, 1960, he had made a forged entry at serial No. 33 in the daily diary of the Police Lines, Karnal, to the effect that he had left for Hissar with the police guard on May 18, 1960, and returned on May 22, 1960 and that on the basis of the said entry the petitioner got a T. A. Bill for Rs. 17.22 Paise sanctioned and actually received the amount of the bill on August 27, 1960,

though in fact he had not gone with the police guard in question at all. At the trial of the Criminal Case, the petitioner admitted having made the relevant entry in the daily diary, further admitted that he had not gone with the police guard on the relevant date and also admitted having drawn the disputed amount of the T. A. Bill but pleaded that having made the disputed entry he did not leave the Police Lines at the instance of Ram Lal Moharrir, though his name was included in the guard that was to leave for Hissar on that date. He also stated that he was ready to pay back the amount to the Government. He denied the signature on the T. A. Bill. By his judgment, dated May 31, 1961, Shri R. K. Jain, Magistrate First Class, Karnal, acquitted the petitioner of the charges levelled against him by giving him the benefit of doubt. He found that the petitioner's name was in the relevant entry from the very start, that the petitioner did not accompany the guard or return with it, that the petitioner did receive the amount of Rs. 17.22 Paise on account of the T. A. bill for the period May 18, 1960, to May 22, 1960, but that the signature of the petitioner on the T. A. bill was not proved. He held that the signature of Harbans Lal had not been properly identified. Regarding the prayer of the prosecution to examine a handwriting expert, the Magistrate observed as follows—

"Further when the police had taken the signature of Harbans Lal accused in the presence of Shri B. K. Dewan, Magistrate it was the duty of the police to send the specimens to the Handwriting Expert for comparison as to whether the signatures of the accused (sic). The application on this issue when all the witnesses resided was at a much belated stage and could not be entertained under S. 540-A, Criminal Procedure Code, as it would have been nothing but to fill in the lacuna of the prosecution. I admit that none else would have dared to sign this entry exhibit P. C. at point P. C./2 as the amount was to go to the constable whose T. A. was entered but since it has not been proved on record that this entry was actually signed by Harbans Lal accused and it was within his knowledge that it related to the T. A. for the period from 18-5-1960 to 22-5-1960. Naturally, the lack of investigation on this point is to benefit the accused. It is thus clear that the second issue as to who signed the entry Exhibit P. C./2 is not proved beyond doubt that it was signed by Harbans Lal accused."

A departmental enquiry was started against the petitioner. The summary of allegations (Annexure 'B') served on the petitioner charging him with "grave misconduct in the discharge of his duties as

a Police Officer, highly unworthy, unbecoming of a member of a disciplinary force." A formal charge-sheet (Annexure 'C'), dated October 30, 1961, charging the petitioner with outright dishonesty and grave misconduct, highly unworthy and unbecoming of a member of police force, was served on the petitioner. Shri Ulfat Rai, Prosecuting Inspector of Police, Karnal, who had been appointed by the Superintendent of Police, Karnal, to hold an enquiry into the said charges, gave his report wherein he found the petitioner guilty of the charges framed against him and recommended that the petitioner may be suitably and appropriately punished. The punishing authority, that is, the Superintendent of Police tentatively agreed with the report of the enquiry officer and thereupon served on the petitioner a formal show-cause notice (Annexure 'D'), dated March 27 1962, alongwith a copy of the findings of the enquiry officer. The Superintendent of Police further stated in the notice that upon a careful consideration of the findings of the enquiry officer and in particular of the conclusions reached by him in respect of the charges framed against the petitioner, he (Superintendent of Police) was provisionally of the opinion that the penalty of dismissal should be inflicted on the petitioner. The show-cause notice was served on the petitioner by the Superintendent of Police personally after calling the petitioner in his office and after hearing him, the petitioner was given an opportunity of showing cause against the action proposed to be taken and was asked to submit his representation in writing, if any, within certain specified time. The petitioner submitted a written reply denying the allegations against him. After hearing the petitioner, the Superintendent of Police, by his detailed impugned order, dated June 1, 1962 (Annexure 'E'), believed the evidence against the petitioner, dealt with the technical points raised by him, held that the departmental enquiry against the petitioner had been correctly ordered and conducted in accordance with the procedure laid down in the police rules and instructions on the subject. He also recorded a finding to the effect that the petitioner had been given full opportunity to cross-examine the prosecution witnesses and to offer his defence. He further held that the guilt of the petitioner was fully and conclusively proved from the evidence on the record. He, therefore, directed the dismissal of the petitioner from the service with effect from June 1, 1962.

The petitioner's appeal, preferred to the Deputy Inspector-General of Police, Ambala Range, against his dismissal and his further revision, submitted to the Additional Inspector-General of Police,

against the first appellate order, were dismissed by the appellate authority and the revisional authority on October 23, 1962, and January 31, 1964, respectively (Annexures 'F' and 'G'). Thereupon, the present writ petition was filed by Harbans Lal.

2. The Superintendent of Police and the Deputy Inspector-General of Police, Ambala Range, have filed their separate written statements. The petitioner has filed a replication, in reply to which a further affidavit has been sworn by Shri Kanwar Randip Singh, Deputy-Inspector-General of Police, Ambala Range.

3. Mr. Hans Raj Aggarwal, learned counsel for the petitioner, while impugning the original and appellate orders of the dismissal of the petitioner, firstly urged that the petitioner having been departmentally punished on October 26, 1960 (Annexure 'H'), he could not be punished a second time on the same charge. This argument appears to be wholly misconceived. There is nothing at all to show that the order of petitioner's reversion (Annexure 'H') was passed by way of punishment. On the contrary, the order clearly shows that the reversion was directed as the petitioner was not found to be efficient enough to perform the duties of the selection grade post against which he was officiating. The argument of Mr. Aggarwal was that reversion simpliciter is always a punishment and even if it is from an officiating rank to a substantive one on account of a person being found unfit to officiate in the higher rank, the provisions of Article 311 of the Constitution are attracted. This contention of the counsel is exactly contrary to the law settled by their Lordships of the Supreme Court in the Divisional Personnel Officer, Southern Railway v. S. Raghavendrachar, AIR 1966 S. C. 1529. Reversion from a post to which an incumbent has been provisionally promoted was held not to amount to reduction in rank. In State of Bombay v. F. A. Abraham, AIR 1962 S. C. 794, their Lordships of the Supreme Court expressly refused to agree with the observations of the Nagpur High Court in M. A. Waheed v. State of Madhya Pradesh, AIR 1954 Nagpur 229, to the effect that when a person officiating in a post is reverted for unsatisfactory work, his reversion would amount to a reduction in rank. In Abraham's case, AIR 1962 SC 794 the Supreme Court took the view that the Government had a right to consider the suitability of the official concerned to hold the post to which he had been appointed to officiate and that it was entitled for that purpose to make enquiries about his suitability. Nothing more appears to have happened in the instant case.

4. In the State of Punjab v. Appar Apar Singh, Letters Patent Appeal No.

346 of 1965, decided on July 21, 1966= (AIR 1967 Punj 139), it was held that unless the reduction is by way of punishment it cannot be called into question because the provisions of Article 311 (2) of the Constitution are not otherwise attracted. Following the law laid down by the Supreme Court in F. A. Abraham's case, AIR 1962 SC 794 and the judgment of this Court in Appar Apar Singh's case, L. P. A. No. 346 of 1965, D/- 21-7-1966= (AIR 1967 Punj 139), I hold that the order of the petitioner's reversion (Annexure 'H') was not by way of punishment and did not amount to 'reduction in rank' within the meaning of Article 311 of the Constitution. From this finding, it follows that the said administrative order of reversion on account of unfitness of the petitioner to hold the higher officiating post did not bar disciplinary proceedings against the petitioner for any misconduct or default in the officiating rank. As stated by the Superintendent of Police in his return, the reversion was under Police Rule 13.5 (4) and was in order.

5. The second argument advanced by Mr. Hans Raj Aggarwal was that the impugned disciplinary proceedings against the petitioner were barred by Police Rule 16.3, as the petitioner had been acquitted by a competent Criminal Court in his prosecution under the Penal Code. Police Rule 16.3 states—

"16.3 (1) When a Police Officer has been tried and acquitted by a Criminal Court he shall not be punished departmentally on the same charge or on a different charge upon the evidence cited in the Criminal case, whether actually led or not, unless—

(a) the criminal charge has failed on technical grounds; or

(b) in the opinion of the Court or of the Superintendent of Police, the prosecution witnesses have been won over; or

(c) the Court has held in its judgment that an offence was actually committed and that suspicion rests upon the Police Officer concerned; or

(d) the evidence cited in the criminal case discloses facts unconnected with the charge before the Court which justify departmental proceedings on a different charge; or

(e) additional evidence admissible under Rule 16.25 (1) in departmental proceedings is available.

(2) * * * * *

Whereas it is clear that the petitioner was not punished departmentally 'on the same charge', I need not go into the question whether the different charge upon which he was punished, was based "upon the evidence cited in the criminal case" or not, in view of the fact that I agree

with the learned Advocate-General for the State of Haryana that this case falls within the category of cases excluded by clauses (a) (b) and (c) from the purview of sub-rule (1) of Rule 163. The case falls within clause (a) because the Deputy Inspector-General of Police and the Additional Inspector-General of Police correctly found that the Criminal Court had acquitted the petitioner on a technical ground. In this connection, the Deputy Inspector-General of Police (the appellate authority) held as follows—

"The provisions of Police Rule 163 in this respect have not been ignored. The criminal charge was held to have failed primarily because the investigating officer did not prove the handwriting of the defaulter by an expert evidence. I agree that this was an omission of a technical nature during the investigation, but all the same even the Court has observed that it could be nobody else but the defaulter who could have committed the offence. The relevant observations of the Court are as follows—

'I admit that none else would have dared to sign this entry Exhibit P C. at point P C./2 as the amount was to go to the constable whose T A. bill was entered.'

This observation of the Court has established that the T A. bill was drawn by the defaulter with dishonest intention. Keeping this observation of Court in view the finding and the order of the Superintendent of Police can be held fully justifiable.'

When the matter went up in revision to the Additional Inspector-General of Police, he held in this connection—

"This contention was also discussed in detail by the Deputy Inspector-General in his appellate order. There is no doubt that the revisionist was acquitted by the Court but the Court while passing the order clearly mentioned as follows—

'I admit that none else would have dared to sign this entry Exhibit P C. at point P C./2 as the amount was to go to the constable whose T A. was entered but since it has not been proved on record that this entry was actually signed by Harbans Lal accused and it was within his knowledge that it related to the T A. for the period from 18-5-1960 to 22-5-1960. Naturally the lack of investigation on this point is to benefit the accused. It is thus clear that the second issue as to who signed the entry Exhibit P C./2 is not proved beyond doubt that it was signed by Harbans Lal accused. In the light of my above discussion, I giving the benefit of doubt to Harbans Lal accused acquit him of the charge under Sections 463/471-A/420/477-A.'

In accordance with the provisions of Police Rule 163 the departmental enquiry was correctly held and there is no

force in this contention of the revisionist."

It appears from the above-said discussion on this point by the departmental authorities that the petitioner escaped conviction in the criminal proceedings merely because of a technical flaw in the investigation of the case

6 The case would also fall under clause (b) if either the Court or the Superintendent of Police was to be of the opinion that the prosecution witnesses had been won over. In this case the Criminal Court recorded a clear finding to the effect that 'all the witnesses resiled which is, for all practical purposes equal to stating that they had been won over. The Superintendent of Police has also stated in paragraph 6 (u) of his return that according to his finding the petitioner had won over three material witnesses who had at the trial resiled from their statements under Section 161 of the Code of Criminal Procedure. This is enough to bring the case squarely under clause (b). In any event, the Criminal Court impliedly held that the offence of cheating the Government of the amount in question had actually been committed and the passage in the judgment of the learned Magistrate already quoted above in the quotation from the orders of the departmental authorities leaves no doubt in my mind that when the Magistrate stated that 'I admit that none else would have dared to sign this entry' while referring to the entry in the T A. bill, he still proceeded to acquit the petitioner. It was merely because the said conviction in the mind of the Magistrate was treated by him as not raising the status of the guilt of the petitioner who was the police officer concerned above suspicion. This brings the case within the exception contained in clause (c).

7 Mr Hans Raj Aggarwal referred to the judgment of Shamsher Bahadur J., in *Amin Lal v State of Punjab* 1965 Cur LJ 509 (Punj) and argued that the petitioner having been acquitted by the Criminal Court could not be again tried departmentally. The State does not appear to have invoked the clauses (a) and (b) of the exception to the rule in *Amin Lal's* case, 1965 Cur LJ 509 (Punj). Only clauses (c) and (d) were invoked. On the facts of that case, it was held by the learned Judge that the relevant observations in the judgment of the Criminal Court could not possibly lead to the inference that some suspicion still attached to the Police Official concerned. Similarly, it was held that clause (d) could not be invoked against the police official concerned. Each case depends on its own facts and the judgment of Shamsher Bahadur J., in *Amin Lal's* case, 1965 Cur LJ 509 (Punj) (a short-note of which also

appears in 1965 Pun LR (S. N.) 89) is of no avail to the petitioner. Considering all the circumstances of the case, I am convinced that the protection afforded by the purview of sub-rule (1) of Police Rule 16.3 is not available to the petitioner.

8. The third submission of Mr. Aggarwal was that the impugned departmental proceedings were barred by Police Rule 16.38 (1), as immediate information of the commission of the offence was not given to the District Magistrate and the departmental proceedings were not conducted after obtaining a decision of the District Magistrate permitting the same. Rule 16.38 (1) reads—

"16.38 (1) Immediate information shall be given to the District Magistrate of any complaint received by the Superintendent of Police, which indicates the commission by a Police Officer of a Criminal offence in connection with his official relations with the public. The District Magistrate will decide whether the investigation of the complaint shall be conducted by a Police Officer, or made over to a selected Magistrate having 1st Class powers."

I am in full agreement with the decision of the departmental authorities on this question to the effect that the protection of the above said rule cannot possibly be invoked by the petitioner on the short ground that the charges, on which the petitioner has been punished and indeed even the offences for which he was charged in the criminal case, had no 'connection with his official relations with the public'. A plain reading of the above-quoted rule would show that it has no application to a case of a criminal offence which has no connection with the official relations of the delinquent police official with the public.

9. The last submission of the learned Counsel for the petitioner was that Article 311 (2) of the Constitution and principles of natural justice have been violated in this case inasmuch as—

(i) Prosecuting Inspector Ulfat Rai was not competent and only the Superintendent of Police was competent under Police Rule 16.24 (2) to serve the charge-sheet on the petitioner;

(ii) the summary of allegations (Annexure 'B') was vague and did not comply with Police Rule 16.24 (1) inasmuch as the names of the witnesses and summary of the statements which the prosecution witnesses were expected to give, had not been detailed in the summary of allegations;

(iii) copies of statements of witnesses recorded during the preliminary enquiry had not been furnished to the petitioner; and

(iv) the Superintendent of Police had issued the show-cause notice (Annexure

'D') merely on the report of the enquiry officer without applying his own mind to the matter.

In order to appreciate these points it is necessary to notice the following additional facts which have been proved in this case by the affidavit (written statement) of the Superintendent of Police, Karnal, dated April 16, 1964—

(1) Shri Ulfat Rai, the then Prosecuting Inspector of Police, Karnal, had been appointed by Shri M. L. Puri, the then Superintendent of Police, Karnal, on July 29, 1961, to prepare the departmental file against the petitioner;

(2) At the time of his prosecution in the Criminal Court, the petitioner had been supplied with copies of all the documents referred to in sub-section (4) of Section 173 of the Code of Criminal Procedure which, inter alia, included copies of statements of prosecution witnesses. The material witnesses examined in the departmental enquiry were the same persons who had been the prosecution witnesses in the trial of the criminal case;

(3) The petitioner never made any request for supply of copies of statements of witnesses recorded during the preliminary enquiry;

(4) The Superintendent of Police, Karnal, after consideration of the findings and the conclusions reached by the enquiry officer was provisionally of the opinion that penalty of dismissal should be inflicted on the petitioner. The Superintendent of Police had applied his mind to the merits of the facts before issuing the notice;

(5) The petitioner was called twice by the Superintendent of Police, Karnal, in his presence once on March 27, 1962, when the show-cause notice (Annexure 'D') was served on him and again on May 17, 1962 to show-cause against the proposed penalty; and

(6) Before passing the final order of dismissal the show-cause notice (Annexure 'D') was duly served on the petitioner and his representation there-against was taken into consideration by the Superintendent of Police, Karnal.

Police Rule 16.24 may at this stage be set out—

"16.24 (1) The following procedure shall be followed in departmental enquiries—

(i) The Police Officer accused of misconduct shall be brought before an officer empowered to punish him, or such superior officer as the Superintendent may direct to conduct the enquiry. That officer shall record and read out to the accused officer a statement summarising the alleged misconduct in such a way as to give full notice of the circumstances in regard to which evidence is to be recorded. A copy of the statement will also be

supplied to the accused officer free of charge.

(ii) If the accused Police Officer at this stage admits the misconduct alleged against him, the officer conducting the enquiry may proceed forthwith to frame a charge, record the accused officer's plea and any statement he may wish to make in extenuation and to record a final order, if it is within his power to do so, or a finding to be forwarded to an officer empowered to decide the case. When the allegations are such as can form the basis of a criminal charge, the Superintendent shall decide at this stage, whether the accused shall be tried departmentally first and judicially thereafter.

(iii) If the accused police officer does not admit the misconduct, the officer conducting the enquiry shall proceed to record such evidence, oral and documentary in proof of the accusation, as is available and necessary to support the charge. Whenever possible, witnesses shall be examined direct, and in the presence of the accused, who shall be given opportunity to take notes of their statements and cross-examine them. The officer conducting the enquiry is empowered, however, to bring on to the record the statement of any witness whose presence cannot, in the opinion of such officer be procured without undue delay and expense or inconvenience, if he considers such statement necessary, and provided that it has been recorded and attested by a Police Officer superior in rank to the accused officer or by a Magistrate, and is signed by the person making it. This statement shall also be read out to the accused officer and he shall be given an opportunity to take notes. The accused shall be bound to answer any questions which the enquiring officer may see fit to put to him with a view to elucidating the facts referred to in statements or documents brought on the record as herein provided.

(iv) When the evidence in support of the allegations has been recorded the enquiring officer shall, (a) if he considers that such allegations are not substantiated, either discharge the accused himself, if he is empowered to punish him, or recommend his discharge to the Superintendent, or other officer, who may be so empowered, or (b) proceed to frame a formal charge or charges in writing explain them to the accused officer and call upon him to answer them.

(v) The accused officer shall be required to state the defence witnesses whom he wishes to call and may be given time, in no case exceeding forty-eight hours, to prepare a list of such witnesses, together with a summary of the facts as to which they will testify. The enquiring officer shall be empowered to refuse to hear any witnesses whose evidence he

considers will be irrelevant or unnecessary in regard to the specific charge framed. He shall record the statements of those defence witnesses whom he decides to admit in the presence of the accused, who shall be allowed to address questions to them, the answers to which shall be recorded, provided that the enquiring officer may cause to be recorded by any other Police Officer superior in rank to the accused the statement of any such witness whose presence cannot be secured without undue delay or inconvenience, and may bring such statement on to the record. The accused may file documentary evidence and may for this purpose be allowed access to such files and papers, except such as form part of the record of the confidential office of the Superintendent of Police, as the enquiring officer deems fit. The supply of copies of documents to the accused shall be subject to the ordinary rules regarding copying fees.

(vi) At the conclusion of the defence evidence or if the enquiring officer so directs, at any earlier stage following the framing of a charge, the accused shall be required to state his own answer to the charge. He may be permitted to file a written statement and may be given time, not exceeding one week, for its preparation, but shall be bound to make an oral statement in answer to all questions which the enquiring officer may see fit to put to him, arising out of the charge, the recorded evidence, or his own written statement.

(vii) The enquiring officer shall proceed to pass orders of acquittal or punishment, if empowered to do so or to forward the case with his finding and recommendations to an officer having the necessary powers. Whenever the officer passing the orders of punishment proposes to take into consideration the adverse entries on the previous record of the accused Police Officer, he shall provide reasonable opportunity to the defaulter to defend himself and a copy or at least a gist of those entries shall be conveyed to the defaulter and he shall be asked to give such explanation as he may deem fit. The explanation furnished by the defaulter shall be taken into account by the officer before passing orders in the case.

(viii) Nothing in the foregoing rule shall debar a Superintendent of Police from making or causing to be made a preliminary investigation into the conduct of a suspected officer. Such an enquiry is not infrequently necessary to ascertain the nature and degree of misconduct which is to be formally enquired into. The suspected Police Officer may or may not be present at such preliminary enquiry, as ordered by the Superintendent of Police or other gazetted officer

initiating the investigation, but shall not cross-examine witnesses. The file of such a preliminary investigation shall form not part of the formal departmental record, but statements therefrom may be brought to the formal record when the witnesses are no longer available in the circumstances detailed in clause (iii) above. All statements recorded during a preliminary investigation should be signed by the person making them and attested by the officer recording them.

(ix) No order of dismissal or reduction in rank shall be passed by an officer empowered to dismiss a Police Officer or reduce him in rank until that officer has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, provided that this shall not apply—

(a) where a Police Officer is dismissed or reduced in rank on the ground of conduct which led to his conviction on a criminal charge; or

(b) where the officer empowered to dismiss him or reduce him in rank is satisfied that for some reason to be recorded by that officer in writing, it is not reasonably practicable to give to that Police Officer an opportunity of showing cause.

Before an order of dismissal or reduction in rank is passed, the officer to be punished shall be produced before the officer empowered to punish him, and shall be informed of the charges proved against him, and called upon to show cause why an order of dismissal or reduction in rank should not be passed. Any representation that he may make shall be recorded, shall form part of the record of the case, and shall be taken into consideration by the officer empowered to punish him before the final order is passed.

Provided that if, owing to the complicated nature of the case or other sufficient reason to be recorded, the officer empowered to impose the punishment considers this procedure inappropriate, he may inform the officer to be punished in writing of the charges proved against him, and call upon him to show cause in writing why an order of dismissal or reduction in rank should not be passed. Any written representation received shall be placed on the record of the case and taken into consideration before the final order is passed.

(2) (i) Notwithstanding anything contained in sub-rule (1) a Superintendent of Police or any officer of rank higher than Superintendent may institute, or cause to be instituted, ex parte proceedings in any case in which he is satisfied that the defaulter cannot be found or that in spite of notice to attend the defaulter is deliberately evading service or refusing to attend without due cause.

(ii) The procedure in such ex parte proceedings shall, as far as possible, conform to the procedure laid down in sub-rule (1);

Provided that the defaulter shall be deemed—

(a) not to have admitted the allegations contained in the summary of misconduct, and

(b) to have entered a plea of not guilty to the charge;

Provided further that the defaulter, if he subsequently appears at any stage during the course of the proceedings shall not be entitled to claim de novo proceedings or to recall for cross-examination any witness whose evidence has already been recorded. He shall, however, be fully informed of the evidence which has led against him and shall be permitted to take notes thereof. He shall also be furnished with a copy of the summary of misconduct and of the charge or charges framed."

Regarding the first objection of the petitioner against the departmental enquiry it is noteworthy that the petitioner has not been able to point out any statutory rule requiring the Superintendent of Police to serve the charge-sheet personally on a delinquent police constable. In paragraph 6 (v) of the writ petition reliance has been placed on Police Rule 16.24 (ii) in support of the petitioner's contention to the effect that the Superintendent of Police alone was competent to charge-sheet the petitioner. The argument appears to be misconceived. Clause (ii) of sub-rule (1) of Police Rule 16.24 applies only to a case where the accused Police Officer "admits the misconduct alleged against him". The petitioner admittedly never adopted that course. It is clause (iii) of sub-rule (1) of Rule 16.24 which applies to the petitioner, as he did not admit the misconduct alleged against him. In such an eventuality it is "the officer conducting the enquiry" who is to proceed to record evidence in proof of the accusation and then to proceed under clause (iv), that is: (a) if he considers that the allegations against the accused police official are not substantiated, to discharge him or recommend his discharge to the Superintendent, or (b) proceed to frame a formal charge or charges in writing, explain them to the accused Police Officer and call upon him to answer them. Since the Prosecuting Inspector Ulfat Rai had been duly appointed by the then Superintendent of Police, Karnal, as "the officer conducting the enquiry", he was the only competent person under clause (iv) of sub-rule (1) of Police Rule 16.24 to frame a formal charge or charges in writing against the petitioner. It is admitted that Prosecuting Inspector Ulfat Rai was the enquiry

officer. The charge-sheet (Annexure C) dated October 30 1961 and the summary of allegations (Annexure B) were drawn by him. I am, therefore unable to find any irregularity in this procedure.

10 Nor have I been able to find any force in the second point urged by Mr Aggarwal to the effect that the summary of allegations did not fulfil the requirements of clause (i) of sub-rule (1) of Police Rule 1624, as the names of the witnesses and summary of statements which those witnesses were expected to make had not been detailed therein. No law has been cited before me which requires any such thing to be done. The summary of allegations (Annexure B) contains a faithful account of the allegations against the petitioner into which the enquiry had to be conducted, and contains the requisite detail including (i) the name and particulars of Head Constable Ram Jas under whom the police guard had to escort the prisoners to the Borstal Jail, Hissar on May 18 1960 (ii) particulars of the relevant entries in the daily diary (iii) particulars of the T A. bill and of Constable Jagtar Singh who had prepared the bill, (iv) particulars of Head Constable Gobind Lal, Bill Clerk, who had checked the T A. bill, (v) particulars and names of the constables for giving reference to the departure and return reports, whose bills had been returned, and (vi) other material information. In the circumstances of this case nothing more could conceivably be required to give full notice of the circumstances in regard to which the evidence was to be recorded by the enquiry officer. The procedure adopted was in entire conformity with Police Rule 1624 (1).

11 The third point pressed on behalf of the petitioner is equally devoid of merit for more than one reason. The summary of allegations as well as the facts stated in the returns filed by the respondents show that the witnesses examined against the petitioner in the departmental enquiry were the same as had been examined earlier at the criminal trial. The petitioner does not dispute that he was already in possession of the statements given by those witnesses during the criminal investigation as well as the statements given by them at the trial of the case. The argument of the learned Counsel for the respondents has been that in spite of this fact if the petitioner had again asked for another set of copies of statements given by the witnesses in proceedings under Section 161 of the Code of Criminal Procedure they would have had no hesitation in supplying the same. The averment of the Superintendent of Police (reproduced in an earlier part of this judgment) regarding the petitioner

never having asked for copies of the statements of the witnesses has not been denied by the petitioner in his replication. On these facts, counsel cannot derive any benefit from the law laid down by their Lordships of the Supreme Court in *Khem Chand v Union of India*, AIR 1958 SC 300 or in *State of Madhya Pradesh v Chintaman Sadashiva Wai-champayan*, AIR 1961 SC 1623. Counsel then referred to the judgment of the Supreme Court in *Tirlok Nath v Union of India*, 1967 SLR 759 (SC) and argued that the enquiry held without the supply of copies of statements should be regarded as the one in violation not only of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules 1930 but also of Article 311 (2) of the Constitution. I do not think it has ever been laid down by the Supreme Court or by any other Court that if a delinquent Government Official does not dispute that he already had the requisite copies of statements of witnesses to be examined in the departmental enquiry and does not ask for another set of them, any law or rule requires or envisages the necessity of the department supplying such official another set of those very copies.

In this view of the matter it is unnecessary to decide whether the Civil Services (Classification, Control and Appeal) Rules 1930 have any application to the petitioner though I am inclined to think *prima facie* that those rules do not apply to constables employed in the Punjab Police. The 1930 Rules apply to the Central Government servants, as is apparent from Rule 3 thereof. The Police Rules which contain Rule 1624 have been framed under Sections 7 and 12 of the Police Act, the material part of which is in the following terms—

7 Subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may from time to time make under this Act, the Inspector General, Deputy Inspector General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss suspend or reduce any Police Officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duties or unfit for the same.

: : : :
: : : :
: : : :

12 The Inspector General of Police may from time to time, subject to the approval of the State Government frame such orders and Rules as he shall deem expedient relative to the organisation classification and distribution of the Police Force, the places at which the members of the Force shall reside, and the particular services to be performed

by them; their inspection, the description of arms, accoutrements and other necessities to be furnished to them; the collecting and communicating by them of intelligence and information, and all such other orders and Rules relative to the Police Force as the Inspector General shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for tendering such force efficient in the discharge of its duties."

The rules framed under the above-said provisions of the Police Act, 1861, are not only subject to Article 311 of the Constitution, but also subject to such rules as the State Government may, from time to time, make. Corresponding to 1930 Central Rules, the State Government has framed the Punjab Civil Services (Punishment and Appeal) Rules, 1952. Rule 7 of the said Punjab Rules corresponds to Rule 55 of the Central Rules. Police Rule 16.24 appears to me to envelop the requirements of Article 311 of the Constitution as well as the material requirements of Rule 7 of 1952 Punjab Rules. On the facts of this case, none of the relevant rules, or even the ordinary principles of natural justice, appears to have been violated in the disciplinary proceedings conducted against the petitioner in spite of the non-supply of the copies of the statements of the prosecution witnesses.

12. In giving a decision about the last submission of Mr. Aggarwal, I have to prefer the affidavit of the Superintendent of Police read with the relevant part of the show-cause notice itself (Annexure 'D') to the effect that the petitioner had been called by the Superintendent of Police personally on March 27, 1962, after he had considered the report and findings of the enquiry officer and come to a provisional decision about inflicting a major penalty on the petitioner and I cannot possibly believe the impression of the petitioner to the effect that the Superintendent of Police did not at all apply his mind to the matter.

13. No other point having been urged in this case, the writ petition fails and is dismissed with costs.

RSK/D.V.C. Petition dismissed.

AIR 1969 PUNJAB & HARYANA 139
(V 56 C 23)

R. S. SARKARIA, J.

Sadhu Singh Balwant Singh, Appellant
v. Smt. Jagdish Kaur Sadhu Singh, Respondent.

F. A. F. O. No. 83-M of 1966 and Civil Misc. No. 3086 of 1967, D/- 28-3-1968.

Hindu Marriage Act (1955), S. 9 —
Petition by husband for restitution of

IL/KL/D840/68

conjugal rights — Burden of proof — Expression "without reasonable excuse" — Meaning of.

Sub-section (1) of S. 9 indicates that the petitioner seeking restitution of conjugal rights, in order to get a decree, has to prove two things: (i) that the respondent has withdrawn from the society of the petitioner, and (ii) that such withdrawal has been without reasonable excuse. The word 'excuse' appears to have been advisedly used. It is something less than 'justification', and something more than a mere whim, fad, or brain-wave of the respondent. It is a fact which has to be determined with reference to the respondent's state of mind in the particular circumstances of each case. The scope of the word 'excuse' is not restricted to the grounds which under sub-section (2) of the section can be taken in answer to a petition for restitution of conjugal rights, because in view of Sections 101, 102 and 103 of the Evidence Act, the burden of proving the aforesaid twin conditions in sub-section (1) rests on the petitioner. He has to succeed on the strength of his own case. He cannot take advantage of the weakness of the defence. Case law discussed.

(Para 13)

Cases Referred: Chronological Paras

(1967) 1967-69 Pun LR 566, Roshan	
Lal v. Basant Kumari	11
(1967) 1967-69 Pun LR 603, Gurdip	
Kaur v. Partap Singh	11
(1962) AIR 1962 All 447 (V 49),	
Smt. Mango v. Prem Chand	13
(1959) AIR 1959 Punj 162 (V 46)=	
61 Pun LR 188, Mst. Gurdev	
Kaur v. Sarwan Singh	13, 14
(1954) 1954-3 All ER 208=1954-1	
WLR 1051, Spicer v. Spicer	11
(1950) 1950-1 All ER 832=48 LGR	
384, Munro v. Munro	13
(1947) 1947-1 All ER 630=177 LT	
148, Gardner v. Gardner	11

H. S. Wasu with L. S. Wasu, for Appellant; Har Parshad with Dr. A. S. Anand, for Respondent.

JUDGMENT:— This appeal by the husband is directed against an order, dated 16-8-1966, of Shri Radha Krishan Battas, Subordinate Judge, 1st Class, Rupar, by which the appellant's petition under Section 9 of the Hindu Marriage Act, 1955, (hereinafter referred to as 'the Act') for restitution of conjugal rights against the wife, was dismissed.

2. The appellant was married to the respondent on 29-3-1964. He is serving as a Physical Education Supervisor in a school under the control of the Fertilizer Corporation of India at Naya Nangal. Respondent Jagdish Kaur is the daughter of Dr. Ajmer Singh of Ludhiana. She was at all material times employed and posted as teachress in Government Middle School, Ludhiana. After the marriage,

the parties went for a honeymoon tour to Simla, where they lived together for about 7 days. Thereafter, the couple went to the house of Dr Ajmer Singh at Ludhiana. The respondent's mother however advised them to go to Rupar, which they did on 7-4-1964. Thereafter, the spouses went to their respective places of posting at Ludhiana and Nangal.

3 In the summer vacations of July-August, 1964, the wife came to her husband's house on 10-8-1964 and stayed with his parents at Rupar. The petitioner alleges that on 28-8-1964 she left the matrimonial home in his absence and had withdrawn herself from his society without reasonable excuse. It is also pleaded that she took along with her ornaments and clothes, valued at Rs 4,000/-

4. On the preceding facts, the husband on 10-5-1965 made a petition for restitution of conjugal rights in the Court of Subordinate Judge 1st Class, at Rupar.

5 In her written statement, the wife pleaded that she was given obnoxious, intolerable and inhuman treatment by her in-laws at Rupar. She was turned out of the petitioner's house on 28-8-1964, and was forcibly relieved of her ornaments and belongings. Her mother-in-law opposed the very idea of her going to Nangal to live with the petitioner. She was segregated from her husband and made to spend her holidays in Rupar without his company. The petitioner was too much under the influence of his parents and had no voice of his own. It is also stated that the petitioner's parents were dissatisfied with the dowry given by her parents, and, therefore taunted and teased her. She also expressed her willingness to live with the petitioner at Nangal, but not with his parents at Rupar as she apprehended danger to her life.

6 In the replication, the petitioner alleged that he did not like his wife to serve as a mistress in a school. His mother also did not want the petitioner to continue in school service. It was denied that the dowry was ever a consideration for this marriage. It was added.—

"In fact, the respondent took this marriage just as a cover to get latitude to enjoy life in a different way other than the normal married life. She, in fact, is an instrument to be used by Mrs. Daljit Kaur Thandi, her previous Headmistress, Ludhiana. The correspondence between them is a clear proof of the fact that respondent does not want to lead the normal life of a married woman. The respondent is living away from the petitioner out of her own pleasure. Still the petitioner is desirous of enjoying her company."

7. The allegations of ill-treatment of the respondent were also denied. By way

of additional plea, it was stated that the petitioner being the only son of his aged parents, was duty-bound to look after them, and the respondent had to share that moral obligation and responsibility of the petitioner. It was denied that there was any danger to the respondent from the parents of the petitioner.

8 The trial Court framed this issue—"Whether the respondent has withdrawn from the society of the petitioner without a reasonable excuse. O A."

9 This issue was decided against the petitioner. The trial Judge found that the petitioner himself was guilty of blameworthy conduct because 'what he wants is a decree and not the girl'. He also observed that while in the witness-box, the petitioner could not conceal his aversion for her which was "flowing out almost as a steam from a boiling kettle". In the result, he dismissed the plaintiff's petition with costs.

10 Mr Harnam Singh Wasu, the learned Counsel for the appellant has contended that the trial Court did not find that there was any dispute over the dowry or she had been forcibly deprived of her gold ornaments or that she was physically turned out of the house. Thus, says Mr Wasu, the trial Court, in a way, found that several major allegations made by the respondent in her written statement or deposition at the trial were false. He has particularly drawn my attention to para 12 of the judgment of the trial Court, wherein it is observed that there are "exaggerations in the version and counter-versions of the spouses", and that "an impartial and 100% correct version cannot be expected from their friends", i.e. witnesses examined by them. It is emphasised that despite these findings and observations, the trial Judge has purely on fanciful grounds and certain unrecorded impressions about the demeanour of the petitioner-appellant, decided the issue against the petitioner.

11. Mr Wasu has further criticised the construction placed by the trial Court on the letters, Exhibits P 1 and P 2, admittedly written by the respondent to one Mrs. Thandi. He has adverted me to certain sentences appearing in those letters, and vehemently urged that they show that the respondent had perverse unnatural relations with Mrs. Thandi. These letters, says Mr Wasu, also indicate that the respondent, in spite of the requests made by her mother-in-law to the contrary, left the matrimonial home in the absence of the husband for going to Ludhiana and living with Mrs. Thandi, who according to the respondent's own averment in these letters, was the only person in the world which the respondent could love. Thus, by implication, she had disclaimed and disowned any love for her husband. Mr. Wasu has fur-

ther urged that her attitude in refusing to live with the appellant's parents, who have no issue other than the appellant, was highly unreasonable. All these circumstances, says Mr. Wasu, taken together, inescapably lead to the conclusion that the respondent left the matrimonial home of her own accord with a view to carry on her unnatural evil pursuits in the company of Mrs. Thandi. In support of his contentions, the learned counsel has cited *Gurdip Kaur v. Partap Singh* 1967-69 Pun LR 603; *Roshan Lal v. Basant Kumari*, 1967 Pun LR 566; *Gardner v. Gardner*, (1947) 1 All ER 630 and *Spicer v. Spicer*, (1954) 3 All ER 208.

12. On the other hand, Dr. Anand has canvassed these points:—

(1) That there is abundant evidence, direct and circumstantial, to show that the husband has made this petition with an ulterior motive, viz., for laying the foundation of a future petition for divorce, and not with the bona fide object of resuming cohabitation.

(2) That the admitted or proved circumstances fully justify the conclusion arrived at by the trial Court that the husband had neglected the wife, and had deliberately kept her out of the matrimonial home, which, in the circumstances of the case, amounted to mental cruelty on the part of the husband.

(3) That the husband had the temerity to level, even in the grounds of appeal, imputation of unchastity, viz., of her having unnatural perverse sex relations with Mrs. Thandi — an imputation which is nothing short of mental torture and is by itself sufficient for dismissal of his petition.

(4) That even if it is held that she had not been able to prove with clarity the allegations, that she was forcibly turned out of the house and deprived of her gold ornaments, etc., then also the petitioner, who had to stand on his own legs, had failed to prove that the wife had withdrawn from his society without reasonable excuse.

13. In support of these contentions, reference has been made to *Mst. Gurdev Kaur v. Sarwan Singh*, AIR 1959 Punj 162; *Smt. Mango v. Prem Chand*, AIR 1962 All 447 and *Munro v. Munro*, (1950) 1 All ER 832.

14. In order to appreciate the points in controversy, it will be useful to set out the law on the point as contained in Section 9 of the Act. Sub-section (1) indicates that the petitioner seeking restitution of conjugal rights, in order to get a decree, has to prove two things: (i) that the respondent has withdrawn from the society of the petitioner, and (ii) that such withdrawal has been without reasonable excuse. The word 'excuse' appears to have been advisedly used. It is

something less than 'justification', and something more than a mere whim, fad, or brain-wave of the respondent. It is a fact which has to be determined with reference to the respondent's state of mind in the particular circumstances of each case. The scope of the word 'excuse' is not restricted to the grounds which under sub-section (2) of the section can be taken in answer to a petition for restitution of conjugal rights, because in view of Sections 101, 102 and 103 of the Evidence Act, the burden of proving the aforesaid twin conditions in sub-section (1) rests on the petitioner. He has to succeed on the strength of his own case. He cannot take advantage of the weakness of the defence.

14-A. In this view, I am fortified by a decision of this Court in AIR 1959 Punj 162, wherein Grover, J., observed:—

"Although sub-section (2) of Section 9 of the Hindu Marriage Act confines pleas in defence only to those grounds which can be taken under Sections 10, 12, and 13 of the Act, sub-section (1) itself lays down certain conditions which must be fulfilled before a decree can be granted. It will have to be seen firstly whether the husband or wife, as the case may be, has withdrawn from the society of the other without reasonable cause. The second requirement is that the Court must be satisfied of the truth of the statements made in such a petition. Thirdly, there should be no legal ground why the relief should not be granted.

"The first requirement seems to incorporate the rule accepted in English Law that while granting restitution it has to be seen whether the respondent had a reasonable cause for leaving the petitioner and the Court has discretion to refuse relief if reasonable cause exists even in the absence of matrimonial offence. The test, however, as to what constitutes reasonable cause would vary with the circumstances of each case. It will have to be applied in the changed social conditions as they obtain today and not with the rigid background of the tenets of the old texts of Manu or other Hindu Law givers."

15. Keeping in view the law on the point, as stated above, I pass on to discuss the evidence on record.

16. The most important piece of evidence, which according to Mr. Wasu, constitutes eloquent testimony of the unnatural perverse relations of the respondent with Mrs. Thandi, is letters, Exhibits P. 3 and P. 4, admittedly written by the respondent to her former Headmistress, Mrs. Thandi.

17. Before I pass on to consider these letters, it is important to bear in mind that these letters were intercepted by the appellant. It will not be out of place to

mention here that the stability of a marriage rests on three pillars, namely, mutual trust, bilateral respect, and sympathetic understanding. Out of these three, which sustain a matrimonial home, trust is by far the most important prop. To be trusted says George Mac Donald, is a greater compliment than to be loved. Trust begets trust suspicion breeds suspicion. The interception of these letters by the needlessly suspicious husband constituted an act of vandalism against Trust undermining the very foundation of the matrimonial relations. This is an important factor which must affect the Court in its approach towards the appellants case.

18 In order to appreciate the tenor, context, and true purport of these letters, it is necessary to reproduce their English rendering in extenso. Letter dated 20-8-1964 Exhibit P 3 reads as follows:-
Dear Jiji,

Why such cruelty towards me? Why did not you write to me? You take it lightly even though it may cost the other his life. I am weeping alone, lying in the drawing room. Thus apart, I am harassed by fever. Jiji, by God, fear is gripping me. The slightest noise from the street strikes terror in my heart. What to do! Where should I go! Just half an hour back, I felt as if Bibi (Jiji?) was speaking in the courtyard. Uff! I am bursting into cries. Have you no mercy on me! Ah! even God has no mercy on me! Alas! I cannot write what is now in my mind, because you will feel it—my God! I could not get a wink of sleep even on the night of 21st August. Only at about 4 A.M. I dozed off to wake up from the nightmare at 7 A.M. chanting the name of God. I am still running temperature, I am feeling very bad. Anyway, let my health be indeed so bad, yet I wish you to be restored to health. After taking a hot bath, I quickly changed clothes dressed my hair took tea, came here and laid myself in the sofa, waiting for the postman till 10-30 A.M. The postman never came. Then fear started gnawing me. I prayed with folded hands before the picture of Guru Nanak Sahib for a letter written by my Raja. The clock struck 11. Still no trace of the postman. Beji (mother-in law) after feeling my pulse asked me to go and lie down in the bed, but how could I like the bed! I said that I would go to bed after sometime. After 11 the postman came with two letters. The address on both of them was not in your hand. The heart then started pounding within me. I feared that these letters had been got written by someone else. What does this mean? Yet, Jiji, Ah! I opened the letter and read it. It was in your hand. For full 15 minutes, the heart did not stop hammering. I was sweating. I thanked God

million times that he heard my prayers. He should continue to hear my prayers. Your letter of the 19th has been received today the 21st. What my condition was yesterday, I cannot say. Jiji, in my life, in reality, I have been able to love you only. On reading your letter of 20th, much happened to my heart. Even if you do not write, a single tear of yours helps me a lot to reach the depths of your heart. I learnt all about your sighs and sorrows, though I may not utter a word to tell you all what I perceive — or everything will be alright. Time will bring in its wake everything. That time is not far off, I believe. My presence by your side at this time was extremely necessary. Do you know that I am controlling my feelings within my heart, and weighing it down, as it were, with a heavy stone. Do not think me alive. Though I am physically here, I am in heart by your side. I rarely speak. Beji is close to me. I spend the whole day remembering you, also in my prayers. When I do not receive any letter from you, I become like an insane person. Look, Jiji! Have you been moved by my entreaties? Tell me the truth on oath. How much time do you spend in the bath-room? And what do you do there? Please do write it. What care do you take of my thing (keepsake)? Who sleeps by your side at night? Had I not received your letter today I do not know what would have happened — only God knows!

The second letter, dated 25-8-1964, Exhibit P 4 reads as follows:—
'Dear Jiji,

Lot of love and then respects. Yesterday I did not receive any letter from you. Yes it had not to come. As I wrote to you, Beji taunted me several times that I had not received any letter on that day. I kept quiet. It will not come even today because you did not receive any letter of mine on Monday. So I will remain without it (dry) even today. On the 24th yesterday you also so remained 'dry'. Yet today, you will get 'wet'.

'Jiji, really I do not feel at home, what to do! I suffer from illusions as if somebody is calling me by my name. Sometimes, the heart fears, sometimes it gets nervous. I will try my best to come on Saturday. Jiji, when you were ill or when you used to change, you looked very lovely. Now you are receiving Redsul injections and will get lovelier than before. Get stronger so that attack may be scared of you. You have not told me, how much time you spend in the bath-room, and what do you do in the bath-room. Have you acceded to my request which I had made to you? You never accepted my advice when I used to be near you. Still, your obstinacy (courage)

harms you. You think that you have great strength in you. Please swear by me and tell the truth, how much have you remembered me? Jiji, when I came to Rupar, Ah! how you were lying quiet eyes streaming tears. That picture is still screened before my eyes. Sometimes, I feel as if you are laughing and moving about in your courtyard and the drawing-room, and are not taking rest. You have not informed me as to who sleeps by your side, and how much time during the day you spend alone. Jiji, when will I join you? I am waiting for that moment. Beji is cross with me since yesterday, and I, too, am angry. I sit idle (killing flies) under the fan in the day alone, in the drawing-room. It is now quarter to 11. The postman has not come. I am having some headache and some pain in the eyes. I do not know, why? Jiji, write to me in detail as to your present state of health. For God's sake, for the present, you must take rest. Jiji, I am looking quite smart today. I wish, you were with me today. This is not a letter. I am just talking to you at random (nonsense)

"Tomorrow's post will certainly bring something. Every time I get so upset. Convey my Sat Sri Akal to mother and Bhabi Ji. Request Dr. Sahib on my behalf that he must give you Redisul daily."

19. I wonder, how the aforesaid letters read as a whole, warrant even a reasonable conjecture that the respondent was indulging in lesbian practices between herself and Mrs. Thandi. No husband, save when he is unreasonably suspecting, can conjure up from these letters any conclusion of unnatural sex relations between the respondent and Mrs. Thandi.

20. The passages or the sentences which in the imagination of the appellant smack of such perverse relations, were put to the respondent during cross-examination in the witness-box. She was asked to explain when she wrote in Exhibit P.3, "What care are you taking of my 'thing', and who sleeps by your side?" She explained that by "my thing", she meant her photograph, which had been given to Mrs. Thandi as a keepsake. The necessity of asking Mrs. Thandi about the time she spent in the bath-room and as to who used to sleep near her at night-time, was that Mrs. Thandi had suffered a heart stroke; she was a patient of heart trouble. This explanation fully fits in with the general tenor and context of these letters.

21. I entirely agree with the learned trial Judge that there is nothing sinister in these letters, which would justify even a surmise that the wife was guilty of any matrimonial offence. The mere fact that in one of these letters, she wrote that

Mrs. Thandi was the only person to whom the respondent could love, cannot be construed as meaning that she had no love for her husband.

22. These letters clearly reveal the tormented mind of a love-starved, mentally tortured, and helpless wife, who has been deprived by her husband of his company and matrimonial bed. She has vividly painted her state of loneliness and segregation to which the husband and in-laws had reduced her. She has in these letters hinted and complained of gripping fears, harassing fever, fearsome loneliness, gnawing mental pains, trying tribulations, and horrible helplessness. In the letter, Exhibit P. 3, she has expressed her inability to write and disclose everything about her miserable state and anguished mind, lest Mrs. Thandi, who was suffering from a heart ailment, should get worried.

23. It is true that these letters show that the respondent was very intimate with Mrs. Thandi but there is nothing unnatural about that intimacy. Mrs. Thandi was her former Headmistress. Respondent's devotion to Mrs. Thandi was wholly innocuous and natural. Counsel also laid stress on that part of the letter, Exhibit P. 4, wherein she informed Mrs. Thandi that she would try her best to reach Ludhiana on Saturday (29th August, 1964) and go straight to her. It is argued that this sentence conclusively shows that she had withdrawn herself from the society of the petitioner of her own accord, without any reasonable excuse.

24. I do not think that the mere fact that she was anxious to go to Ludhiana and enquire about Mrs. Thandi's health, warrants this conclusion which the Counsel wants me to draw. It is not disputed that she was posted as a teachress at Ludhiana. It is also common ground that at the time of the marriage also, she was in the Education Service of the State. The petitioner is also in the same profession. It is, therefore, not unreasonable to presume that the fact of both the spouses being in the same profession, was one of the considerations of marriage. It is also not disputed that she had come for the last time to her husband's parents during the summer vacation, and had to resume her post at Ludhiana on the 1st of September, 1964. Her informing Mrs. Thandi that she would be coming on Saturday, the 29th August, 1964, just at the end of the summer vacation, did not indicate an intention on her part to withdraw from the society of her husband, but only an intention to resume her official duties at the end of the vacation. But why did she leave one day earlier? This acceleration of her departure rather indicates that something happened subsequently to the writing of the letter, Exhibit P. 4, which hastened her departure. This something

according to the sworn testimony of the respondent, was the mental and physical torture inflicted by her mother in law and her husband. It is also common ground that in the morning of 28th August, 1964 a telegram was sent to Dr Ajmer Singh, father of the respondent, asking him to reach Rupar immediately. The respondent has sworn that she has entreated her in laws to wait for the arrival of her father but they did not do so but compelled her to leave the house immediately. It is in the evidence of Dr Ajmer Singh how he reached the house of the petitioner and found that his daughter the respondent, had already departed.

25 The observations made by the learned trial Judge with regard to the conduct and demeanour of the petitioner cannot be lightly ignored. It is true that he did not make a separate note at the time of recording the statement of the petitioner about his demeanour. But this demeanour is eloquently reflected in the sardonically curt statement of the petitioner. In examination in-chief, he was volunteering statements.

26 He stated that he was prepared to keep the respondent if she either left service or got herself transferred to the station where the petitioner was posted. He further admitted that he did not try for her transfer from Ludhiana. He was questioned as to whether he had made any arrangement for taking her to Nangal. He bluntly replied that he had made no arrangements as none was required. He volunteered, 'She was free to go with me in a bus, I do not possess a car to take her in another way'. He further stated that he used to take his meals at Nangal in a hotel. He admitted that after the departure of the respondent, he never went to Ludhiana, nor did he write any letter to her or her parents asking her to return to Rupar.

27 In the written statement, the respondent made an offer that she was prepared to go back and live with the petitioner at Nangal. The petitioner however did not want her to live with him at Nangal, but with his parents at Rupar. Her refusal to live with his parents at Rupar away from him, cannot be said to be unreasonable in the circumstances of the case.

28. Dr Ajmer Singh himself appeared in the witness-box and stated how his efforts as well as that of the respondent in persuading the petitioner to admit her to the matrimonial home proved abortive.

29 In view of this intransigent and unrelenting attitude of the petitioner and the circumstances of the case the trial Court was justified in reaching the conclusion that the husband did not sincerely

want to resume cohabitation, and that he had made this petition merely for the purpose of preparing ground for a future petition for divorce. I entirely agree with that finding. In short, the petitioner had failed to prove that the respondent had withdrawn from his society without reasonable excuse.

30 In the light of what has been said above the appeal fails and is hereby dismissed with costs.

MOVJ/D V C.

Appeal dismissed.

AIR 1969 PUNJAB & HARYANA 144 (V 56 C 24)

D K. MAHAJAN AND P C. JAIN JJ
Anand Kumar Nirwani Petitioner v
Punjab University through The Registrar Punjab University Respondent
Civil Writ No 2365 of 1967 D/ 30-7 1968

Constitution of India Art 226 — Natural justice — Student caught red handed with hand written chits — Chits containing matter relevant to subject in which student was appearing on that date — Explanation of student immediately taken by Superintendent — Standing Committee examining entire material consisting of chits explanation of student report of Superintendent and evidence led by student during personal bearing granted by it — Held it could not be said that by not permitting student to cross examine Superintendent and Dy Superintendent principles of natural justice had been infringed or any prejudice was caused to him 1966 Cur LJ 241 (Punj) & 1967 Cur LJ 670 (Punj) & 1960 1 All ER 631 Dist. ing (Para 5)

Cases Referred Chronological Paras
(1967) 1967 Cur LJ 670 (Punj)
Kural Singh v The Vice-Chancellor 4, 5
(1966) 1966 Cur LJ 241 (Punj)
Ashok Kumar v Punjab University 4, 5
(1960) 1960 1 All ER 631-1960-1
WLR 223 University of Ceylon v Fernando 4, 5
Harbans Lal, for Petitioner N K. Sodha, for Respondent.

P C JAIN J — This is a petition filed by Anand Kumar Nirwani under Articles 226 and 227 of the Constitution of India for the issuance of the writ of certiorari for quashing the order of the Punjab University dated 27th of September 1967 disqualifying the petitioner for 1967 and 1968 (four sessions) under Regulation 12-C of the Punjab University Calendar 1966 (Volume I).

2 The facts as alleged in the petition are that the petitioner joined the Law
IL/KL/D845/68

College of the Punjab University and appeared in the F. E. L. Examination held by the Punjab University in June, 1967, at University Centre, Chandigarh. The Roll No. of the petitioner for the said examination was 344. The petitioner appeared in the fourth paper relating to the Law of Torts and Indian Easements Act on 8th of June, 1967 and the paper was to start at 8 A.M. The petitioner got late by few minutes and when he reached the examination hall, the question paper had already been distributed. Consequently, the petitioner entered the examination hall in a hurry and forgot to leave outside the hall the three chits of papers on which some notes had been written for the purpose of refreshing his memory. After some time, the petitioner having started answering the question paper, took out his handkerchief from his pocket and in that process one of the three chits fell down on the ground from his pocket and it was then that he realised that he had not left those three chits outside the hall by mistake. The petitioner then picked up that chit and along with other two chits which he took out from his pocket handed them over to the Superintendent, Examination Centre voluntarily and this was done when the petitioner had just started answering the first question. According to the petitioner, the Superintendent had not objected and taken any action and the petitioner continued to answer the paper as before. It was only about fifteen minutes before the expiry of the time when the Superintendent took away the first answer book and supplied the second answer book in which the petitioner attempted only parts of one or two questions. According to the petitioner throughout the examination he did not copy from or make use of the chits in answering the question paper. The petitioner also reiterated his version as to how the chits had been brought in the examination hall inadvertently, to the Superintendent who recorded his statement a few minutes before the expiry of the time of the examination. On 5th of July, 1967, the petitioner was served with a show-cause notice according to which he was accused of having used unfair means and violating the Regulations 12-c and 13-b of the Punjab University Calendar, 1966. This notice was served on the basis of the report which was submitted by the supervisory staff against the petitioner alleging that the case was detected by the Superintendent of the Centre himself. By this notice, he was required by the Assistant Registrar to see the latter on 21st of July, 1967 at 9-30 A.M. in connection with the enquiry to be conducted by him on that day. On 21st of

July, 1967, the petitioner was given a questionnaire consisting of twelve questions which were answered by the petitioner in writing and while giving reply to Question No. 11, the petitioner specifically demanded that he wanted to cross-examine the Superintendent and the Deputy Superintendent who had made false statements against him and that they should be called before the Standing Committee. Later on the petitioner was informed by letter dated 27th of September, 1967 (Annexure 'A') that he had been disqualified for 1967 and 1968 (four sessions) under Regulation 12-c at page 106 of the Punjab University Calendar, 1966 (Volume I). The petitioner alleged that the order of the respondent regarding his disqualification was illegal and invalid as the charge of copying from the said chits under Regulation 13-b of the Regulations was not proved against the petitioner and so also the charge under Regulation 12-c was neither proved nor established as the chits were not taken by the petitioner in the hall with a mala fide intention and the possession of the same was due to inadvertence. It was asserted that principles of natural justice were offended as the statements of the Superintendent and the Deputy Superintendent were not taken in his presence and he was afforded no opportunity to cross-examine them. It was also asserted that the impugned order was not a speaking order.

3. Shri Sujana Singh, Registrar, Punjab University, filed a return on behalf of the Punjab University, Chandigarh. All the allegations mentioned above were controverted and it was asserted that the order of the Respondent-University disqualifying the petitioner for two years was perfectly legal and within the jurisdiction of the answering-respondent. It was emphatically denied that the petitioner was not given adequate opportunity to represent his case. It was asserted, however, that the petitioner was not entitled under the law to cross-examine the Superintendent or the Deputy Superintendent of the Examination Centre and more so when no mala fides were alleged against them. The Standing Committee after considering the entire material on the record including the statements of the petitioner and the witnesses produced by him came to the unanimous conclusion that the petitioner should be disqualified for two years.

4. The only submission which the learned Counsel for the petitioner has made before us is that in the present case the principles of natural justice have been infringed as no opportunity was given to cross-examine the Superintendent and the Deputy Superintendent in spite of the fact that it was demanded and that in

case the same had been afforded to him, he would have proved his innocence and bona fides. In support of his contention, the learned Counsel referred to a decision of R. S. Narula, J., in *Ashok Kumar v Punjab University*, 1966 Cur LJ 241 (Punj) and the decision of P. D. Sharma, J. in *Kiroal Singh v The Vice Chancellor 1967 Cur LJ 670 (Punj)*. Reference was also made by the learned Counsel to a decision in *University of Ceylon v Fernando* 1960-1 All ER 631. The learned Counsel on the strength of these authorities submitted that the Superintendent and the Deputy Superintendent should have been examined in the presence of the petitioner and he should have been given an opportunity to cross-examine them. After considering this contention of the learned Counsel I am of the view that there is no force in the same and none of these authorities is applicable to the facts of this case.

5 In *Ashok Kumar's case* 1966 Cur LJ 241 (Punj) the contention raised in the present case was not considered and the petition was allowed primarily on the ground that there was no evidence against the petitioner. *Kirpal Singh's case* 1967 Cur LJ 670 (Punj) was decided on the peculiar facts of that case as would be clear from the following observations of P. D. Sharma, J.

"In view of the peculiar circumstances of the two cases, the Superintendent Shri Vishwa Mitter and Shri Nshar Singh, Deputy Superintendent should have been examined before the petitioner by Mr. Verma or the Standing Committee and the two petitioners should also have been afforded an opportunity to cross-examine them."

The University of Ceylon's case, 1960-1 All ER 631 too does not help the petitioner; rather it goes against him. According to this decision, the two essential requirements are that a person should have been adequately informed of the case he has to meet and he should be afforded an equally adequate opportunity of stating or presenting his case. Since it was found that these conditions had been satisfied, although certain statements had been recorded in the absence of the plaintiff and he had no opportunity of putting any question in cross-examination to the witnesses it was held that the requirements of natural justice had been fulfilled. The reason was indicated by their Lordships towards the conclusion of the judgment in the following words—

"The plaintiff might have fared better if the charge against him had been tried in accordance with the more meticulous procedure of a Court of Law which would have included as of course the

tendering of Miss Balasingham for cross-examination. But that is not the question. The question is whether, on the facts and in the circumstances of this particular case, the mode of procedure adopted by the Vice-Chancellor, in bona fide exercise of the wide discretion as to procedure reposed in him under clause 8, sufficiently complied with the requirements of natural justice. In their Lordships' opinion it has not been shown to have fallen short of those requirements." In the case before us, however, the petitioner was caught red-handed with handwritten chits which was found under his answer book and the same was detected by the Superintendent and on his search two other chits were also recovered from his pocket. These chits contained the matter which was relevant to the subject in which the petitioner was appearing on that date. The explanation of the petitioner was immediately taken by the Superintendent on the spot. It was not denied by the petitioner that these chits were not in his hand-writing and were not recovered from him. The entire material consisting of the chits, the explanation of the petitioner, the report of the Superintendent, and the evidence led by the petitioner was considered by the Standing Committee. Even personal hearing was granted by the Standing Committee to the petitioner. It was then that the Standing Committee unanimously found the petitioner guilty of violating Regulation 12-c of the Punjab University Calendar 1966 (Volume I) and decided to disqualify him for a period of two years. It cannot as a general rule be laid down that in each and every case, the candidate as a matter of right on his mere asking is entitled to a right of cross-examination. It will depend on the facts and circumstances of each case whether the rule of natural justice has been complied with by the University authorities by affording an adequate opportunity to a candidate to present his case against the charge or allegation made against him. On the facts and in the circumstances of this particular case, it cannot be said that by not permitting the petitioner to cross-examine the Superintendent and the Deputy Superintendent the principles of natural justice have been infringed or any prejudice is caused to the petitioner.

6 In this view of the matter, there is no force in this petition and the same is dismissed with costs.

7. D. K. MAHAJAN, J.:— I agree.

RSK/DVC.

Petition dismissed.

AIR 1969 PUNJAB & HARYANA 147
(V 56 C 25)

TEK CHAND, J.

Workmen of M/s. Bali Singh, Bhagwan Singh, Petitioners v. Management of M/s. Bali Singh, Bhagwan Singh, Respondents.

Civil Reference No. 4 of 1967, D/- 29-2-1968.

(A) Punjab Reorganisation Act (1966), S. 93 — Proceeding — Reference of industrial dispute to Labour Court or Industrial Tribunal is a proceeding within meaning of section.

The Industrial Disputes Act was not intended to provide for any extraordinary exigencies resulting from bifurcation of a State into two or more States or territories. It is for this reason that in S. 93 (3) of the Punjab Reorganisation Act, proceeding has been given a comprehensive and inclusive definition so as to include "any suit, case or appeal". In this sense a case is to be given a wide meaning of a circumstance, situation or happening which is the subject-matter of an investigation or enquiry calling for a decision. References of industrial disputes to the Labour Court or to the Industrial Tribunal are in that sense to be deemed cases. The use of the word 'case' is generic and not narrow or specialised. Section 93 was intended to cover such exigencies. The words relating to proceeding pending before "a Court (other than a High Court), Tribunal, authority or officer" also indicate that proceedings in the nature of cases may be pending not only before Courts and Tribunals but also before authorities or officers considering and investigating them. It would not have been easy or convenient to pass specific orders in each matter and, therefore, it was necessary to enact Section 93 so that pending matters might stand automatically transferred to the concerned State or territory without the necessity of passing separate orders. Even if inclusive definition was not given of the word "proceeding" in S. 93, in its general acceptance also, it is a term of wide amplitude; and means a prescribed course of action for enforcing or protecting a legal right and further embracing the requisite steps to be taken whether procedural or substantive. Proceeding also means forms in which relief is sought before Courts of law or before other bodies or authorities determining rights and liabilities and in which actions are brought and defended and the manner of conducting them and the mode of deciding them. All those happenings or events before a Labour Court or Industrial Tribunal or any other authority on whom jurisdiction is conferred by law to dispose of conten-

tious matters are understood by the term "proceeding". Section 93 of the Punjab Reorganisation Act which contemplates automatic transfers applies to proceedings which were pending before the Labour Courts or Industrial Tribunals.

(Para 8)

(B) Punjab Reorganisation Act (1966), S. 93 — "Corresponding Court, Tribunal, authority or officer" — Transfer of case from Labour Court, Rohtak to Labour Court, Jullundur — Labour Court, Jullundur, is corresponding Labour Court in Rohtak by virtue of S. 10 of Industrial Disputes Act (1947).

(Para 9)

G. S. Aulakh, for Petitioners; H. R. Sodhi Sr. Advocate with N. K. Sodhi, for Respondents.

ORDER:— This is a reference forwarded to this Court by the Presiding Officer, Labour Court, Jullundur, formulating the following questions:—

(1) Whether the instant reference, which was registered at No. 4 of 1964 by the Labour Court, Rohtak and at No. 145 of 1966 by the Labour Court, Jullundur is a "proceeding" within the meaning of Section 93 of the Punjab Reorganisation Act, 1966?

(2) Whether Labour Court, Jullundur, or Industrial Tribunal, Punjab, Chandigarh, is "corresponding Court, Tribunal, Authority or Officer" within the meaning of Section 93 of the Punjab Reorganisation Act, 1966?

(3) Whether the reference "stands transferred" to the Labour Court, Jullundur or Industrial Tribunal, Punjab, Chandigarh, under Section 93 of the Punjab Reorganisation Act, 1966, with effect from 1st November, 1966, when that Act came into force?

2. The facts of this case are that the Governor of Punjab in exercise of the powers conferred by clause (c) of sub-section (1) of Section 10 read with proviso to that sub-section of the Industrial Disputes Act, 1947, referred to the Labour Court, Rohtak, constituted under Section 7 of the said Act, the matter specified below:

"Whether the workers should be granted Dearness Allowance and whether it should be linked with the cost of living index? If so, what details and from what date?"

3. The industrial dispute was between the workmen and the management of Messrs. Balli Singh Bhagwan Singh of Amritsar vide No. 6-SF-III-Lab-I-64/728, dated the 10th January, 1964, published in the Punjab Government Gazette Extraordinary on the same date. It is not necessary to go into the merits of the respective contentions of the parties which are given in detail in the order of reference. Before any order could be made by the Labour Court, Rohtak, the Punjab Reorganisation Act, 1966, came

into force on 1st of November, 1966 and the Labour Court sent the record of the reference of the dispute to Labour Court, Jullundur under Section 93 of the Punjab Reorganisation Act 1966. The Presiding Officer of Labour Court, Jullundur, issued notice to the parties and on 6th of December 1966 the management made an application stating that the Labour Court Jullundur was not properly and legally seized of the reference in question and, therefore, could not adjudicate upon it. The following preliminary issue was framed—

Whether this Court is not properly and legally seized of this case and, therefore, cannot adjudicate upon it?

The contention of the management before the Labour Court and before me has been that Section 93 is not applicable and the reference was not a 'proceeding' and the Labour Court, Jullundur could not be said to be corresponding court or tribunal.

4. On behalf of the management, Shri H. R. Sodhi, has taken me through some relevant sections of the Industrial Disputes Act with a view to show that the provisions of Section 93 of the Punjab Reorganisation Act, 1966 are not attracted. Under Section 2 (a) (u) of the Industrial Disputes Act, the appropriate Government means the State Government and in this context prior to the reorganisation would mean the State of Punjab.

5. Section 7 empowers the appropriate Government to constitute one or more Labour Courts for the adjudication of industrial disputes relating to any matters specified in the second schedule. Before the bifurcation of the State, there was a Labour Court at Jullundur and another Labour Court at Rohtak. This dispute was referred to the Labour Court at Rohtak. Section 7-A provides for the constitution of one or more Industrial Tribunals by the appropriate Government, by notification, for the adjudication of industrial disputes relating to any matter whether specified in the second schedule or the third schedule. So far as the matters referred to in the second schedule are concerned, the jurisdiction of the Industrial Tribunals and of the Labour Courts is concurrent. Under Section 10 (1) the appropriate Government has the power to refer an industrial dispute to a Labour Court or to a Tribunal for adjudication. According to the proviso to Section 10 (1) (d) where the dispute relates to any matter specified in the third schedule and is not likely to affect more than 100 workmen, the appropriate Government may make a reference to a Labour Court under clause (c). Thus, ordinarily disputes over any matter specified in the third schedule are referable to an Industrial Tribunal but where the workmen af-

ected are not likely to be more than 100, the reference may be made to a Labour Court. This was done in this case.

6. The power to transfer certain proceedings was exercisable by the appropriate Government under Section 33B of the Act. The appropriate Government could, therefore, withdraw any proceeding pending before a Labour Court, Tribunal or National Tribunal and transfer the same to another Labour Court, Tribunal or National Tribunal, as the case may be. Section 33B (1) runs as under—

"The appropriate Government may by order in writing and for reasons to be stated therein, withdraw any proceeding under this Act pending before a Labour Court, Tribunal or National Tribunal and transfer the same to another Labour Court, Tribunal or National Tribunal, as the case may be for the disposal of the proceeding and the Labour Court Tribunal or National Tribunal to which the proceeding is so transferred may subject to special directions in the order of transfer proceed either de novo or from the stage at which it was so transferred."

Provided that where a proceeding under Section 33 or Section 33-A is pending before a Tribunal or National Tribunal, the proceeding may also be transferred to a Labour Court.

7. Section 93 which deals with the transfer of pending proceeding under the Punjab Reorganisation Act, 1966 is reproduced below—

'93 Transfer of pending proceedings.

(1) Every proceeding pending immediately before the appointed day before a Court (other than a High Court) Tribunal, authority or officer in any area which on that day falls within a State or Union Territory shall, if it is a proceeding relating exclusively to the territories which as from that day are the territories of another State or Union Territory, stand transferred to the corresponding Court, Tribunal, Authority or Officer in that other State or Union Territory, as the case may be.

(2) If any question arises as to whether any proceeding should stand transferred under sub-section (1) it shall be referred to the High Court having jurisdiction in respect of the area in which the Court, Tribunal, Authority or Officer before which or whom such proceeding is pending on the appointed day is functioning and the decision of that High Court shall be final.

(3) In this section—

(a) 'Proceeding' includes any suit, case or appeal and
(b) 'Corresponding Court, Tribunal, Authority or Officer' in a State or a Union Territory means—

(i) The Court, Tribunal, Authority or Officer in that State or Union Territory in which or before whom, the proceeding

would have lain if it had been instituted after the appointed day; or

(ii) In case of doubt, such Court, Tribunal, Authority or Officer in that State or Union Territory, as may be determined after the appointed day by the Government of that State or the Central Government, as the case may be, or before the appointed day by the Government of the existing State of Punjab, to be the corresponding Court, Tribunal, Authority or Officer."

8. I may now turn to the arguments advanced by the learned Counsel on matters which have been referred to this Court by the Presiding Officer, Labour Court, Jullundur. It was argued on behalf of the management that the power to refer an industrial dispute vests exclusively in the appropriate Government. In this case, the Government of Punjab before the bifurcation of the State had made a reference and that Government alone could withdraw the same under Section 33B and transfer the case to another Labour Court. After 1st of November, 1966, there have come into existence two Governments for the new States of Punjab and Haryana. The matter under reference is deemed to have lapsed. Neither the former reference can be given effect to nor withdrawn. It was urged that in view of this difficulty, the President of India in the exercise of powers conferred under Section 33B of the Industrial Disputes Act had withdrawn cases from the Labour Court, Rohtak on account of reorganisation of the State of Punjab and had referred them to the Labour Court, Jullundur, vide notification No. 685-SF-3-Lab-I-66, dated the 28th October, 1966.

There was another notification No. 685-SF-3-Lab-I-66 dated the 28th October, 1966, by which the President of India was pleased to withdraw cases from the Labour Court Jullundur and refer the same to the Labour Court, Rohtak. Both these notifications are published in Punjab Government Gazette Extraordinary D/- 31-10-1966. In these respective notifications, the cases which have been transferred from one Labour Court to another are specified but the instant case has been omitted. It has been argued with reference to these two notifications that the only way of transferring the cases was in the manner done by the President of India and since the instant case does not figure among those cases, it cannot now be transferred by the successor Governments nor can it be deemed to be transferred automatically. On the basis of this reasoning, it is contended that the reference made by the former Punjab Government on 10th January, 1964, has lapsed.

It was also urged that the provisions of Section 93 of the Punjab Reorganisation

Act are not attracted and are not applicable to industrial disputes which are in a class by themselves. It is argued that an industrial dispute is not a "proceeding" within Section 93, sub-section (3) as it cannot be deemed to be "a suit, case or appeal". Section 93 of the Punjab Reorganisation Act when contrasted with S. 33B of the Industrial Disputes Act, is a special provision. The Industrial Disputes Act, was enacted when the eventuality of the type resulting from bifurcation of a State into two or more States or territories was not contemplated. The Industrial Disputes Act was not intended to provide for such extraordinary exigencies. Hence, a special provision was necessary in the Punjab Reorganisation Act to provide for a contingency arising out of reorganisation of a State. It is for this reason that in Section 93, sub-section (3), proceeding has been given a comprehensive and inclusive definition so as to include "any suit, case or appeal".

In this sense, a case is to be given a wide meaning of a circumstance, situation or happening which is the subject-matter of an investigation or enquiry calling for a decision. References of industrial disputes to the Labour Court or to the Industrial Tribunal are in that sense to be deemed 'cases'. The use of the word 'case' is generic and not narrow or specialised. Section 93 was intended to cover such exigencies. The words relating to proceeding pending before "a Court (other than a High Court), Tribunal, Authority or Officer" also indicate that proceedings in the nature of cases may be pending not only before Courts and Tribunals but also before authorities or officers considering and investigating them. It would not have been easy or convenient to pass specific orders in each matter and, therefore, it was necessary to enact Section 93 so that pending matters might stand automatically transferred to the concerned State or Territory without the necessity of passing separate orders.

Even if inclusive definition was not given of the word "proceeding" in Section 93, in its general acceptance also, it is a term of wide amplitude; and means a prescribed course of action for enforcing or protecting a legal right and further embracing the requisite steps to be taken whether procedural or substantive. Proceeding also means forms in which relief is sought before Courts of Law or before other bodies or authorities determining rights and liabilities and in which actions are brought and defended and the manner of conducting them and the mode of deciding them. All those happenings or events before a Labour Court or Industrial Tribunal or any other authority on whom jurisdiction is conferred by law to dispose of contentious matters are understood by the term "proceeding".

Section 93 of the Punjab Reorganisation Act which contemplates automatic transfers applies to proceedings which were pending before the Labour Courts or Industrial Tribunals

9 Another point which was urged was that the Labour Court at Jullundur could not be deemed a 'corresponding Court, Tribunal, Authority or Officer' to the Labour Court at Rohtak in so far as the jurisdiction relating to matters specified in Second Schedule of the Industrial Disputes Act was concurrent. I do not find any merit in this argument as Section 10 of the Industrial Disputes Act relating to reference of disputes to Courts Board or Tribunals, has force, being a Central Act extending to Punjab, Hariana and other States in India. The Labour Court in Jullundur is a corresponding Labour Court in Rohtak.

10 In view of what has been stated above, the reference is answered as under—

(1) The instant reference, which was registered at No 4 of 1964 by the Labour Court, Rohtak, and at No 145 of 1966 by the Labour Court, Jullundur, is a 'proceeding' within the meaning of Section 93 of the Punjab Reorganisation Act, 1966

(2) The Labour Court, Jullundur or Industrial Tribunal, Punjab Chandigarh is 'corresponding Court, Tribunal, Authority or Officer' within the meaning of Section 93 of the Punjab Reorganisation Act, 1966

(3) The reference stands transferred to the Labour Court, Jullundur by virtue of Section 93 of the Punjab Reorganisation Act, 1966, with effect from 1st November 1966 when that Act came into force.

11. In my view therefore the industrial dispute is to be deemed as validly referred under Section 93 of the Punjab Reorganisation Act, 1966 to the Labour Court, Jullundur which has jurisdiction to proceed with the case.

12. The reference is answered accordingly

VGW/DVC,

Answer accordingly

AIR 1969 PUNJAB & HARYANA 150
(V 56 C 26)

R. S. NARULA AND S S
SANDHAWALIA, JJ

P K. Oswal Hosiery Mills, Mullerganj
Ludhiana, Appellant v Tilak Chand L.
Ghasia Ram Jain, Respondent.

First Appeal No 262 of 1958 D/- 13-8-1968 from decree of Sr Sub J., Ludhiana, D/- 9-6-1958

(A) Tort — Libel or slander — Action for — Suit by partnership firm for libel

KL/LL/F30/68

or defamation of firm not maintainable — Such suit can however be brought by its partners — Form of suit indicated — (Civil P C (1908), O 30, R. 1) — (Partnership Act (1932), S 4)

A firm of partnership cannot maintain a suit for libel or slander. A firm is merely a compeodious artificial name adopted by its partners and is not itself a legal entity. Libel or slander of a partnership firm may indeed amount to defamation of its partners. But then it is the partners who may in such an eventuality sue and not the firm. The remedy of an associatioo like a partnership concern really lies at the hands of its individual members who can personally sue if they have been defamed. It is not necessary for all the partners of a firm to join in such an action. Any one or more of the partners who feel aggrieved may sue and the others may be joined as pro forma defendants.

(Para 9)

(B) Limitatioo Act (1908), Arts. 22, 24, 25 and 36 — Scope and applicability — Suit for damages for slander of goods or title — Residuary Art. 36 applies and not Art. 24 or 25 — Claim in suit in substance one for damages for defamation and mental worry — Arts 22, 24 and 25 apply — (Obiter)

If a suit for damages in tort cannot be brought under any other specific Article in the first Schedule to the Limitation Act it would be governed by Article 36 AIR 1928 Cal 1 & (1987) ILR 11 Bom 133 Rel. on AIR 1938 Nag 84 & AIR 1938 All 454, Ref.

(Para 13)

Obiter—A suit for damages on account of slander of goods or slander of title would be governed by the residuary Article 36 and not by Article 24 or 25 which are intended to relate to libel or slander of person which would both fall under the genus 'defamatioo' (Para 14)

Where the plaint makes it clear that the real claim of the plaintiff is for damages for defamation by the defendant by writing the impugned letter the suit would be maintainable only within the time allowed by Arts. 24 and 25 Limitation Act even though the plaint may have used the words slander of title several times. In so far as the suit relates to damages on account of mental worry it being based on an injury to person would be governed by Article 22 Limitatioo Act. (On facts of this case it was held that the finding of the trial Court that the suit was barred by limitation was correct.)

(Para 15)

(C) Tort — Slander of goods and slander of title — Distinction.

Slander of goods is a form of slander of title and the actioo in such a case is for making defamatory statements about a man's goods, which are actionable if they are untrue and cause him special

damage and are made maliciously. "Slander of title" is a false and malicious statement about a person's property or business and does not relate necessarily to his personal reputation, but to his title to property or his business or generally to his material interest. (Para 14)

Torts arising out of fraud, deceit and injurious falsehood including cases of slander of title or slander of goods have never been treated as torts of trespass or injury to the person. Winfield on Torts (7th Edn.) P. 693, Ref. to, (Para 14)

Cases Referred: Chronological Paras

(1938) AIR 1938 Nag 84 (V 25)=
ILR (1938) Nag 348, Hargovind
Dullabh Jiwan v. Kikabhai Ra-
himatullah 13

(1937) AIR 1937 Lah 709 (V 24)=
39 Pun LR 686, Harnam Singh
v. Doola Singh 14

(1936) AIR 1936 All 454 (V 23)=
1936 All LJ 574, Sobha Ram v.
Tika Ram 13

(1928) AIR 1928 Cal 1 (V 15)=
46 Cal LJ 455, Imperial Tobacco
Co. v. Albert Bonnan 12, 13

(1926) AIR 1926 Cal 757 (V 15)=
30 Cal WN 465, Albera Bonnan
v. Imperial Tobacco Co. 12

(1924) AIR 1924 Bom 290 (V 11)=
25 Bom LR 1333, Abdulla Moha-
med Jabli v. Abdulla Mohamed
Zulaikhi 14

(1902) ILR 24 All 368=1902 All
WN 96, Ishri alias Hatim Ali v.
Muhammad Hadi 14

(1887) ILR 11 Bom 133, Essoo
Bhayaji v. Steam-ship "Savitri" 13

H. L. Sarin, M. S. Jain, A. L. Bhal, for
Appellants; Y. P. Gandhi and V. P.
Gandhi, for Respondents.

JUDGMENT:— Eight persons including Tilak Chand defendant-respondent (to whom I will hereinafter refer as the defendant) formed a partnership at Ludhiana under the style "P. K. Oswal Hosiery Mills." Some of the parties were minors and were merely admitted to the benefits of the partnership. The defendant retired from the partnership vide deed of dissolution Exhibit P. 119, on and with effect from June 24, 1954. According to the said deed of dissolution, he had separated himself from the firm "after the rendition and settlement of accounts" and thereafter he had been left with no concern with the aforesaid firm. He also stipulated in the deed that the remaining parties and partners of the firm would be entitled to and liable for all the outstandings of the firm and would be entitled to carry on the hosiery business regarding contracts for supplying the goods to the Government and manufacturing and supplying of other hosiery goods and every sort of business relating to the hosiery in the name of P. K. Oswal

Hosiery Mills and the defendant would have no objection thereto, as he had absolutely severed his connections from the firm in which he had become a partner on January 1, 1954. On the same date a sum of Rs. 6,613/13/6 was received by the defendant and he executed for the said amount receipt Exhibit P. 120 stating as follows:—

"I have received in cash Rs. 6,613/13/6 (rupees six thousand six hundred and thirteen and annas -/13/6) of the current coin, double of Rs. 3,306/14/9 (rupees three thousand three hundred and six and annas -/14/9) from firm P. K. Oswal Hosiery Mills, Ludhiana and have separately executed a deed of dissolution of partnership. In future I shall have no concern with the aforesaid firm nor is any previous account of mine of any kind outstanding against the firm." The remaining members of the firm also got from the defendant letter Exhibit P. 121 of the same date — to the Sales Tax and Taxation Officer, Ludhiana. The defendant wrote letter Exhibit P. 122 to the Manager, Punjab National Bank Ltd., Ludhiana, letter Exhibit P. 123, to the Government Department, in each one of which letters, he had stated that he had left the partnership of P. K. Oswal Hosiery Mills and that (in Exhibit P. 121) his name may be deleted from the record of the addressee as such partner. To the sales tax authorities he had added that the relevant books and necessary documents were with the remaining partners of the firm. To the Punjab National Bank Ltd. he had added that in future no liabilities whatsoever stood against him relating to the accounts of the firm in connection with the partnership. To the Government he had written that he had no concern or connection of any sort with the outstandings of P. K. Oswal Hosiery Mills and the machinery of every kind because having received his share, the defendant had separated from the firm and had nothing to do with the assets and liabilities thereof.

2. On November 16, 1954, however, the defendant wrote the first alleged incriminating letter Exhibit P. W. 11/1 to the Director-General, Supplies and Disposals, New Delhi. In that letter he stated that it was through his zeal and co-operation that the firm had acquired good reputation and manufactured articles of the required standard to the satisfaction of the indentors and the inspectorate, but unfortunately something had happened in such a way that the constitution of the firm had since gone under a drastic change and perhaps the department had not been apprised of the same till then. He then added that he considered it his moral duty to apprise the Government of the changes and "actual state of affairs." After referring to the

previous history of the constitution of the firm, the defendant continued to state—

"It may further be notified that there is also some internal monetary trouble regarding the payment of my dues and for the same I am seeking advice of my legal advisor. As a result it is just possible that there may be some complications in regard to the payment drawn by the firm since June 1954.

From this date I have got no connections with the activities of the said firm and it is very likely that with this change the quality of the goods produced by this firm under the management of its new constitution, may differ from what it had already been produced hitherto before and as to whether they shall be able to maintain the good reputation which I have earned from your Department through my zeal, hard labour and co-operation of the officers of your Directorate.

I do not know whether this change of constitution may call for any fresh action for reviewing the present registration of the firm but should any such action be considered necessary your Department may kindly do the needful at an early date in the matter and if necessary due precautions may be taken with regard to the payment of the firm's bills and also in regard to warding off new contracts till my case is decided."

Copies of the said letter were endorsed by the defendant to various branches of the Directorate General of Supplies and Disposals and to the Registrar of Firms, Jullundur, as well as to the Deputy Accountant General, Industry and Supply, New Delhi. On the receipt of the above-mentioned communication, letter Exhibit P W 1/1, dated November 25, 1954, was written by the Assistant Accounts Officer of the office of Deputy Accountant General (Industry and Supply), New Delhi, semi-officially to Shri B. Sen Gupta, Deputy Director of Supplies, office of the Director General and Supplies, New Delhi, wherein it was stated that the defendant's letter showed that there was some quarrel among the partners of the firm, and the defendant had pointed out that as a result of the dispute there might be some complications in regard to the payments drawn by the firm since June, 1954. The Assistant Accounts Officer then proceeded to seek the advice of Mr. Gupta in the following words—

"In view of this I request you to please let me know in consultation with your legal advisor whether we should continue to make payments to the firm so long as the bills are received and presented in the name of the firm or we should stop payment of all bills.

I shall be grateful if you could kindly take immediate action and advice this

office accordingly. I am withholding payment of firm's bills till I hear from you."

3. On December 30, 1954, the office of the Deputy Accountant-General, Industry and Supply, New Delhi, wrote to Messrs P. K. Oswal Hosiery Mills on the subject of payment of bills that as many as 18 bills of the firm of which amounts were mentioned in the margin of the letter had been forwarded to the Director-General of Supplies and Disposals, New Delhi, with letter, dated December 22, 1954, and that two subsequent bills had been kept pending in the office of the Deputy Accountant-General. The letter then proceeded to state—

"The bills cannot be paid until the payment issue raised by one of the partners Shri Tilak Chand in his letter No. nil, dated 16th November, 1954, is settled by the Director-General (Supplies and Disposals) New Delhi, and necessary instructions are received from Director-General Supplies and Disposals to make the payment of the bills."

The matter remained pending for some time. The Director-General, Supplies and Disposals, then wrote letter, dated January 18, 1955, Exhibit P W 11/2 to the defendant asking him to confirm in connection with his previous letter, dated December 1, 1954, whether he had no objection to the payments being made to the plaintiff-firm of bills in connection with the execution of the acceptance of tenders placed on that firm. The letter continued to add that in the absence of an intimation from him within a week from the date of the receipt of the letter, payment shall be made to the plaintiff-firm on the footing that the defendant had no interest whatsoever in the amount which was due from the Government to the firm. In reply to the above-mentioned letter, the defendant sent telegram Exhibit P W 11/4, dated January 27, 1955, in the following words—

"Acknowledge your letter SX-1/21643-D/11/2310, dated the 18th regarding Bills payment firm P. K. Oswal Hosiery, Ludhiana, Stop Matter seriously under consideration. Please don't make payments up to 31st instant. Letter follows." Thus was followed by defendant's letter, Exhibit P W 11/5, dated February 2, 1955, to the Director-General, Supplies and Disposals. The Director-General of Supplies and Disposals then asked the plaintiff-firm to execute a bond to indemnify the Government in case of any other claim from the defendant. In that connection, the Government sent to the plaintiff-firm letter Exhibit P W 11/3, dated February 26, 1955 forwarding with it a specimen copy of the indemnity bond which was required to be properly filled in and executed by the plaintiff-firm on a stamped paper of the requisite value. It was

in executing the said bond that the payments were subsequently released to the plaintiff-firm.

4. On March 1, 1955, the Deputy Accountant-General (Industry and Supply) wrote to the plaintiff-firm letter Exhibit P. 2 returning their bill, dated February 5, 1954, with the remarks that the same could not be obtained "until the payment issue raised by one of the partners Shri Tilak Chand in his letter, dated November 16, 1954, is settled by the Director-General Supplies and Disposals, New Delhi, and necessary instructions are received from the Director-General, Supplies and Disposals, to make payment of the bills."

5. It was in the above background that on December 1, 1956, the plaintiff-firm acting through its partner Yuvraj Kumar instituted the suit from which the present appeal has arisen for recovery of Rs. 10,800, as detailed below on account of "damage and loss to person and loss to property, and loss to trade present and future on account of slander of title of property on the basis of a written complaint made by the defendant, in respect of which he was, in no case, entitled to do so and also other false statements of the defendant, whose aim and purpose was to slander the rights and property of the plaintiffs and which were published intentionally and mischievously by the defendant as a result of which the plaintiffs suffered special loss":—

1. On account of damages on account of interest at the rate of six per cent per annum on the sum of Rs. 1,25,131/-, the payment of which was detained and withheld by the Director-General Supplies and Disposals for different periods as a result of the unjust act of the defendant;

Rs. 5,800/-

2. On account of damages for mental worry;

Rs. 1,500/-

3. On account of damages for embarrassment in the discharge of the liability of the plaintiff-firm in the market, and damages and loss in their credit and position and loss of their reputation as regards the business in the market and in the eyes of their servants;

Rs. 3,500/-

Total Rs. 10,800/-

A list of the bills submitted by the plaintiff-firm of which the payment had been delayed on account of the defendant's letter is contained in the schedule attached to the plaint. After written statement in reply to the plaint and a replication in reply thereto by the plaintiff had been filed, and the documents filed by the parties had been admitted or denied by the other side, the Court found vide its order, dated April 26, 1957, that

the petition of plaint did not disclose any date of accrual of the cause of action, and therefore, directed the plaintiff to amend the petition of plaint. Thereupon the amended plaint, dated May 3, 1957, was filed by the plaintiff-firm.

5a. In order to appreciate the arguments addressed to us in this appeal, it appears to be necessary to quote verbatim paragraphs 4, 5, 8 and 9 of the amended plaint:—

"4. In spite of the receipt regarding the full and final settlement, and his letters, dated the 24th June, 1954, the aforesaid defendant, in order to cause loss to the plaintiff-firm in their trade and business, to injure the feelings and reputation of other member-proprietors of the firm and to cause them financial loss, without any rhyme and reason and without any just plea and with the intention of slandering their title of the property, sent a quite false and against facts, a written complaint through letter dated the 16th November, 1954, to the Deputy Accountant-General, Industries and Supplies, New Delhi and also forwarded copies thereof to other officers of the Department of Supplies. Later on, for want of self-control, and with mala fide intention, he also wrote another letter dated the 26th November, 1954, to the Income-tax Officer, 'B' Ward, Ludhiana, in which he made insulting objections and statements in order to cause loss to the financial position and reputation of the plaintiff-firm. In this way, the defendant, in order to cause loss to the plaintiff-firm, made up his mind to continue his such acts, attitude (sic).

5. Some time after his letter dated the 16th November, 1954, the defendant made a request to the Director-General Supplies and Disposals to withdraw the aforesaid letter. Upon this the aforesaid Department started enquiries for verification of the matter and their satisfaction. It seems that the defendant, during the course of enquiries intentionally hesitated to satisfy the department in the matter of the withdrawal of the aforesaid letter and acted with mala fide intention. For this reason, in spite of the serious efforts on the part of the plaintiff-firm, their bills were withheld in the concerned departments and their payment was detained. The entire responsibility in that behalf falls upon the defendant, according to law.

8. Apart from the loss mentioned above, the plaintiff-firm suffered loss in their trade and business on account of the illegal acts of the defendant and the aforesaid firm as well as the proprietors of the firm, faced great embarrassment in the matter of the discharge of their liabilities in the market and they suffered an adverse effect as regards the credit, position and reputation in their sphere

of business and in the eyes of their servants, which is estimated by the firm at Rs 3500/- The action of the defendant is tantamount to making such a writing for which there was no just and sound reason and the defendant mischievously mentioned absolutely false facts in his letter in order to slander the plaintiff's rights in the property, as a result of which the plaintiff-firm and the proprietors of the firm suffered special damages. The contents of the aforesaid letter, in the eye of law, come under the definition of slander of title to property

9 Besides this, on account of the contents of the defendant's letter, the proprietors of the plaintiff-firm suffered great mental worry. In this regard also, the plaintiff-firm is entitled to get the damages, which are fixed at Rs 1500/- Since in the eye of law, the mental worry caused by the injuring of the feelings and reputation, is tantamount to personal injury, therefore, the plaintiff-firm is, in every way, entitled to get the said amount. In this way the plaintiff-firm is entitled to get the amount of Rs. 10800/- in all by way of damages, from the defendant, according to law and justice." In the corresponding paragraphs of the written statement filed by the defendant in reply to the amended plaint, it was stated as follows—

"4 With regard to paragraph No 4 of the plaint, it is submitted that on 24th June, 1954, full settlement of the accounts was not arrived at and a full amount due to him was not paid.

The amount of Rs. 3200/- was agreed to be paid later on realisation and the question of goodwill was agreed to be dealt with later. It is admitted that the defendant wrote a letter on 16th November, 1954, to the Directorate-General of Supply and Disposal, New Delhi, and despatched its copies to the connected Supply Department Office. It is also correct that on the same date the defendant addressed a letter to the Income-tax Officer, B Ward, Ludhiana. It is, however, incorrect that the defendant addressed those letters to injure the plaintiff's business or to injure the feelings and reputation of the other proprietors of the firm or to cause any material loss to them. The contents of the above letters do not justify any such allegations. The letters were written by the defendant to protect his own interest and not to cause any injury or loss to the plaintiff. On account of the unwarranted acts of the plaintiff rights of the defendant were affected regarding the assessment of income-tax. The Director-General Supply and Disposal was also to be addressed communications to protect the interests of the defendant. Hence the defendant wrote the letter to protect his right and interest. These letters were not intend-

ed to cause any loss or damage to the plaintiff nor in fact these letters and communications could do any loss and damage to the plaintiff. The plaintiff in his own plaint has not stated what were the contents of those letters and which part of the contents is calculated to injure the reputation or any injury to the feelings and to the property of the plaintiff. No false defamatory and slanderous allegations were made by the defendant against the plaintiff. The plaintiff's financial position was not adversely affected by these communications. The rest of the contents of this paragraph are denied.

5 Paragraph No 5 of the plaint as put is wrong and is not admitted. The defendant never backed out to satisfy the Director-General Supply and Disposal about the contents of his communications to the department nor did he act mala fide. No payment of the bills of the plaintiff was detained by any act on the part of the defendant nor was it in the power of the defendant to detain any such payment. The payment was detained on account of the acts of the plaintiff which will be dealt at length later on. The defendant, therefore, is not responsible for the payment being detained or delayed. As soon as the intervention of the respectable persons brought about a settlement between the parties the defendant informed the department accordingly. The delay in the payment of the bill was not due to any acts on the part of the defendant but this delay was committed by the department. The plaintiff did not suffer any injury or loss on account of any acts on the part of the defendant.

8 Paragraph No 8 of the plaint is incorrect. It is denied that the plaintiff suffered any loss or damage in his business on account of any act of the defendant. It is further not admitted that the plaintiff's firm suffered any embarrassment in the discharge of their liabilities in the market. It is further denied that on account of any act of the defendant the plaintiff suffered any degradation in the eyes of their servants and persons connected with them nor was their credit, position, reputation was adversely affected by any act of the defendant entitling them to a recovery of Rs. 3500/- as damages from the defendant. The aforesaid amount is exaggeratedly excessive. The defendant had proper and sufficient grounds for writing letters referred to in paragraph No 4 of the plaint. These contents were never false. Their contents never affected any right in property and business of the plaintiff, nor were they calculated to defame the plaintiff. No mischievous matter was contained in those letters. The contents of the letters caused no injury and damage to the plaintiff or its proprietors and do not in-

the eye of law amounts to slanderous title and libel.

9. Paragraph No. 9 of the plaint is denied. The aforesaid letters did not expose the plaintiff to any worry or mental injury and the plaintiff is not entitled to claim any damages on that score.

Damages amounting to Rs. 1,500/- claimed on that score are exaggerated. The feeling and the reputation of the plaintiff never suffered any injury on account of those letters. No act of the defendant amounts to personal injury. The plaintiff is not entitled to recover any damages from the defendant."

After a further replication had been filed by the plaintiff, the trial Court framed the following issues:—

"1. Whether the plaintiff-firm has been registered under the Partnership Act?

2. Whether Shri Yuvraj Kumar is a partner of the plaintiff-firm?

3. Whether the suit claim or any part thereof is within limitation?

4. Whether the payment of Rs. 1,25,131/- to the plaintiff was withheld by the Industries and Supplies Department, Delhi, by reasons of any act or conduct of the defendant?

5. If issue No. 4 is found in the affirmative, to what amount of damages, if any, is the plaintiff entitled on this account from the defendant?

6. Whether the defendant has been guilty of slander of title to the property of the plaintiff? If so, to what amount of damages is the plaintiff entitled from the defendant on this account?

7. Is the plaintiff entitled to any special damages on account of mental worry caused to him by any act or conduct of the defendant? If so, to what amount of damages is he entitled?

8. Whether the defendant is entitled to any special costs under Section 35-A of the Civil Procedure Code?"

6. By his judgment under appeal, Shri A. N. Bhanot, Senior Subordinate Judge, Ludhiana, held that issues Nos. 1 and 2 had been conceded, that the suit was barred by time, the limitation for filing the same being one year under Articles 22, 24, and 25 of Schedule I to the Limitation Act, 1908, that the amount in question was not proved to have been withheld by the Government on account of any act or conduct of the defendant, that issue No. 5 did not arise and issues Nos. 6 and 7 were not proved. He decided issue No. 8 against the defendant and, as a result, dismissed the suit of the plaintiff-firm. The main issues on account of the decision of which the suit of the plaintiff-firm failed were issues Nos. 3, 4 and 6, and the arguments of the learned Counsel for the parties before us have been confined to the findings of the trial Court on those three issues.

7. The evidence on the record of this case shows that at the time of the dissolution of the partnership and retirement of the defendant from the firm on June 24, 1954, at least three disputes remained outstanding viz., (i) the question of income-tax, (ii) the question of goodwill, and (iii) the question of realisation of outstandings. Shri Gian Dass Jain D. W. 3 (who was Senior Subordinate Judge, Gurdaspur at the time of depositing in this case as a witness for the defendant) stated that he went to Ludhiana in the month of December, 1954, and that on that occasion he was called upon to intervene to get the disputes between the plaintiff-firm and the defendant settled. According to his deposition the dispute mostly centred round the income-tax assessable on the plaintiff-firm, and that Tilak Chand defendant wanted to safeguard himself against any imposition of tax on him with regard to the firm. Babu Ram, whose son was a partner in the plaintiff-firm and at whose house the witness was staying, gave an undertaking in writing to the defendant that he would not be liable to pay any tax with regard to the plaintiff-firm. The writing Exhibit D. W. 3/1 was left with the witness and he produced the same in Court during the course of his deposition. At the same time another writing is stated to have been obtained from Tilak Chand defendant wherein he agreed to abide by the instructions of the plaintiff-firm with respect to the income-tax matters. Mr. Gian Dass Jain added that in the month of January, 1955, the parties again assembled at his flat in Delhi when Lachhman Dass member of the plaintiff-firm complained that the defendant had again created some trouble for them. The complaint of the defendant was that he had not been given anything in respect of goodwill and some other dues. The defendant was claiming about Rs. 10,000/- for that. The matter was discussed at great length and the plaintiff-firm offered to pay Rs. 3,000/- to the defendant "without prejudice" if the defendant would co-operate with them in all matters. The defendant did not, however, agree.

This and other evidence on the record shows that no full and final settlement of all possible disputes between the parties had in fact been made on June 24, 1954. Detailed reference to the contents of the alleged offending letter Exhibit P. W. 11/1 has already been made. It cannot in my opinion be said that the contents of the said letter were in any manner defamatory or libelous. The defendant merely wanted to safeguard his own interest and bragged that the good quality of the goods previously manufactured by the firm was due to his effort and the defendant gave expression to an apprehension that without him the firm may not be

able to manufacture the same quality of goods in future. If he gave gratuitous advice to the Government to make sure that it did not get into difficulty regarding the payment of the previous dues of the firm, he was not in my opinion, thereby committing any tort. According to the official evidence on the record, the firm was expected to inform the department of every change in its constitution and to submit income-tax clearance certificate along with a list of partners. Thus the firm did only after November 5, 1955, because that is the date of the income-tax clearance certificate. The trial Court was, therefore, correct in holding that the payment was not stopped by the department merely on account of the letter of the defendant, but mainly on account of the omission of the plaintiff itself. In any case, the defendant did not direct stopping of the payment to the plaintiff-firm nor had the defendant any right or authority to do so. If the stoppage of payment by the Government was not justified, the plaintiff-firm could possibly try to obtain relief against the Government, but the claim against the defendant was in any event misconceived. The evidence on the record of this case does not at all prove either the slander of title or slander of any goods of the appellant firm. In view of our finding to the above effect on Issue No 6 it is unnecessary to go further into the matters covered by Issue No 4.

8. Law relating to the capacity of corporations to sue in tort is summed up in "Winfield on Tort" (Seventh Edition at page 80) in the following words—

"A corporation can sue for torts committed against it, but there are certain torts which it is impossible to commit against a corporation. Such are assault and personal defamation. Thus, a corporation cannot sue for libel a person who charges it with bribery and corruption although the individual members of it might be able to do so, but if a libel or slander affects the management or its trade or business, then the corporation itself can sue, as where the workmen's cottages of a colliery company were falsely described in a newspaper as highly insanitary."

In "Salmond on the Law of Torts" (fourteenth edition) the same subject is dealt with at pages 614-615 in these terms—

'In general a corporation may sue for and tort (e.g., malicious presentation of a winding up petition) in the same way as an individual. The only qualifications are (i) the tort must not be of a kind which it is impossible to commit against a corporation e.g., assault or false imprisonment, (ii) in case of defamation, it must be shown that the defamatory matter is of such nature that its tendency is

to cause actual damage to the corporation in respect of its property or business. Thus an action of libel will lie at the suit of a trading corporation charged with insolvency or with dishonest or incompetent management. But where there is no actual damage, nor any tendency to produce such damage, no action will lie at the suit of the corporation, the only persons who have any cause of action are the individual members or agents of the corporation who have been defamed. So it has been held that a municipal corporation cannot sue for libel charging it with corruption and bribery in the administration of municipal affairs."

9. We would have had to judge the capacity of the appellant to sue by applying the tests laid down in the above-quoted texts of authority if the appellants were a corporation in law. Unfortunately for the appellants, however, it is not even a legal person. It is a partnership firm. It is well known that a firm is merely a compendious artificial name adopted by its partners and is not itself a legal entity. Libel or slander of a partnership firm may indeed amount to defamation of its partners. But then it is the partners who may in such an eventuality sue and not the firm. The remedy of an association like a partnership concern really lies at the hands of its individual members who can personally sue if they have been defamed. It is not necessary for all the partners of a firm to join in such an action. Any one or more of the partners who feel aggrieved may sue and the others may be joined as pro forma defendants. Salmond writes in this connection at page 641 (Article 187) of his book (ibid) as under—

"Where two or more persons possess a right of action in respect of one and the same injury—as for example, a trespass or other wrong to the property of co-owners, or a libel on a firm of partners in the way of their business—is it necessary that those persons should all join in one and the same action, or can one of them sue without the others? The old rule of the common law on this point was that (with certain exceptions which need not be now considered) all persons so suffering a joint injury must join in one action. But now the non-joinder of persons jointly injured is no bar to an action by one or some of them. The only effect of such a non-joinder is that the Court may, in its discretion order the other persons so jointly injured to be joined as parties to the action either as plaintiffs or (if they will not consent) as defendants. Where two or more persons have suffered a joint, but not a several injury, a release granted by one of them will, in the absence of fraud, destroy the whole cause of action, and operate as a bar to an action by any of the others."

For the foregoing reasons we are inclined to think that the trial Court was perfectly correct in holding that the plaintiff-firm cannot maintain a suit for libel or slander. Moreover, the plaintiff has in this case failed to prove that the statements contained in the defendant's letter, dated November 16, 1954, were made falsely or maliciously. Nor is there any evidence to show that the business of the plaintiff-firm suffered in any manner on account of the alleged defamatory letters. After perusing the evidence on the record of this case, we are satisfied that the finding of the trial Court to the effect that the said evidence is not sufficient to prove either the causing of any such mental worry which may be actionable or losing of reputation or slander of property of the plaintiff-firm. We have, therefore,

	"Description of suit	Period of limitation	Time from which period begins to run
22.	For compensation for any other injury to the person.	One year	When the injury is committed.
24.	For compensation for libel.	One year	When the libel is published.
25.	For compensation for slander.	One year	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results."

10. On the other hand, the plaintiff has contended that neither Article 22, nor 24 nor 25 is applicable to this case,

and that the suit is, therefore, governed by the residuary Article 36 relating to torts, which is quoted below:—

"36. For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.

Two years

When the malfeasance, misfeasance or non-feasance takes place."

11. In the alternative the plaintiff claims that Articles 22 and 25 not being applicable, if it is found that even Article 36 does not apply to this case, the

limitation for filing the suit from which this appeal has arisen would be six years under Article 120. Article 120 is in the following terms:—

"120. Suit for which no period of limitation is provided elsewhere in this Schedule.

Six years

When the right to sue accrues."

12. Mr. Harbans Lal Sarin, the learned Senior Counsel for the appellant-firm first referred to the judgment of a Division Bench of the Calcutta High Court in *Imperial Tobacco Co. v. Albert Bonnan*, AIR 1928 Cal 1. The appeal before the Division Bench had arisen out of the judgment of a learned Single Judge of the Calcutta High Court in a suit filed by Albert Bonnan against the Imperial Tobacco Co. for recovery of about seven and half lacs of rupees as damages for various acts done by the defendant-company, the main act being an allegation made to the customs authorities about the goods of the defendant being counterfeited on account of which allegation the

goods of the defendant were detained by the customs authorities for some time. The action was based on an allegation of slander of goods. As to the question of limitation it had been held by the learned Single Judge (Pearson, J.), in *Albert Bonnan v. Imperial Tobacco Co. (India), Ltd.*, AIR 1926 Cal 757, that the goods in question having been detained by the Collector of Customs on representation made by the defendant maliciously and without reasonably probable cause, the limitation for filing a suit for damages for such detention against the defendant was governed by Article 36. The learned Judge observed that Article 36 is the general article which provides a period

of two years' limitation for a suit to recover damages in tort unless any specific Article provides otherwise. It was held that in so far as the cause of action may be slander of title or slander of goods, the limitation would be either one year under Article 25 or two years under Article 36 the latter being applicable in the circumstances of the case before the learned Single Judge. The plaintiff had in that case invoked Article 48 but the contention of the plaintiff in that respect was repelled on the ground that the defendant-company never had possession or control over the goods and the Collector of Customs could not be looked upon as the agent of the defendant-company. When the matter was taken up in appeal to the Division Bench by Imperial Tobacco Co., (the defendants) it was held by Rankin, C. J. and C. C. Ghose, J. that a suit for damages against the defendant at whose instance the plaintiff's goods were detained by the Customs Authorities, is governed by Article 36 and not by Article 49. It is noteworthy that the contest in that case was between Art. 48 or Article 49 on the one hand and Art. 36 on the other. It was only in certain observations of the learned Single Judge that Article 25 was mentioned. Otherwise no one ever claimed that the suit against Imperial Tobacco Co. was governed by Article 25.

13 There is in fact no quarrel with the proposition of law that if a suit for damages in tort cannot be brought under any other specific Article in the first Schedule to the Limitation Act, it would be governed by Article 36 as held in the case of *Imperial Tobacco Co.* AIR 1928 Cal 1 (supra) and also in *Essoo Bhavaji v. The Steamship 'Savitr'*, (1887) ILR 11 Bom 133. In the *Bombay* case it was held that the intention of the Limitation Act appeared to be that not more than two years should be allowed for bringing the suit founded on a tort, except in certain well-defined particular instances covered by the earlier Articles relating to actions in tort.

A Division Bench of the Nagpur High Court (*Stone C. J. and Vivian Bose, J.*), held in *Hargovind Dullabh Jiwan v. Kikabhai Rahumatullah*, AIR 1938 Nag 84 that where a person dissuades other persons from taking a certain building on rent by making false statements as to habitability and safety of the building, the person so representing is liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. It was held that the action in such a case is one for misfeasance independent of contract and Article 36 applies to such action.

The judgment of a Division Bench of the Allahabad High Court (*Sulaiman,*

C. J. and Bennet, J.), in *Sobha Ram v. Tika Ram*, AIR 1936 All 454, is not directly relevant for deciding the case before us. The contest in that case was between the residuary Article 120 on the one hand and Article 22 of the first Schedule to the Limitation Act on the other. It was held that where a person entices away the wife of another a suit for damages against him by the husband is governed by Article 120 as such a suit does not fall within the scope of any other Article in the first Schedule. Their Lordships observed that such a suit is not governed by Article 24 as the suit is not for a libel, but for loss of society of the wife, and the infringement of that absolute right by the other. It is on the basis of the above-mentioned authorities that the appellant-firm sought to argue that the suit from which the present appeal has arisen was within time. It was submitted by Mr. Sarin that Article 22 was not applicable because no part of the claim was founded on any injury to the person of the plaintiff. So far as Articles 24 and 25 are concerned, the argument of the learned Counsel for the appellant was that the libel and the slander referred to therein is the libel of a legal or living person or slander of such a person and that the said expressions did not relate to slander of goods or slander of title. It was also argued that in the scheme of Part IV of the first Division of the First Schedule to the Limitation Act, it is apparent that suits referred to in Article 19 (for compensation for false imprisonment) Article 21 (by executors or representatives under the Indian Fatal Accidents Act) Articles 22 to 25 relate to torts against the person and that torts against the property are referred to in Articles 29 to 36. Article 29 relates to suits for compensation for wrongful seizure of moveable property, Art. 30 to a suit against a carrier for compensation for losing or injuring goods, Article 31 to suits against a carrier for compensation for non-delivery etc., and Article 32 against a defendant who perverts property given to him for certain use.

14 It is the common case of both sides that if Articles 22, 24 and 25 or any of them is applicable to the present suit, it must fail as being barred by time, but that if the suit is governed by Article 36, no part of the claim made therein is beyond time. The whole argument of the parties on the question of limitation appears to be based on some kind of misapprehension. The plaintiff-firm has tried to make out a case on the issue relating to limitation as if the claim is based on slander of title or slander of goods. Slander of title is committed when one falsely and maliciously writes or speaks defamatory words affecting the title of another to real or personal property.

"Slander of title" is a false malicious statement in writing, printing, or by word of mouth injurious to any person's title to property and causing special damage to such persons. (Stroud's Judicial Dictionary, Volume 4, page 2798). "Slander of goods" is a form of slander of title, and the action in such a case is for making defamatory statements about a man's goods, which are actionable if they are untrue and cause him special damage and are made maliciously. "Slander of title" is a false and malicious statement about a person's property or business and does not relate necessarily to his personal reputation, but to his title to property or his business or generally to his material interest. In Winfield on Tort (seventh edition), it is stated at page 693 as follows:—

"By far the happiest term for it is Salmond's 'Injurious falsehood,' for 'slander of title' might suggest a connection with 'slander' with which in fact it has scarcely anything in common; and if we adhere to the older phrase it is only because Salmond included under 'injurious falsehood' the other torts of 'passing-off' and 'injuries to trade marks' to which the term perhaps does not apply quite so exactly.

As for classification, slander of title is more closely allied to unlawful competition than to any other heading. Most of the modern cases on it are concerned with rival traders and nearly all the cases, old and new, are instances of interference with business, if not unlawful competition."

Torts arising out of fraud, deceit and injurious falsehood including cases of slander of title or slander of goods have never been treated as torts of trespass or injury to the person. Though Pearson, J., did distinguish between "slander of goods" and "slander of title" for applying Article 36 on the one hand and Article 25 on the other to suits covered by those causes of action, there appears to be no distinction between the two in so far as the use of the word "slander" in Article 25 is concerned. On a consideration of all the authorities cited before us on the subject, we are prima facie of the view that a suit for damages on account of slander of goods or slander of title would be governed by the residuary Article 36 and not by Article 24 or 25 which are intended to relate to libel or slander of person which would both fall under the genus-'defamation'. In fairness to learned Counsel for the respondent it may be stated that he relied on the judgment of the Lahore High Court in Harnam Singh v. Doola Singh, AIR 1937 Lah 709, of the Allahabad High Court in Ishri alias Hatim Ali v. Muhammad Hadi, (1902) ILR 24 All 368, and of the Bom-

bay High Court in Abdulla Mohomed Jabli v. Abdulla Mahomed Zulaikhi, AIR 1924 Bom 290. Counsel for the plaintiff-appellant also relied on Section 23 of the Limitation Act and claimed that he had suffered a continuing wrong for which the limitation had not expired when the suit was filed. We find no force in this contention of the plaintiff. In any case, as already stated, we are not called upon to finally decide this matter in the view we have taken of the case of the plaintiff-appellant on merits.

15. At the same time it is clear from the plaint of the suit that though words "slander of title" have been used therein several times, the real claim of the plaintiff is for damages for defamation. There were no ready goods in this case, the title to which or quality of which was made the subject of any slander by the defendant. From the evidence produced by the plaintiff-firm, it is clear that its grievance was that it had been defamed and humiliated by the defendant by writing the impugned letter. That indeed was the finding of the trial Court also inasmuch as the suit may be maintainable by a firm for slander of goods or slander of title, but no suit is maintainable by a firm which is not a legal person for defamation either by word written or spoken. In this view of the matter, the suit from which the present appeal has arisen would indeed be maintainable only within the time allowed by Articles 24 and 25. In so far as the claim of mental worry is concerned, that may be a claim based on an injury to person and would be governed by Article 22. The finding of the trial Court on the issue relating to limitation does not, therefore, seem to be incorrect on the facts of this case and the suit of the plaintiff does appear to have been time barred.

16. For the foregoing reasons this appeal fails and is accordingly dismissed. We, however, direct that the parties in this case will bear their own costs throughout.

KSB

Appeal dismissed.

AIR 1969 PUNJAB & HARYANA 159
(V 56 C 27)

D. K. MAHAJAN AND P. C. JAIN, JJ.
Mahesh Chand, Plaintiff-Petitioner v.
Puran Chand and another, Defendants-
Respondents.

Civil Misc. No. 4267 of 1967 in Civil
Original No. 1 of 1967, D/- 30-7-1968 from
judgment of D. K. Mahajan, J., D/- 29-3-
1968.

Court-fees Act (1870), S. 11 — Scope
— Arbitration Act (1940), S. 17 — Section

JL/LL/E675/68

17 does not override provisions of S 11 of Court-fees Act — Suit for dissolution of partnership and rendition of accounts — Dispute by agreement of parties referred to arbitration — Award made rule of Court by decree under S 17 — Held decree that followed was a decree in a suit, that put an end to suit, and, therefore, provisions of S 11 of Court-fees Act, applied. (1882) ILR 4 All 218 (FB) Rel. on. (Para 5)

Cases Referred Chronological Paras
(1882) ILR 4 All 218=1882 All WN

28 (FB) Nath Prasad v Ram

Paltan Ram

5

R. N. Mittal with S. K. Syal, for Petitioner H. L. Soin & Puran Chand for Respondents.

D. K. MAHAJAN, J.— This case was referred by me to a larger Bench in view of the importance of the question involved.

2 The precise question, that requires determination, is whether a suit, in which there is a reference to arbitration and a decree follows on the award and is made a rule of the Court under Section 17 of the Arbitration Act, would be governed by the provisions of Section 11 of the Court fees Act?

3. This question has arisen in the following circumstances. The decree-holder filed a suit for dissolution of partnership and rendition of accounts against the judgment-debtor. This suit was pending in the Court of Subordinate Judge, Ambala, and was brought to this Court by transfer. The dispute in the suit, with the agreement of the parties was referred to arbitration. The arbitrator gave his award and after bearing the objections of the parties the award was made a rule of the Court under Section 17 of the Arbitration Act.

4. The office however, did not draw up the decree in view of the provisions of Section 11 of the Court-fees Act. The plaintiff-decree-holder and one of the defendants in whose favour the award has gone, have made an application for execution of the recovery of amount awarded to them. The judgment-debtors have raised the objection that there is no decree and that none could be drawn till the provisions of Section 11 of the Court fees Act were complied with, namely the difference in the Court-fees paid and the requisite Court fees on the relief granted is made good. It is this objection that falls for determination in these proceedings. When the matter was posted before me on the 29th of March, 1968 I was doubtful whether the provisions of Section 11 would apply to such a decree. It was for that reason that I referred the case to a larger Bench, and that is how the matter has been placed before us.

5 After hearing the learned Counsel for the parties at length, I am of the view that the objection of the judgment-debtors is well founded and must prevail. There is no provision in the Arbitration Act which, either by necessary implication or specifically, overrides the provisions of Section 11 Mr R. N. Mittal, who appears for the decree-holder, contends that inasmuch as a decree under Section 11 in a reference outside Court does not require Court-fee Stamp it follows that a decree in a suit does not require Court-fees when it is an award-decree and is passed under Sec. 17 of the Arbitration Act I am unable to agree with this contention. Section 11 of the Court-fees Act reads thus —

"In suits for mesne profits or for immovable property and mesne profits, or for an account, if the profits or amount decided are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought the decree shall not be drawn up until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed."

and it only covers the cases specifically mentioned therein and those too in a suit. The present decree undoubtedly was passed in a suit. The only difference was that instead of the Court determining the controversy by agreement of the parties the forum was changed and an award was given by the arbitrator which award was made a rule of the Court under Section 17 of the Arbitration Act, and in terms of that provision a decree had to follow. It cannot, therefore, be held that a decree under Section 19 in a suit is not decree within the terms of Section 11 of the Court-fees Act. The view I have taken of the matter, finds support from the observations of Mr Justice Straight in Nath Prasad v Ram Paltan Ram, (1882) ILR 4 All 218 (FB) though the decision does not relate to the matter of the Court fees. The observations of the learned Judge are quoted below—

"* * * The agreement to refer a suit to arbitration does not close the

litigation; on the contrary, the parties continue before the arbitrators in the adverse positions of plaintiff and defendants, the one seeking to fix liability on the other, and the other to avoid that liability. Even if the award is subsequently made upon the consent of the parties, it does not occur to me that it stands in any respects in a different position to a confession of judgment in the suit itself, and the decree that is passed in either case would seemingly stand upon the same footing. * * * *

Therefore, the approach has to be whether the decree, that followed, was a decree in a suit; and it cannot be denied that the decree, that followed, was in a suit. It is the decree that put an end to the suit; and, therefore, the provisions of Section 11 of the Court-fees Act come into play.

6. For the reasons recorded above, the objection prevails and is allowed. The plaintiff is allowed one month's time to make good the Court-fees. There will be no order as to costs.

7. P. C. JAIN, J.:— I agree.
RSK/D.V.C. Appeal allowed.

AIR 1969 PUNJAB & HARYANA 161 (V 56 C 28)

R. S. NARULA AND S. S.
SANDHAWALIA, JJ.

Union of India and others, Appellants
v. P. C. Bahl and others, Respondents.

Letters Patent Appeals Nos. 427 of 1967 and 1 of 1968, D/- 22-8-1968 from judgment of Tek Chand, J., in C. W. No. 2161 of 1966, D/- 20-10-1967.

(A) Civil Services — Indian Administrative Service (Appointment by Promotion) Regulations (1955), Reg. 5 — Determination of seniority of officer — At this stage Reg. 5 (5) has no application and it is only when that provision comes into play that recording of reasons is envisaged.

The sole judge regarding merits and suitability of a particular member of the State Civil Service is the statutory committee and they have first to be satisfied regarding these two factors. Thereafter having reference to the seniority of a member they may decide to bring him on the list. This process, therefore, is distinct from determining his position in the seniority of the list prepared by the Committee. It governs only the first step whether a person should or should not be included in the list. (Para 16)

The next step arises when the decision to bring a member of the State Civil Service on the list has been answered in the affirmative by the Committee. Then arises the question of determination of

the seniority of an officer. This step is governed wholly by Reg. 5 (3) of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955. Three criteria are spelled out therefrom. One of the criteria for such determination is the seniority of the officer in the State Civil Service. The other two are merit and suitability. All that is required by Reg. 5 (3) is the subjective satisfaction of the Committee with regard to these three criteria. If they are satisfied that a junior officer (or officers) because of his exceptional merit and suitability deserves a place in the list higher than that of officers senior to him then they are perfectly entitled and indeed duty bound to do so in the terms of the proviso to Reg. 5 (3). It is patent that Reg. 5 (3) does not require any reason to be recorded for holding any person to be of exceptional merit and suitability. Sub-regulations (1), (2), (3) and (4) of Reg. 5, as is clear from the language thereof make no mention whatsoever of any recording of reasons. At this stage as yet Reg. 5 (5) has no application whatsoever and it is only when that provision comes into play that the recording of reasons is envisaged. (Para 17)

The phrase "Exceptional merit and Suitability" in Reg. 5 (3) has not been used in an abstruse or abstract sense. "Exceptional merit and Suitability" in this provision has been used in a relative sense qua the candidates who are eligible and whose names are being considered for the purpose of determination of their seniority. One candidate may be of exceptional merit and suitability qua the other rival candidate. In any case when once the Committee has arrived at an opinion to the said effect regarding a candidate's exceptional merit and suitability the statute in its wisdom has thought it expedient to respect that opinion. If acting bona fide and clearly alive to and in conformity with the provisions of Reg. 5 (3), the Committee have arrived at a certain opinion qua a certain officer or a set of officers their action is unsailable. (Para 18)

(B) Civil Services — Indian Administrative Service (Appointment by Promotion) Regulations (1955), Reg. 5 (5) — Supersession in process of selection — Officer junior to member of State Civil Service brought on select list whilst his name after due consideration not considered to be fit to be so brought — Held, that was what Reg. 5 (5) meant by supersession. 15 Southern Reporter 2nd Series P. 1, Ref. — No State Civil Service Officer has any vested legal right to claim to be brought on select list (Point conceded). (Para 21)

(C) Constitution of India, Art. 226 — Indian Administrative Service (Appoint-

ment by Promotion) Regulations (1955) Reg 5 (3) — Determination of seniority in State Civil Service List — Determination is entrusted under Reg 5 (3) to judgment and discretion of statutory committee — Discretion exercised by Committee without any mala fides — Going behind exercise of such discretion, examination of facts and adjudication thereon are precluded in writ petition. AIR 1954 SC 217, Rel. on. (Para 24)

Cases Referred Chronologically Paras

- (1967) AIR 1967 SC 284 (V 54)=
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15 Southern Rep. 2nd Series 1,
Kemp v Stanley 19

H. L. Sibal Advocate-General (Punjab)
with R. C. Satia, for Appellants; Bhagirath
Dass with B. K. Jhungan and S. K.
Hirajee, for Respondent No 1 only

S S SANDHAWALIA, J.— These two
connected Appeals Nos. L. P. A. 427 of
1967 and L. P. A. 1 of 1968 on behalf of
the Union of India and others and Sunder
Singh and others respectively are under
Clause 10 of the Letters Patent and are
directed against the judgment of Tek
Chand, J., dated the 20th October 1967.
By the said order the learned Single
Judge had allowed the petition under
Article 226 of the Constitution filed by
P. C. Bahl, respondent No 1 and granted
him a writ of mandamus directing the
appellants in L. P. A. No 427 of 1967 to
prepare a fresh seniority list in accordance
with the judgment under appeal. As
the points of facts and law arising in the
two appeals are identical they will be
disposed of by a single judgment.

2. The facts giving rise to the filing
of the writ petition by P. C. Bahl, respondent
No 1, in both the petitions may
now be surveyed. Respondent No 1 is a
member of the Punjab State Civil Service
and he was confirmed therein on the
1st of June, 1948. From the said date he
has been working in different capacities
in several departments of the State of

Punjab and at the time of filing of the
writ petition he held the status of a De-
puty Secretary. On the 1st of November
1956 which was the appointed date
under the Reorganization Act, 1956 a
joint seniority list was prepared giving
the relative place of seniority of each
one of the members of the Punjab Civil
Service. In the said list which was an-
nexed as Annexure 'A' to the petition,
respondent No. 1 was shown at serial No.
59. It is pleaded that this list forms the
basis of seniority for all future promo-
tions, appointments and confirmations for
the purposes of selection or promotion to
higher posts.

3. The contention of respondent No. 1
was that on having completed 6 years of
service in the State Civil Service he was
eligible for and was considered by the
Committee for inclusion in the list pre-
pared under Regulation 5 of the Indian
Administrative Service (Appointment by
Promotion) Regulations 1955 for the first
time in the year 1956. However it had
been averred on behalf of the Union of
India that respondent No 1 P. C. Bahl's
name was placed before the Committee
for the first time in March, 1956 but he
was not considered fit for inclusion in the
select list. His name was also considered
in subsequent meetings held in July,
1957 February 1956 September 1958,
and December 1959 but he was not con-
sidered fit for inclusion in the Select List
by these Committees and was superseded
in the Select List prepared in September,
1958, and December 1959. His name was
included in the Select List by the Com-
mittee which met on the 21st of January,
1961 and the same was continued in the
Select List prepared on the 27th of Janu-
ary 1962, 23rd of November 1962 and
the 30th of September 1963. Respondent
No 1 had pleaded that though his name
had figured in the list but it did not ap-
pear in the order of seniority in which
his name had stood in the State Civil
Service List mentioned above. His name
had been placed below the officers who
had been selected in 1958 and 1959 al-
though he pleaded that their names in
the said Seniority List were much below
the seniority of respondent No 1. Sub-
sequently till the year 1965 more names
were added to the List but the seniority
in the List was arranged in accordance
with the order in which a particular
officer was selected and according to re-
spondent No 1 it was in violation of
Regulation 5 (3) of the Indian Adminis-
trative Service (Appointment by Promo-
tion) Regulations, 1955

4. This list which had been arranged
by the Committee in accordance with the
year of selection which was at variance
with the original seniority as appearing in
the State Seniority List was submitted
for approval to the Union Public

Service Commission and approval was given without effecting any changes. This List thus became the Select List from which the appointments to the Indian Administrative Service Cadre were to be made in accordance with the order in which a name appeared in the Select List. On the 8th of November, 1965, respondent No. 1 made a representation to the State of Punjab that his name should be placed in accordance with the Regulation 5 (3) so that the seniority which was reflected in the State Seniority List be given effect to while arranging the names in the Select List; and that when the occasion for appointment to the Indian Administrative Service arose he might avail of his proper place of seniority. This representation was annexed with the Annexure 'C' to the original writ petition. A reply thereto was received from the Chief Secretary to the Government of Punjab dated the 27th of April, 1966, which informed respondent No. 1 that the Indian Administrative Service Selection Committee which had met on the 21st of January, 1961, had quite justifiably placed him below the Select List already in force when his name was first included in the List. A reference was made in this communication to the instructions contained in the Government of India, Ministry of Home Affairs Letter No. 7/6/55-AIS(1) dated the 5th October, 1955. Not satisfied with the reply of the State Government, respondent No. 1 then moved the High Court by way of petition under Article 226 of the Constitution of India which has been allowed by the judgment under appeal.

5. A brief reference to the relevant statute and the rules and regulations which fall for determination may now be made. As these have come up for detailed consideration during the course of arguments it is desirable to set them down in extenso. Under Section 3 of the All India Services Act, 1951 (Act 61 of 1951), the Central Government made after consultation with the Governments of the States concerned rules for the regulation of recruitment, and the conditions of services of persons appointed, to an All India Service. It was also provided that all rules made under this section shall be laid for not less than fourteen days before Parliament as soon as possible after they are made, and shall be subject to such modifications whether by way of repeal or amendment, as Parliament may make on a motion made during the session in which they are so laid. Pursuant to these provisions of the Act, the Central Government made the Indian Administrative Service Recruitment Rules 1954 and the Indian Administrative Service (Appointment by Promotion) Regulations 1955. Rule 4 provides for the methods

of recruitment to the Indian Administrative Service as follows:—

- a) by a competitive examination;
- b) by promotion of substantive members of a State Civil Service;
- c) by selection, in special cases from among persons, who hold in a substantive capacity gazetted posts in connection with the affairs of a State and who are not members of a State Civil Service. As is patent from the facts above-mentioned we are concerned with clause (b) which relates to the method of recruitment by way of promotion from the members of a State Civil Service.

6. The main points of controversy in these appeals revolve around Regulations Nos. 5, 6 and 7 of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955. They are as follows:—

"5(1). The committee shall prepare a list of such members of the State Civil Service as satisfy the condition specified in Regulation 4 and as are held by the committee to be suitable for promotion to the service. The number of the members of the State Civil Service included in the list shall not be more than twice the number of substantive vacancies anticipated in the course of the period of twelve months commencing from the date of the preparation of the list, in the posts available for them under Rule 9 of the Recruitment Rules or 10 per cent of the senior duty posts borne on the cadre of the State or group of States whichever is greater:

Provided that in any particular year, the maximum limit imposed by this sub-regulation, may be exceeded to such extent as may be determined by the Central Government in consultation with the State Government concerned.

(2) The selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority.

(3) The names of the officers included in the list shall be arranged in order of seniority in the State Civil Service:

Provided that any junior officer who in the opinion of the Committee is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him.

(4) The list so prepared shall be reviewed and revised every year.

(5) If in the process of selection, review or revision it is proposed to supersede any member of the State Civil Service, the Committee shall record its reasons for the proposed supersession.

(6) The list prepared in accordance with Regulation 5 shall then be forwarded to the Commission by the State Government along with—

(i) the records of all members of the State Civil Service included in the list;

(ii) the records of all members of the State Civil Service who are proposed to be superseded by the recommendations made in the list

(iii) the reasons as recorded by the Committee for the proposed supersession of any member of the State Civil Service and

(iv) the observations of the State Government on the recommendations of the Committee.

7(1) The Commission shall consider the list prepared by the Committee along with the other documents received from the State Government and, unless it considers any change necessary approve the list.

(2) If the Commission considers it necessary to make any changes in the list received from the State Government, the Commission shall inform the State Government of the changes proposed and after taking into account the comments, if any of the State Government, may approve the list finally with such modification, if any as may in its opinion, be just and proper

(3) The list as finally approved by the Commission shall form the Select List of the members of the State Civil Service

(4) The Select List shall ordinarily be in force until its review and revision, effected under sub-regulation (4) of Regulation 5 is approved under sub-regulation (1) or as the case may be finally approved under sub-regulation (2)

Provided that in the event of a grave lapse in the conduct or performance of duties on the part of any member of the State Civil Service included in the Select List, a special review of the Select List may be made at any time at the instance of the State Government and the Commission may if it so thinks fit, remove the name of such member of the State Civil Service from the Select List."

Regulation 8 provides for the appointment to Cadre Posts from the Select List made under the above regulation whilst regulation 9 relates to the appointments to the Indian Administrative Service from the Select List prepared pursuant to the earlier regulations.

7 The learned Single Judge in a judgment resplendent with erudition has dealt meticulously with the contentions raised before him. In fact he has sometimes dwelled exhaustively on the meaning to be attributed to each word in the above-said regulations the construction of which calls for determination. However for the purposes of these appeals, the matter is now in a narrower compass. The substance of the learned Judge's findings is six fold and these may be enumerated as follows:—

(1) That the Indian Administrative Service (Appointment by Promotion)

Regulations, 1955 are statutory and are not merely in the nature of an executive instruction.

(2) That the infringement of the statutory regulation contained in the above-said 1955 Regulations is a matter which is justiciable by this Court

(3) That the instructions contained in the Government of India, Ministry of Home Affairs letter No 7/6/55-AIS(1) dated the 5th October 1955 cannot override the provisions of Regulations above-mentioned,

(4) That respondent No 1, P C. Bahl, is not guilty of any laches

(5) That on the facts of this case, regulation 5 (5) governed regulation 5 (3) and as such the Committee had to record its reasons for the supersession of respondent No 1. The Committee having failed to record any express reasons the decision regarding the fixation of the respondent's seniority by the Committee is vitiated

(6) The Committee has in fact given no reasons but has merely stated its conclusions. That the giving of the reasons is distinct from the statement of a mere conclusion.

8 Mr H. L. Sibal, the learned Counsel for the appellant, in this appeal has not assailed the first three findings arrived at by the learned Single Judge. In fact it has been fairly conceded before us that undoubtedly the Indian Administrative Service (Appointment by Promotion) Regulations, 1955 (hereinafter called the 1955 Regulations) is a statutory provision having been framed under the All India Services Act. Further it is conceded that it is by now settled law that the violation of a statutory provision would be justiciable by this Court. It is also conceded that if an executive instruction purports to override or run contrary to any statutory provision it would be of no validity to that extent. However, it has been strenuously contended in this regard that the Government of India's instructions dated the 5th October 1955 are not violative of the statutory Regulations in any way whatsoever and are in fact wholly in conformity therewith. It is submitted that all the actions taken by the appellants are according to them, entirely in consonance with and pursuant to the 1955 Regulations and not in derogation thereof.

9 The controversy therefore now centres round the last three findings of the learned Single Judge and out of these three the last two in fact are crucial for the determination of this case.

10 To narrow down the area of the controversy it may be noticed at the outset that Mr Bhagirath Das, the learned Counsel for respondent No 1 P C. Bahl has lucidly formulated the case of his

client primarily on the contravention of the 1955 Regulations. He rightly makes this contravention, the corner stone of his client's case. He has explicitly stated that his client makes no grievance whatsoever of the facts prior to his selection to the list. He, therefore, rightly concedes that any action taken prior to that date has not been made the subject of attack in the petition before the learned Single Judge and he therefore does not rely on any facts previous to this crucial date. He has also contended that his case is not that there has been any infringement of Article 311 of the Constitution of India at all and further that as regards the decisions by the Committee and the Union Public Service Commission, no absence of bona fides whatsoever is suggested. In substance he contends that the 1955 Regulations being statutory there has been a clear violation of the same; this is patently justiciable; and hence the respondent is entitled to the relief he has claimed in the petition before the learned Single Judge which according to him has been rightly granted. The hard core of the point at issue is, therefore, reduced to this—

"Has there been a patent contravention of Regulation 5 of the 1955 Regulations."

11. The gravamen of Mr. Sibal's argument, therefore, in this appeal is that Regulation 5 (5) relates to supersession at the time of the selection, review or revision of the list. He contends that it is only when a supersession takes place and the said supersession is in the process of selection, review or revision of the select list that the recording of the reasons is necessary under the provisions of the Regulations and in this context the contention is that in the present case there has in fact been no supersession and as such the provisions of Regulation 5(5) are not at all attracted. His second contention is that for the purpose of determination of the order of seniority on the list the only Regulation which can possibly apply is regulation 5 (3). This, he contends, does not require recording of any reasons whatsoever. It gives complete discretion to the Committee and if they are subjectively satisfied that a certain officer, because of his exceptional merit and suitability, in their opinion, can be assigned or placed higher in the list than the officers senior to him, then nothing more is required by the Regulations. The argument, therefore, is that on the present facts of the case of respondent No. 1, Regulation 5 (5) has no application to Regulation 5(3). In elaboration of this main contention, Mr. Sibal has drawn our attention to regulation 5 (2). He emphasises that in the said regulation three criteria are laid out in a specific order, namely (1) Merit; (2) Suitability and (3) Seniority. He contends

that from the language of Regulation 5(2) and in the manner in which these three criteria have been laid the emphasis primarily is on merit and suitability while seniority is placed as the last criterion. For this contention Mr. Sibal has relied on the observations of the Supreme Court in *Sant Ram Sharma v. State of Rajasthan*, 1967-1 SLR 907=(AIR 1967 SC 1910), where at page 917 of the report, (SLR)=(at p. 1916 of AIR) the learned Judges of the Supreme Court have approved of the view of Leonard D. White in the following terms:—

"The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organisation. The main interest to be served is the public interest, not the personal interest of members of the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior Civil Servants are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur, and when selection for promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment.

Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof; and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true."

(Introduction to the Study of Public Administration, 4th Edn., pp. 380, 383).

"As a matter of long administrative practice promotion to selection grade posts in the Indian Police Service has been based on merit, and seniority has been taken into consideration only when merit of the candidates is otherwise equal and we are unable to accept the argument of Mr. N. C. Chatterjee that this procedure violates in any way, the guarantee under Articles 14 and 16 of the Constitution."

12. Relying on the above and applying the ratio thereof to the present case

the contention of Mr Sibal is that it is only when merit and suitability of candidates are otherwise equal, that the consideration of seniority would be called in. Relying next on the proviso to Regulation 5 (3) Mr Sibal contends that in the terms of that proviso the power to arrange the order of seniority on the list has been expressly vested in the Committee. If they are of the opinion that a junior officer, because of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him then they are perfectly at liberty to vary the order of seniority in the State Civil Service. The core of the contention is that the framers of the Regulations have vested a discretion in the statutory body, namely the Committee. All that this proviso requires, therefore, is the subjective satisfaction of the said Committee. Once the Committee is so satisfied and opines accordingly in the terms of regulation 5 (3) then according to him it is acting in conformity with the spirit and the letter of the said regulation. He submits that it has been expressly averred on behalf of the Committee that in the present case they were in fact of the opinion that officers placed higher in the list than the respondent were of exceptional merit and suitability qua him. In face of this averment and the unanimous opinion of the Committee to that effect it is not the practice of this Court to go behind the discretion vested in a statutory body by the law. Mr. Sibal contends that the subjective satisfaction of the Committee is thus to be respected and not to be lightly overridden. He contends further that regulation 5 (3) nowhere requires the recording of any reasons and as the bona fides of the Committee's action have not been challenged the fixation of the order of seniority by them is hence unassailable. Mr Sibal then relied on Regulation 6 (ii) which lays down that the records of all the members of the State Civil Service who are proposed to be superseded by the recommendations made in the list are to be forwarded to the Union Public Service Commission by the State Government along with the select list. He, therefore, wishes us to infer from that that Regulation 6 (ii) is related to Regulation 5 (5) and that the meaning to be attributed to the word 'supersession' becomes clear in this context and it is only in such a case that the records of such an officer are to be sent to the Union Public Service Commission. Then distinguishing the case of Shambhu Dayal Gupta v Union of India, ILR (1967) 1 Punj 490 he placed reliance on the following observations in the said judgment at page 494—

'Sub-regulation (5) of Regulation 5 applies only when it is proposed to super-

seede any member of the State Civil Service which is not the case here"

An alternative contention has also been raised. This is that even if it were to be held that the Committee should record reasons for its action under Regulations 5 (2) and (3), then this also has been complied with.

13. In reply thereto Mr Bhagrat Das, the learned counsel for respondent No 1 has firstly relied on regulation 5(3) and has argued that the proviso thereto is only in the nature of exception. He contends that the criterion of fixing the order of seniority laid down in regulation 5 (3) is primarily the order of seniority in the State Civil Service. He interprets this to mean that this order is the normal one and it is to be disturbed only in very exceptional circumstances. If this order of seniority, according to him, is to be disturbed it must be for specific and explicit reasons and also a specific finding qua each officer that he is of exceptional merit and suitability and, therefore, deserves to be assigned a place in the list higher than that of officers senior to him. The recording of these reasons, according to Mr Bhagrat Das, is the condition precedent to any such action by the Committee. In this case particularly he submits that Regulation 5 (3) would apply and govern Regulation 5 (3) and as such the recording of reasons is the sine qua non for the action of the statutory committee in altering the order of seniority. He submits that the committee has not recorded its reasons. It has hence not complied with the provisions of Regulation 5 (5). This is in flagrant violation of the said regulation and as such the action of the statutory committee cannot be sustained.

14. In elaboration of this contention, he relies on Regulations 6 (iii) and (iv). The submission is that Regulation 6 (ii) expressly requires that the reasons, as recorded by the Committee, for the proposed supersession of any member of the State Civil Service are to be forwarded to the Union Public Service Commission and further not merely the reasons of the Committee but also the observations of the State Government on the recommendation of the Committee are necessary to be submitted to the Union Public Service Commission. He argues that Regulations 6 (iii) and (iv) are mandatory and are clearly related to Regulation 5 (5). Having contended that in this case there has been a clear supersession of respondent No 1, he submits that firstly the recording of the reasons was necessary under Regulation 5 (5) and further those reasons as recorded along with the observations of the State Government have to be submitted to the Union Public Service Commission and then and then alone

a compliance with the regulation could possibly be said to have been executed. Failure to comply with these provisions which, according to him, are mandatory is fatal to the action of the Committee. He argues that compliance with the above provision is a condition precedent for the Commission when it acts in the finalisation of the list and converts it into the select list. In the absence of this condition precedent, according to him, any action of the Union Public Service Commission in framing the select list would be without the necessary foundation required for the said purpose by the regulation.

15. Reliance was placed on the observation of the Supreme Court in *Associated Electrical Industries (India) Private Ltd. v. Its Workmen*, AIR 1967 SC 284. That was a case under the Industrial Disputes Act. Under the said provision a power is given to the appropriate Government to transfer proceedings pending before one Tribunal to another Tribunal and one of the requirements of Section 33B of the Industrial Disputes Act is that before making such an order reasons for the same must be recorded. Interpreting the same, the observations of the learned Judges are as follows:—

"When we turn to the orders by which the reference was withdrawn from the Industrial Tribunal and transferred to another, we find that there is no reason mentioned in any of them. All that the orders purport to say is that it is expedient to withdraw the inference from one tribunal and transfer it to another. In our opinion, the said bare statement made in the orders by which the proceedings are withdrawn from one Tribunal and transferred to another does not amount to a statement of reasons as required by Section 33B (1). It is quite clear that the requirement about the statement of the reasons must be complied with both in substance and in letter. To say that it is expedient to withdraw a case from one tribunal and transfer it to another repeatedly on three occasions in respect of the same proceedings is not to give any reason as required by the section."

To examine these rival contentions the scheme of the Indian Administrative Service (Appointment by Promotion), Regulations 1955 may first be examined. Regulation 2 pertains to the definitions whilst Regulation 3 provides for the constitution of the Committee which is to make the selection. Regulation 4 provides the conditions of eligibility for promotion from the State Civil Service to the select list and thereafter to the Indian Administrative Service. Regulation 5 which is crucial and which calls for interpretation then provides for the "preparation of a list of suitable officers" as are held by the Committee to be suit-

able for promotion to the Indian Administrative Service. Regulation 6 deals with the consultations with the Commission in the finalisation of the list prepared by the Committee and Regulation 7 provides for the finalisation of the list prepared by the Committee which is then termed as the select list. The rest of the provisions of the Regulations are not very relevant.

16. The process, therefore, of determining the seniority on the list prepared by the statutory committee is two-fold. First after an officer of the State Civil Service has satisfied the test of eligibility for promotion to the select list the question for the determination by the Committee is whether a member of the State Civil Service should at all be brought on the select list. The test for including the member of the State Civil Service in the list is entirely a subjective test by the statutory Committee. Regulation 5 (1) begins as follows:

"The Committee shall prepare a list of such members of the State Civil Service as satisfy the condition specified in Regulation 4 and as are held by the committee to be suitable for promotion to the Service."

The crucial words, therefore, are "as are held by the Committee to be suitable for promotion." An indication in the nature of guide-lines is laid out in Regulation 5 (2). The statutory committee is enjoined to consider whether because of the merit and suitability with due regard to seniority, a certain officer is fit to be brought on the select list. The sole judge regarding merit and suitability of a particular member of the State Civil Service is the statutory committee and they have first to be satisfied regarding these two factors. Thereafter having reference to the seniority of a member they may decide to bring him on the list. This process, therefore, is distinct from determining his position in the seniority of the list prepared by the Committee. It governs only the first step whether a person should or should not be included in the list.

17. The next step arises when the decision to bring a member of the State Civil Service on the list has been answered in the affirmative by the Committee. Then arises the question of determination of the seniority of an officer or, to put it in another way, the order in which his name shall appear in the list. This step in our view is governed wholly by Regulation 5 (3). As is patent from the language and the position thereof the purpose of Regulation 5 (3) including the proviso is clear. Three criteria are spelled out therefrom. One of the criteria for such determination is the seniority of the

officer in the State Civil Service The other two are merit and suitability It is expressly provided by the proviso in this sub-regulation that merit and suitability may override seniority The power to determine the inter-play of these three criteria has been vested by the framers of the regulation in the statutory committee or to put it in technical language all that is required by Regulation 5 (3) is the subjective satisfaction of the Committee with regard to these three criteria. If they are satisfied that a junior officer (or officers) because of his exceptional merit and suitability deserves a place in the list higher than that of officers senior to him then they are perfectly entitled and indeed duty bound to do so in the terms of the proviso It is patent that Regulation 5 (3) does not require any reason to be recorded for holding any person to be of exceptional merit and suitability Sub-regulations (1) (2) (3) and (4) of Regulation 5 as is clear from the language thereof make no mention whatsoever of any recording of reasons At this stage as yet Regulation 5 (b) has no application whatsoever and it is only when that provision comes into play that the recording of reasons is envisaged.

18. The phrase "Exceptional merit and Suitability" in Regulation 5 (3) in our view has not been used in an abstruse or abstract sense. "Exceptional merit and Suitability" in this provision has been used in a relative sense qua the candidates who are eligible and whose names are being considered for the purpose of determination of their seniority. One candidate may be of exceptional merit and suitability qua the other rival candidate Similarly a number of candidates may be adjudged as being of exceptional merit and suitability in comparison to another candidate. In any case when once the Committee has arrived at an opinion to the said effect regarding a candidate's exceptional merit and suitability the statute in its wisdom has thought it expedient to respect that opinion. It is noticeable that it has not been required that the Committee should explain the basis of their opinion by expressly recording their reasons therefor That requirement is only as regards Regulation 5 (5) It would, therefore, be treading a dangerous ground to go behind the clear expression of subjective satisfaction and the expression of opinion following thereto which had been expressly averred to in the written statement on behalf of the Committee As already noticed there is no suggestion of mala fides on the part of the Committee. If acting bona fide and clearly alive to and in conformity with the provisions of Regulation 5 (3) they have arrived at a certain opinion qua a certain officer or a

set of officers their action is, to our minds, unassailable. We are, therefore, of the opinion that the order of the seniority of respondent No 1 was fixed in conformity with and after complying with the provisions of Regulation 5 (3) and there were no infringements thereof.

19. It, therefore, remains to determine whether the provisions of Regulation 5 (5) are attracted to the facts of the case of respondent No 1 Thus it is the construction to be placed on regulation 5 (5) which will ultimately tilt the balance between the two rival contentions raised on behalf of the appellants and the respondent. The crucial questions which arise herein may be formulated as follows—

(1) Has there been a supersession of respondent No 1 as is envisaged in Regulation 5 sub-clause (5)?

(2) Has this supersession been in the process of selection, review or revision? If the answer to these two queries is in the affirmative it is only then that a case for the respondent (No 1) would be spelled out and if the reply is in the negative, it is patent that the contentions raised on his behalf must necessarily fail. The crucial word, therefore, which falls for interpretation is the word 'supersede' used in Regulation 5 (5) This word is not a term of legal art and has not been defined or interpreted either in *Bouvier's Law Dictionary* or *Wharton's Law Lexicon*. In *Stroud's Judicial Dictionary* this word has been interpreted in the special context of the meaning to be placed thereon in Company Law, and in cases of conflict between a general Act and a local Act. This does not in any way aid us in ascribing the correct meaning thereto in the present case. The construction to be put on this word was considered in the American case of *Kemp v Stanley*, 15 Southern Rep 2nd Series p 1 This is a decision of the Supreme Court of Louisiana. That case arose in determining the constitutionality of a statute which authorised the Attorney-General of the State of Louisiana to supersede the district Attorney. The language of the statute was in the following words—

"Provided further that the Attorney-General shall have power to relieve supplant and supersede the District Attorney in any criminal proceeding, when he may deem it necessary for the protection of the rights and interests of the State."

The learned Judges of the Supreme Court of Louisiana in that case accorded judicial approval to the meaning given to this word in the Second Edition of *Webster's International Dictionary*. Therein this word 'supersede' has been given the following meaning pertaining to the present context—

"To displace, or pass over, so as to appoint a successor or make way for another; to supplant; as, the Governor superseded Judge A with Judge B.

To take the place, room, or position of; to follow in place of; to replace; as, the new bill is designed to supersede all previous bills; the new appointee supersedes a promoted (or dismissed) official."

The issue, therefore, clearly is that attributing the meanings above-mentioned to this word then has there been a supersession of the respondent in those terms?

20. It is necessary to go back to the facts and it is noticeable that for the first time the name of respondent No. 1 P. C. Bahl was brought on the list on 21st January, 1961. In the minutes of the Committee's meeting of the even date, his name after consideration was placed at No. 28 in the select list. Thereafter the list was revised annually next year and in the meeting of the Committee held on the 27th February, 1962, his name then finds place at No. 19 of the list prepared on the said date for this year which was duly approved by the Union Public Service Commission. Thereafter on the 23rd November, 1962, in the annual revision of the list, the name of the respondent finds place at No. 18. It thus emerges that from the moment of bringing his name on the list in 1961 till the time of the filing of the petition, his position in the seniority on the select list had not been altered to his detriment. It is not the case at all that after 21st January, 1961, when his name was first brought on the list at No. 28 any person whose name appeared lower than his in the order in the list has been raised to an order higher than that of respondent No. 1. As a matter of fact as has been noticed, his name in the order of seniority has in fact been gradually upgraded to number 18 due to the appointments to the Indian Administrative Service of the persons above him, retirement, and other factors. We are, therefore, clearly of the opinion that from the crucial date of the 21st January, 1961, when the name of the respondent was first placed on the select list, onwards there has been no supplanting or replacing or passing over of respondent No. 1 which may amount to supersession within the meaning of the said word used in Regulation 5 (5).

21. Assuming for the sake of the argument that there has been a supersession of respondent No. 1 (though we have expressly found otherwise), the question then arises whether this supersession arises in the process of selection, review or revision. We will consider this aspect in all its three aspects. Firstly as regards the process of selection, it is noticeable that on the averments made on behalf of the State of Punjab, the name of

respondent No. 1 was considered in March, 1956; July, 1967; February, 1958; September, 1958 and December, 1959, by the statutory Committee. On all these occasions, the Committee did not consider him fit to be brought on the select list. He was in those relevant years clearly superseded in the process of selection. Officers junior to him on the State Civil Service List were brought on the select list whilst his name after due consideration was not considered to be fit to be so brought. This, to our mind, is what Regulation 5 (5) means when it refers to supersession in the process of selection. But the noticeable feature of this case clearly is that respondent No. 1 makes no grievance of this supersession. He did not at any stage challenge such supersession in the process of selection in the years 1956 to 1959. In this petition it is expressly his case that no grievance whatsoever is made of the period prior to the 21st January, 1961. It is otherwise also conceded that no State Civil Service Officer had any vested legal right to claim to be brought on the select list. In the words of Mr. Bhagirath Das, the learned Counsel for respondent No. 1 mere non-selection in a previous year does not give any right of action to a member of the State Civil Service and no such ground was in fact pleaded in the writ petition. The name of respondent No. 1 was brought on the list for the first time in January, 1961, and even at that stage it was provisional being subject to the result of a disciplinary case pending against him. It is thus clear that after the said date of 21st January, 1961, the case is not within the ambit of any supersession in the process of selection. Supersession, if any, was prior to the said date which expressly is not before this Court for adjudication.

22. As regards the second aspect, regulation 5 (4) provides for a review and regulation 7 (4) provides for a special review of the list. Admittedly in this case there has been no occasion for any review or special review under the above-said provisions. Hence patently no question of supersession in the process of revision arises at all. Regarding the third aspect, as has already been noticed, the list was revised after 1961 in the years 1962 and 1963 and the order of seniority of respondent No. 1 has not thereafter been altered to his detriment in the revisions in these two years. Obviously, therefore, no question of any supersession in the process of revision of the said list can arise.

23. We are therefore, clearly of the view that on the facts of the present case there is in fact no supersession of respondent No. 1 within the meaning and context of regulation 5 (5) and further even if it be so held it has not been in any

process of selection, review or revision. Therefore, in our view Regulation 5 (5) is not at all attracted on the facts of this case.

24. Mr J N Kaushal, the learned counsel for the appellant in L. P. A. No. 1 of 1968 whilst adopting the arguments advanced by Mr Sibal has further raised the contention that once it is held that Regulation 5 (3) alone is applicable, the matter is completely narrowed down. He submits that this regulation does not require any reasons to be given. Under the proviso to Regulation 5 (3) exceptional merit and suitability can override the criterion of seniority. In the minutes of the meeting of the Committee held on the 23rd November 1962, it has been expressly recorded as follows:—

"The list in paragraph 2 above does not follow the order of seniority in the State Civil Service as, in the opinion of the Committee, the exceptional merit and suitability of officers placed in the higher list than those senior to them justify their being assigned places accordingly. Similarly in the minutes of the meeting of the 21st of January 1961, it was recorded as follows:—

"The above list does not follow the order of seniority in the State Civil Service, as in the opinion of the Committee the records of officers Nos. 1 to 25 justify their being assigned places in the list higher than officers senior to them."

In the written statement on behalf of the appellants it was expressly averred that the Committee had found the officers who were placed above respondent No 1 to have exceptional merit and suitability so as to deserve a place higher than that of respondent No 1 in the list of Seniority. Mr Kaushal further contends that the statutory committee and the Union Public Service Commission are not judicial or quasi judicial bodies: they are administrative tribunals and it is not necessary that their actions should be speaking orders expressing in detail all the reasons which impelled them so to act. He contends that if they had complied with the requirements of Regulation 5 (3) and the law vests the discretion to do so in them and it is not the allegation that the said discretion has been motivated by any extraneous consideration, then the exercise of such a discretion cannot be made the subject of an attack. In any case he argued that this Court in its writ jurisdiction would be wholly reluctant to go behind the expression of an opinion which has expressly been vested in the discretion of the Committee by the regulation. He has placed reliance on Vice-Chancellor Utkal University v S. K. Ghosh, AIR 1954 SC 217 for his above contention.

In that case the medical students of Utkal University of Orissa had prayed for a writ of mandamus under Article 226 of the Constitution of India against the Vice-Chancellor of the University and certain other persons connected with it in the High Court of Orissa. The High Court had allowed the petition and granted the writ of Mandamus, on the findings that the syndicate acted unreasonably and without due care and that on the facts there was no justification for the syndicate to pass such a drastic resolution in the absence of proof of the quantum and amplitude of the leakage of the paper in the examination. The learned Judges of the Supreme Court whilst allowing the appeal against the judgment of the High Court of Orissa observed as follows:—

"It may be that the matter could have been handled in some other way as, for example, in the manner the learned Judges indicate but it is not the function of the Courts of Law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question is entrusted by the law."

The ratio of this case is hence clearly applicable. Regulation 5 (3) has entrusted the determination of seniority in the list to the judgment and discretion of the statutory committee. That discretion has been so exercised admittedly without any mala fides. We are, therefore, precluded from going behind the exercise of such discretion and examine the facts for ourselves and adjudicate thereon in a petition under Article 226 of the Constitution of India. That such a course would be erroneous is patent from the following observations in the case above-said:—

"We also think the High Court was wrong on the second point. The learned Judges rightly hold that in a mandamus petition the High Court cannot constitute itself into a Court of appeal from the authority against which the appeal is sought, but having said that they went on to do just what they said they could not. The learned Judges appeared to consider that it is not enough to have facts established from which a leakage can legitimately be inferred by reasonable minds but that there must in addition be proof of its quantum and amplitude though they do not indicate what the yardstick of measurement should be. That is a proposition to which we are not able to assent.

We are not prepared to perpetrate the error into which the learned High Court Judges permitted themselves to be led and examine the facts for ourselves as a Court of Appeal but in view of the strictures the High Court has made on the Vice-Chancellor and the syndicate we are compelled to observe that we do not feel they are justified."

25. Mr. Sibal's next contention was that even if it be assumed that it was necessary that reasons for placing the names of junior officers at higher places than that of respondent No. 1 have to be given that condition in substance has been complied with. At the time of placing the name of respondent No. 1 on the list on the 21st of January, 1961, the Committee had expressly based itself on the records of officers Nos. 1 to 25 as the ground for assigning to them places higher in the list than the officers senior to them. It is further averred that this list has no finality and was revised from year to year and the relevant list which is being attacked was framed on the 23rd November, 1962. Therein also it had been expressly stated in the minutes as has already been quoted above that regarding the variation in the order of seniority in the list, the same was based on the exceptional merit and suitability of the junior officers who were being placed in a position higher than those senior to them and the records justify their being so assigned. Mr. Sibal, therefore, contends that it is clear that the Committee was alive to the requirements of Regulation 5 (3) and has acted in strict compliance therewith. The submission is that reference to the record is the reason for placing the junior officers above respondent No. 1. His contention is that the conclusion is that a junior officer should be placed higher than respondent No. 1 and the reason for the same is the record of such an officer and in comparison thereto the record of respondent No. 1. He contends that both of them are clearly distinct. It is patent that the records of all these officers were before the Committee at the time of the selection. It was recorded in the minutes of the meeting of the 21st January, 1961, as follows:-

"The Committee examined the records of all the permanent members of the State Civil Service who on the 21st January, 1961, had completed not less than eight years of continuous service (whether officiating or substantive) in a post of Deputy Collector." Similarly in the meeting of the 23rd of November, 1962, the following minute was recorded:-

"The Committee examined the records of all the permanent members of the State Civil Service, who, on the first day of January, 1962, had completed not less than eight years of continuous service (whether officiating or substantive) in a post of Deputy Collector/post declared equivalent thereto."

Mr. Sibal, therefore, submits that it was not necessary to refer individually in detail to each part of the record. The Statutory Committee had the record of each officer before it and they were examined and placing reliance on their re-

cord determined the order of seniority. He contends that there is an express reference to the records and that constitutes a valid reason duly expressed on which the conclusion of the Committee is based. The submission is that this is clearly sufficient compliance even if it was to be held that the recording of reasons is necessary. In any case it is argued that this is a substantial compliance with the spirit of the regulation.

26. Mr. Bhagirath Das in reply to this contention has placed reliance on Collector of Monghyr v. Keshav Prasad Goenka, AIR 1962 SC 1694 for the proposition that conclusion is distinct from the reasons thereof and on S. G. Jaisinghani v. Union of India, AIR 1967 SC 1427 for the broad proposition that discretion when conferred upon an executive authority must be confined within definite limits. Unquestionably there can be no two opinions regarding this enunciation of the law.

27. In view of our decision that the recording of reasons was not necessary this contention loses its importance. Nevertheless we are inclined to agree with the contention of the counsel for the appellants. There is a clear reference to the records of the officers concerned, the factum of their inspection and then a conclusion therefrom is arrived at along with the other factors. In any case even if the letter of the law is technically infringed, there is substantial compliance in the terms of dictum of the Supreme Court in S. K. Ghosh's case, AIR 1954 SC 217 which is in the following terms:-

"The substance is more important than the form and if there is substantial compliance with the spirit and substance of the law, we are not prepared to let an unessential defect in form defeat what is otherwise a proper and valid resolution." In fairness to the counsel for the parties we may also notice a few subsidiary contentions which had been raised on either side. Mr. Sibal on behalf of the appellants had also argued that the selection by the Committee is merely recommendatory. It is merely an intermediate step that is taken for the purpose of the finalisation of the list. After the Committee has made the recommendation the records of all the members of the State Civil Service included in the list, the records of all the members who have been superseded, the reasons for such supersession and the observations of the State Government are all forwarded to the Union Public Service Commission. Under Regulation 7, the Commission is to consider the list prepared by the Committee along with other documents and if it considers necessary to make any changes it shall inform the State Government of the changes proposed and ask for

its comments and on receipt thereof it may finally approve the list. Particular reliance was placed on the use in Regulation 7 (2) of the words 'just and proper'. The relevant part of Regulation 7 (2) is as follows —

7 (2) If the Commission considers it necessary to make any changes in the list received from the State Government, the Commission shall inform the State Government of the changes proposed and after taking into account the comments, if any, of the State Government, may approve the list finally with such modification, if any as may, in its opinion, be just and proper."

Mr Sibal, therefore, arguing on the language of this regulation submits that thus completely vests the power of selection and approval in the Commission and it is ultimately the approval of the list by the Commission which gives any finality to the list. He therefore, contends that preparation of a list of suitable candidates by the Committee is merely an intermediary step. This he contends can hardly be challenged when no attack against the final order of the Union Public Service Commission has been directed.

28 Mr Bhagirath Das has strenuously argued that Regulation 7 (1) clearly shows that the normal procedure for the Commission is to approve the list and it is only in exceptional circumstances that the Union Public Service Commission would consider a change and then follow the procedure in regulation 7 (2). His argument basically was that any deviation even at an intermediary stage from the regulations would give a cause of action to his client.

29 Mr Sibal has also argued that there is no finality attached to the list prepared by the Committee and even so as regards the select list. The list of 1963 against which the grievance was made has been subsequently revised and as such the petition is virtually infructuous. The earlier list having lapsed and the new list having been prepared this Court will not pass an order which will be merely academic. The learned Counsel for the appellants has also relied on a Division Bench authority of this Court reported as Harpal Singh v State of Punjab Civil Writ No 2861 of 1965, D/- 14-9-1967 (Punj & Har) in which also similar question was raised. We have, however been taken through the judgment but the question which we have earlier decided in this petition regarding the necessity of giving reasons and as to what constitutes 'reasons' has not been determined in the said case and that case is hardly of any assistance, in determining the points at issue.

30. We are mentioning these rival contentions in fairness to the learned Counsel for the parties but in view of

the decision in the earlier part of the judgment it is not at all now necessary to adjudicate upon them. It may further be noticed that reliance was also placed on Harpal Singh's case, C W No 2861 of 1965 D/- 14-9-1967 (Punj & Har) for the submission that respondent No 1 was guilty of laches and the appeal be allowed on that point alone. As the point arising in appeal involves the interpretation of a statutory provision and we are allowing the appeal on merits it is not necessary to go into and adjudicate on the question of laches.

31. We, therefore, hold that—

(1) On the facts of this case there has been no supersession of respondent No 1 within the meaning and context of regulation 5 (5).

(2) Regulation 5 (1), (2), (3) and (4) do not contain any express or implied requirement that the Committee should record its reasons whilst acting under those provisions.

(3) That the order of seniority of respondent No 1 has been fixed in conformity with and after compliance with the provisions of Regulation 5 (3) and there has been no infringement thereof.

(4) On the facts of the case the provisions of Regulation 5 (5) are not attracted and cannot govern the provisions of Regulation 5 (3), and

(5) That even if it be held that the recording of reasons was a legal requirement, there has been a substantial compliance thereof.

32. In view of the above we would allow these appeals and setting aside the order of the learned Single Judge dismiss the writ petition filed by respondent No 1. In the circumstances of the case, there will, however, be no order as to costs.

33 R S NARULA, J.—I entirely agree
MBR/D.V.C.

Appeals allowed.

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(V 56 C 29)

R. S. SARKARIA, J

State of Punjab, Appellant v V K. Kalia, Respondent.

F A. F O No 47 of 1967, D/- 28-8-1968

Motor Vehicles Act (1939), Ss 110, 110A, 110B, 110C, 121 — Scope — Rule of absolute liability — Injuries sustained in motor accident — Claim for compensation — Negligence on part of master or his agent must be proved — Rule of *res ipsa loquitur* held on facts, not applicable — (Tort — Negligence) — (Maxim — *Res ipsa loquitur*) — Tort — Master and Servant).

KL/LL/F12/68

There is no indication either in Ss. 110, 110A, 110B or in S. 110-C of the Motor Vehicles Act, that compensation can be awarded by the Claims Tribunal only when negligence on the part of the driver of the vehicle concerned is established. These provisions, however, do not lay down any criterion for awarding compensation. They merely substitute the Motor Accidents Claims Tribunal for the Civil Courts, for adjudicating claims to compensation in respect of accidents, involving death of, or bodily injury to persons, arising out of the use of motor vehicles. They do not deal with the question as to who is to be held liable and in what circumstances, if an injury results from an accident. For fixing liability, in the absence of any specific statutory provision Courts have to go back to the law of torts, according to which negligence in causing the accident is essential to make the negligent person liable. (Para 9)

Absolute liability—which means liability without any fault or negligence on the part of a person—is exceptional under the common law, the general rule being that a person is liable only for the injury or harm directly flowing from his intention or negligence, and not for any harm resulting from an unavoidable accident. An extension of this rule of absolute liability casts vicarious liability on employers towards their employees. In case of claims for compensation for injuries sustained in motor accidents, negligence on the part of the master or his agent must be proved before he can be fastened with the liability to compensate his servant, sustaining an injury in the course of the service. (Duties of Courts in applying doctrine of absolute liability indicated). (Paras 10, 11)

Though the knowledge of the employer about unserviceable or dangerous condition of the motor vehicle concerned is not a *sine qua non* for fixing him with the liability, it is an important piece of evidence showing that there was no negligence on his part. (Para 13)

Where one K, a Superintendent of Police, while on official tour, received injuries as a result of the accident of official jeep registered in his name and under his control, and at the relevant time the jeep being in road-unworthy condition being driven by the Constable the cause of accident being worn out tyres and tubes and slippery road due to rainy day, the acts of K and his driver amounted to offence under S. 121 of Act and in absence of proof of negligence on part of the State or Controller of Stores, K was not entitled to claim compensation from the State. To such a case, rule of *res ipsa loquitur* i.e. rule of presumptive negligence on part of master, had no application. English case law discussed. (Paras 16, 21, 22, 24)

Cases Referred: Chronological Paras

- (1963) AIR 1963 Punj 214 (V 50)=
ILR (1962) 2 Punj 887, Nand Singh
Viridi v. Punjab Roadways, Amritsar 9
- (1962) AIR 1962 Punj 540 (V 49)=
1962-64 Pun LR 448, Shri Ram
Pertap v. General Manager, Punjab
Roadways, Ambala 8, 9
- (1955) 1955-1 All ER 6=1955-1 QB
474, Jones v. Staveley Iron and
Chemical Co., Ltd. 8
- (1944) 1944-1 All ER 465=1944-1
KB 476, Bowater v. Rowley
Regis Corporation 8
- (1921) 1921-2 KB 674=90 LJKB
1190, Baker v. James Bros & Sons
Ltd. 8, 17, 20, 21
- (1893) 1893-1 QB 491=62 LJQB
353, Le Lievre v. Gould 29
- (1884) 13 QBD 259=53 LJQB 504,
Griffiths v. London & St. Katharine
Docks Co. 20
- (1868) 3 HL 330=37 LJ Ex 161,
Reversing (1865) 3 H & C 774,
Raylands v. Fletcher 10
- (1865) 3 H & C 596=159 ER 665,
Scott v. London and St. Katherine
Dock Co. 21
- (1856) 11 Ex 781= 25 LJ Ex 212,
Blyth v. Birmingham Water Works
Co. 20

Gopal Singh, Advocate-General, Punjab (13-3-1968), G. R. Majithia Deputy Advocate-General Punjab (3-4-1968), for Appellant; K. S. Thapar with Miss Surjit Kaur, for Respondent.

JUDGMENT:— The circumstances giving rise to this appeal are as follows:—

Shri V. K. Kalia respondent was at the material time posted as Superintendent of Police, Gurdaspur. A Government jeep was supplied to him for official use. It was being maintained at Government expense. The tyres of this jeep became worn out. Shri V. K. Kalia, therefore, on the 7th June, 1966 wrote a letter to the Controller of Stores, Punjab, Chandigarh, that inter alia, some tyres and tubes for Government jeep and other transport under his charge were urgently required by him. The Controller was requested to intimate the amount involved so that sanction of the competent authority to purchase those articles might be obtained. He followed this by a reminder, dated 23-6-1966, requesting the Controller to make necessary arrangements for the supply of tyres and tubes at an early date. The Controller of Stores, in reply, sent the letter, dated 24-6-1966, requesting the respondent to send his demand in the new prescribed indent forms, which were available from the Controller of Printing and Stationery, Punjab. He added that further action would be taken on hearing from him (respondent).

2. On the 20th July, 1966, Shri Kalia proceeded in the Government jeep No PNP-15 registered in the name of Superintendent of Police, Gurdaspur, on official duty, to Pathankot. The jeep was driven by Constable Shiycharan Dass No 43. It was raining at about 6.45 P. M., when the jeep was on the road near village Pamar, it skidded and overturned, as a result of which Shri V. K. Kalia received injuries. His right clavical bone was fractured. He remained in plaster for 6 weeks, suffering intense pain. Mr V. K. Kalia, therefore, made an application to the Motor Accidents Claims Tribunal, Punjab, Chandigarh, claiming Rs. 5,000/- as compensation. It was alleged that the accident occurred due to the worn out tyres of the Government vehicle, which were not replaced by the appellant-State, despite repeated requests, in time. At the time of the accident it was raining and the road was wet; consequently, the vehicle skidded and overturned.

3. The application was opposed by the State of Punjab through its Secretary in the Home Department. In its written statement, the State denied its liability to pay any compensation. It was added that the officer had taken out the jeep on the road against the instructions of the Inspector-General of Police, and that the Superintendent of Police, Gurdaspur, being himself the registered owner of the vehicle, could not claim compensation against himself.

4. The Tribunal framed these issues—
1 Was the accident due to any negligence on the part of the driver of the vehicle or due to any defect in the vehicle involved in the accident?

2. What is the quantum of compensation due if any and from whom?

3 Is not the claimant entitled to any compensation?

4. Is the Government not liable to pay any compensation to the claimant?

5 After recording the evidence produced by the parties, the Tribunal found.—

"The accident no doubt took place because the tyres were worn out and had become unserviceable and the driver was not to blame as it was raining that day and the tyres slipped, but the driver was negligent in the performance of his duties as he did take the defective vehicle on the road and did not inform his officer about its unserviceableness that day. The accident was, therefore, both due to the negligence of the driver as well as due to the defect of the tyres. The respondents have also admitted that requisition had been made to the Controller of Stores by the applicant much before the accident for the supply of new tyres. Had they been supplied prior to the accident, it would not have occurred."

6. The two-pronged issue No. 1 was thus decided entirely in favour of the claimant. The remaining issues were also decided against the State. In the result Rs. 4,000/- were awarded as compensation under Section 110-B of the Motor Vehicles Act, 1939, to the claimant against the appellant-State, with costs. It was further directed that the amount be paid within a month of the date of the award, failing which it will carry interest at 6% per annum. Hence this appeal by the State.

7. Mr Majithia, the learned Counsel for the appellant State, has canvassed these points in the course of his arguments—

1 The claimant as Superintendent of Police was the registered owner of the vehicle, and, at the material time, it was being driven by his own subordinate, Constable-driver. It was a rainy day; the claimant knew or should have, by the exercise of ordinary diligence, known that the tyres of the vehicle were worn out and unserviceable, and it was dangerous to take it out on a rainy day on the road. This act of the claimant, Shri V. K. Kalia, and his Constable-driver in taking out the jeep, which was not in a roadworthy condition, on that rainy day, amounted to an offence under Section 121 of the Motor Vehicles Act, read with Rules 51 and 53 of the Motor Vehicles Rules. The claimant, therefore, could not claim compensation for his own wrong or negligence.

2. The State was not liable, because no negligence either on the part of the Controller in not supplying the new tyres, or the driver in driving the vehicle, was established.

3 There were several transport vehicles under the control of the Superintendent of Police, Gurdaspur. The claimant could avoid travelling on that rainy day in that unsafe vehicle, by selecting some other vehicle, or adopting any other mode of conveyance. The accident was, therefore, self-invited and the direct result of the negligence on the part of the claimant.

8. Mr. K. S. Thapar, the learned Counsel for the claimant-respondent contends in reply, that in the first place, the accident occurred as a result of the negligence of the appellant-State in not replacing the worn out tyres of the Government jeep in time, despite requisitions made by the claimant, secondly, even if there was no such negligence, the liability of the State to compensate its servant for an injury sustained by him in the performance of his duty was absolute. It was not dependent on proof of any negligence either on the part of the Controller in not supplying the new tyres in time, or on the part of the driver

of the vehicle in driving it. The claimant as well as the driver both were servants of the State. The claimant was required to go on official tours in this jeep, while it was the duty of the Constable-driver to drive it. A jeep with worn out tyres when driven on the road on a rainy day, is an intrinsically dangerous vehicle.

It was only in answer to the call of duty, which was paramount, that the claimant-respondent took the risk of taking the unsafe vehicle on the road, and thereby met an accident and got injured. It was the duty of the master to keep the vehicle in a roadworthy condition, in which the servant was required to travel in the performance of his duties. It is maintained that the principle of *res ipsa loquitur* will be attracted. It is also said that Section 110-B of the Motor Vehicles Act does not say that compensation can be awarded only when negligence on the part of the driver of the vehicle or its owner is established. In support of this contention, Mr. Thapar has referred to *Shri Ram Pertap v. General Manager, Punjab Roadways, Ambala*, 1962-64 Pun LR 448=(AIR 1962 Punj 540); *Baker v. James Bros. and Sons, Ltd.*, (1921) 2 KB 674; *Jones v. Staveley Iron and Chemical Co., Ltd.*, (1955) 1 All ER 6; and *Bowater v. Rowley Regis Corporation*, (1944) 1 All ER 465.

9. Before entering on the merits of the case, it will be worthwhile to elucidate the law on the point. It is true that there is nothing either in Ss. 110, 110-A, 110-B or 110-C of the Motor Vehicles Act, which says that compensation can be awarded by the Claims Tribunal only when negligence on the part of the driver of the vehicle concerned is established. These provisions, however, do not lay down any criterion for awarding compensation. They merely substitute the Motor Accidents Claims Tribunal for the Civil Courts, for adjudicating claims to compensation in respect of accidents, involving death of or bodily injury to persons, arising out of the use of motor vehicles. They do not deal with the question as to who is to be held liable and in what circumstances, if an injury results from an accident. For fixing liability, in the absence of any specific statutory provision, we have to go back to the law of torts, according to which, generally speaking, negligence in causing the accident is essential to hold the negligent person liable.

As observed by I. D. Dua, J., in *Shri Ram Pertap's case*, 1962-64 Pun LR 448=(AIR 1962 Punj 540) the cardinal principle of liability in tort, when death or bodily injury has been caused to a person, is negligence or failure to take the requisite amount of care required by law. Similarly, in *Nand Singh Virdi v. Pun-*

jab Roadways, Amritsar, AIR 1963 Punj 214, the accident in which the claimant received injuries while travelling in a bus, run by the State, was not proved to be due to any rash or negligent act of the driver. It was held that the claimant was not entitled to claim any compensation from the State for the injuries received by him.

10. It must be remembered that 'absolute liability' — which means liability without any fault or negligence on the part of the respondent, is exceptional under the common law, the general rule being that a person is liable only for the injury or harm directly flowing from his intention or negligence, and not for any harm resulting from an unavoidable accident. The rule of absolute liability has grown in modern times. In *Rylands v. Fletcher*, (1865) 3 H & C 774 (sic) (1868-3 HL 330 reversing (1865) 3 H & C 774), it was laid down that a person who brings dangerous things on his land and a harm results due to their escape, is liable. An extension of this rule casts vicarious liability on employers towards their employees. Employing servants or workmen in industry or business under the present conditions in this machine age is attended with risk of injury due to the negligence or mischief of the employees, which their employer cannot avoid with any amount of care. Statutory provisions, such as *Workmen's Compensation Act*, have been made to put the employer in the position of an insurer against harm done to the employees or its workmen within the scope of the employment. This principle of insurance against harm is in consonance with the socialistic pattern of society envisaged in our Constitution.

11. In applying the doctrine of absolute liability, the Courts have to perform a delicate task. They have to give a new look to the old principles in the light of the present-day circumstances. They have to adopt the old principles to the modern world. If the old principles are to live and not become flint fossils of time, they must be constantly renovated, moulded, and attuned to the changing social conditions. The Courts play a limited role in this process by placing, what is called a dynamic interpretation on principles which carry behind them the sanction of tradition and precedent. They cannot, however, in the absence of any statutory provision, sanctioning that course, cut themselves completely adrift from their past moorings, and arrogate to themselves the functions of the Legislature, introducing entirely new principles, radically differing from or conflicting with the fundamental principles of Common Law that have evolved through the centuries. Leaving aside the cases governed by special statutory provisions, such as *Workmen's Compensation Act*, in

cases of the kind before me, negligence on the part of the master or his agent must be proved before he can be fastened with the liability to compensate his servant, sustaining an injury in the course of the service.

12. The above being the law on the point, I pass on to consider whether in the present case, the accident resulting in injury to the claimant was due to negligence — actual or presumed — on the part of the employer-State or its servant, the driver of the vehicle concerned.

13. It was first on the 7th June, 1966, that the claimant wrote to the Controller of Stores that some tyres and tubes for Government jeep and other transport under his charge were urgently required by him. This letter was more or less of an exploratory nature, inasmuch as the Controller was requested to intimate the amount involved so that sanction of the competent authority to purchase those articles might be obtained. To this letter, the Controller of Stores sent a reply, dated 24-6-1966, asking the claimant-respondent to send his demand in the prescribed indent form available from the Controller of Printing and Stationery, Punjab. There is nothing on the record to show that the claimant-respondent had sent his demand in the prescribed form thereafter. In the letter, dated 7-8-1966, Exhibit D.B., the claimant-respondent did not even say that the tyres of the vehicles had become unserviceable or worn out. The only thing mentioned therein is, that certain number of tyres and tubes were urgently required.

On the other hand, the Controller of Stores in his letter, Exhibit D.D., dated 24-6-1966, clearly intimated the claimant-respondent that further action in the matter could be taken only on receipt of his demand on the prescribed indent forms No. "UF 88". It is true that the knowledge of the employer or the Controller about this unserviceable or dangerous condition of the motor vehicle concerned is not a sine qua non for fixing him with the liability. It is, however, an important piece of evidence showing that there was no negligence on his part. Thus, it was not established that there was any negligence on the part of the appellant or its servant, the Controller of Stores, in not replacing the worn out tyres of the vehicle in time. Indeed, there was negligence on the part of the claimant in not making the demand well in time in the prescribed form. The Claims Tribunal, also, has not recorded any clear finding that there was negligence on the part of the State in replacing the worn out tyres, though it has said that the accident occurred due to the defect in the tyres.

14. Having seen that no negligence on the part of the employer-State has been

proved, I pass on to consider, whether any negligence on the part of the driver had been established. The Tribunal has held that the driver was not to blame for the accident, which occurred due to the rain and the worn out and unserviceable condition of the tyres. The Tribunal has however, held that the driver was negligent as he did take the defective vehicle on the road and did not inform his officer about its unserviceableness that day.

15. I am unable to appreciate this reasoning. It was the claimant's own case that the tyres of the vehicle had become worn out and unserviceable and they required urgent replacement. The knowledge of the claimant about the worn out condition of the tyres can be inferred from the circumstance that he wrote to the Controller as far back as the 7th June, 1966, that the tyres and tubes of the Government jeep and other transport vehicles were urgently needed by him. He followed up this letter by a reminder, dated 23-6-1966. Thereafter, he received the reply of the Controller that the requisition should be sent in the prescribed form. The accident occurred only about 4 weeks after the receipt of this letter. It is, therefore, preposterous to suggest that Mr. Kalia did not know about the worn out and unserviceable condition of the tyres.

He further knew that it was a rainy day. By ordinary diligence, therefore, he ought to have known that it was dangerous to take out the vehicle with unserviceable tyres on a rainy day. He did not require to be told by the Constable-driver about the condition of the tyres and the consequent roadunworthy condition of the jeep on that rainy day. This act of the driver in driving that dangerous and unsafe vehicle on that rainy day, with its unserviceable tyres, and also act of Shri Kalia in allowing his subordinate driver to drive the vehicle on that day, might amount to the commission of an offence by the claimant as well as the driver under Section 121 of the Motor Vehicles Act. Section 121 of the Act, reads as follows:—

"121. Using vehicle in unsafe condition. Any person who drives or causes or allows to be driven in any public place a motor vehicle or trailer while the vehicle or trailer has any defect, which such person knows or could have discovered by the exercise of ordinary care and which is calculated to render the driving of the vehicle a source of danger to persons and vehicles using such place, shall be punishable with fine which may extend to two hundred and fifty rupees, or if as a result of such defect an accident is caused causing bodily injury or damage to property, with imprisonment for a term which may extend to three months or

not open to challenge in our opinion, though, at the same time, the jurisdiction conferred upon the Debt Relief Court under this section is of a limited nature and it can disturb the decree or order of a civil court only to the extent permitted therein.

22. It now remains to examine the cases which have been cited by learned counsel for the respondent No. 1 in support of his arguments. The earliest case referred to by him is *Sunderlal v. Kaushiram*, AIR 1939 All 31. In that case, it was held by a learned single Judge, after examining the provisions of S. 33 of the U. P. Agriculturists Relief Act No. 27 of 1934, that a suit for reopening of the accounts of a closed transaction was not permissible under section 33. It was contended on behalf of the agriculturist that his suit for accounts under section 33 was maintainable even in case of a bond which already stood satisfied. It was held after referring to section 33 (2) that a decree which was already satisfied could not form the subject of a suit under section 33. It is clear that this case is of no help to respondent No. 1.

23. Learned counsel has next referred to *Dau Balwantsingh v. Mt. Bindabai*, AIR 1942 Nag 88 and *Rukhmabai Ganpatrao Parkhi v. Shamlal Surajmal Marwadi*, AIR 1944 Nag 289. In our opinion, there is no observation in both the cases which can be of any help to him in the present case.

24. The writ application is therefore allowed and the order of the District Judge, Jhunjhunu, dated 8th May, 1962, is set aside. The record of his court be sent back to him with direction to hear and decide the revision application afresh in the light of our observations.

25. In the circumstances of the case, the parties are left to bear their own costs in this Court

RSK/D.V.C. Petition allowed.

AIR 1969 RAJASTHAN 129 (V 56 C 28)

D. M. BHANDARI
AND G. M. MEHTA, JJ.

Tickooram, Petitioner v. State of Rajasthan and another, Respondents.

Civil Misc. Writ Petn. No. 308 of 1967,
D/- 16-7-1968.

Constitution of India, Art. 166 — Rules of Business (Government of Rajasthan), Rr. 5 and 21 — Rajasthan Minor Mineral Concession Rules (1959), R. 46 — Appeal under, heard by Secretary but disposed of by Minister-in-charge — Invalid — Deputy Minister, who is not allotted any business of Department, not competent to clothe Secretary with authority to dis-

pose of case — (Constitution of India, Art. 226 — Natural Justice).

An appeal preferred to the Government of Rajasthan under R. 43 (2) of the Rajasthan Minor Mineral Concession Rules, 1959, was heard by the Secretary to Government of Rajasthan, Industries and Mines Department. But it was disposed of by the Minister-in-charge of the Department. The Deputy Minister had expressly passed an order to the effect that the case was to be heard and disposed of by the Secretary. But there was no evidence of allotment by the Minister-in-charge to the Deputy Minister, of any business appertaining to the Department.

Held: (i) that the Secretary was not competent to hear the appeal. As there was no allotment of any business of the Department to the Deputy Minister, any order passed by the latter could not clothe the Secretary with such authority.

(ii) The Minister-in-charge, who did not hear the appeal, could not decide it. The spirit of R. 46 is that the appellate authority must give an opportunity of hearing and that authority is of course to decide the case. It is not envisaged that one authority will hear the appeal and another authority will decide it on the recommendation of the authority who heard the appeal. AIR 1959 SC 308, Rel. on. (Para 8)

Cases Referred: Chronological Paras (1959) AIR 1959 SC 308 (V 46) =

(1959) Supp (1) SCR 319, G. Nageswara Rao v. A. P. S. R. T. Corpn.

Ramgopal Purohit, for Petitioner; M. M. Vyas, Addl. Advocate General and M. L. Shrimal Dy. G. A. for the State; Marudhar Mridul, for Non-petitioner No. 2.

BHANDARI, J: This is a writ petition under Article 226 of the Constitution.

2. A lease for stone quarry No. 1119 in Fidusar area, Tehsil Jodhpur, was granted to the petitioner on 28th April, 1964, by the Mining Engineer, Jodhpur. Shrimati Kaushaliya Devi, respondent No. 2, filed an appeal against the aforesaid order to the Director of Mines and Geology. The appeal was dismissed on 18th June, 1964. Respondent No. 2 preferred an appeal to the Government of Rajasthan, Jaipur, under rule 43 (2) of the Rajasthan Minor Mineral Concession Rules, 1959 (hereinafter called the Rules). This appeal was heard by the Secretary to the Government of Rajasthan, Industries and Mines Department. On 13th January, 1966, he submitted a note for approval to the Minister Incharge of that department stating therein that the lease of the quarry in question be granted to Shrimati Kaushaliya Devi as her application was received earlier than that of the petitioner. In the note he took notice of

the arguments addressed by counsel for the parties. On 26th January, 1966, the Minister incharge signed the note thus signifying his approval thereof.

3. In compliance with the aforesaid order, instructions were sent to the Director of Mines and Geology vide Ex. 4, a copy of which was sent to the petitioner. On receiving a copy of Ex. 4, the petitioner has filed this writ petition and the main ground taken by him in this writ application for challenging the order of the State Government is that the Secretary of the Industries and Mines Department had no authority to give a hearing of the appeal and that the Minister incharge of the department decided the appeal without giving a hearing.

4. Notice of the writ petition was given to the State of Rajasthan and to Shrimati Kaushalya Devi, respondents Nos. 1 and 2 respectively. The reply filed by the State of Rajasthan is not very clear but the position taken up by the learned Deputy Government Advocate during the course of the arguments is that the Deputy Minister, Industries and Mines Department, had passed an order that the Secretary may hear and dispose of the appeal, and in pursuance of that order, the Secretary had heard and disposed of the appeal on 13th January, 1966.

5. It is to be examined in his case whether the Deputy Minister could have passed an order authorising the Secretary to hear and dispose of the appeal and if he could, whether the Secretary can be said to have disposed of the appeal by his order dated 13th January, 1966.

6. Under the Rules, an appeal lies to the Government as Rule 43 (2) provides that any person aggrieved by any order passed by the Director in appeal under sub-rule (1) shall have the right of appeal to the Government. Under sub-rule (4) of R. 43 it is provided that the orders passed by the Government under appeal shall be final. Under Rule 46, the procedure for hearing and disposing of the appeal has been provided. Rule 46 runs as follows:

"46. Procedure of appeal.—(1) Under receipt of Memorandum of appeal satisfying requirements of rule 44 the appellate authority shall fix a date for hearing. It may if it thinks fit, call for the relevant records and other information from the officer whose order is the subject of appeal.

(2) The appellate authority may confirm or modify the order under appeal, after giving the appellant an opportunity of hearing and considering any comments that might be offered by the officer who gave the order under appeal.

Under rule 46, it is incumbent upon the appellate authority to fix a date of hearing. It is further incumbent on it that it should afford an opportunity of hearing to the appellant.

7. Who is to hear and dispose of the appeal is to be gathered from the Rules of Business made under Article 166 of the Constitution by the Governor of the State of Rajasthan. Rule 4 provides that the business of the Government shall be transacted in the Secretariat Department specified in the First Schedule and shall be classified and distributed between those departments as laid down therein. Rule 5 provides that the Governor shall, on the advice of the Chief Minister, allot among the Ministers the business of Government by assigning one or more departments to the charge of a Minister. The same rule provides that the Minister with whom a Deputy is attached may, with the approval of the Chief Minister, allot to the Deputy Minister any business appertaining to the department. Rule 6 provides that each department of the Secretariat shall ordinarily consist of a Secretary to the Government, who shall be the official head of that department, and of such other officers and servants subordinate to him as the Government may determine. Rule 7 provides for collective responsibility for all advice tendered to the Governor. Rule 9 provides that without prejudice to the provisions of R. 7, the Minister-in-charge of a department shall be primarily responsible for the disposal of the business pertaining to that department. Part IV of the Rules of Business provides for departmental disposal of business and Rule 21 in that Part which is relevant for our consideration runs as follows:

"21 Except as otherwise provided by any other rule, cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge who may, by means of standing orders, give such directions as he thinks fit for the disposal of cases in the department. Copies of such standing orders shall be sent to the Governor and the Chief Minister."

Under this rule, cases are to be disposed of by the Minister-in-charge or under the authority of the Minister-in-charge. The Minister-in-charge may, by means of standing orders, give such directions as he thinks fit for the disposal of cases in the department. The learned Deputy Government Advocate has placed reliance on the relevant standing orders in force at the time when the appeal was decided but he is not in a position to show that under the relevant standing orders the Secretary of the department was authorised by the Minister-in-charge to hear and dispose of the appeal. It may be mentioned that these

standing orders' were subsequently amended in September, 1967. It has, however, been argued that the Deputy Minister had expressly passed an order on the file of this case that it was to be heard and disposed of by the Secretary. This order unfortunately is of the Deputy Minister and not of the Minister-in-charge. It has not been brought to our notice that the Minister had allotted to the Deputy Minister the business of disposing of the appeals arising under the Rules. As already mentioned, under R. 5 (2) the Minister-in-charge could, with the approval of the Chief Minister, allot to the Deputy Minister any business appertaining to the department. If such an allotment had been made, it could have been contended that the Secretary had heard the appeal under the authority of the competent person. So far as the hearing of the appeal is concerned, the Secretary was not competent to hear the appeal.

8. There is yet another flaw in the disposal of the appeal. It was heard by the Secretary but it was disposed of by the Minister who did not hear it. The spirit of Rule 46 is that the appellate authority must give an opportunity of hearing and that authority is of course to decide the case. It is not envisaged that one authority will hear the appeal and another authority will decide it on the recommendation of the authority who heard the appeal. In *G. Nageswara Rao v. A. P. S. R. T. Corpn.* AIR 1959 SC 308, in which personal hearing was required by the provisions of law, their Lordships of the Supreme Court observed as follows:

"The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules imposes a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We, therefore, hold that the said procedure followed in this case also offends another basic principle of judicial procedure." We are, therefore, of the opinion that for the reasons aforesaid, the appeal preferred by respondent No. 2 was not properly decided.

9. We, therefore, quash the order passed by the State Government and

conveyed to the petitioner vide Ex. 4. The State Government is directed to rehear the appeal according to law and then dispose it of. We leave the parties to bear their own costs in this Court.

NYR/D.V.C.

Petition allowed.

AIR 1969 RAJASTHAN 131 (V 56 C 29)

C. B. BHARGAVA J.

Urban Improvement Trust, Petitioner v. Raj Kumari and others, Non-Petitioners.

Civil Revn. Nos. 457, 458 and 438 of 1967, D/- 10-7-1968, against order of Munsif, Alwar, D/- 27-10-1967.

(A) Civil P. C. (1908), O. 1, Rr. 10 (2), 1 and O. 2, R. 3 — Suit for ejectment — Application, at very late stage, by third party claiming title, to be impleaded as party — Question generally of judicial discretion — Categories of cases explained.

The question of addition of parties under O. 1, R. 10 (2) is generally one of judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case subject to the provisions of O. 1, R. 1 and O. 2, R. 3. The rule has been enacted to prevent multiplicity of suits and conflict of decisions, though it is not the only consideration in impleading parties.

Such cases fall in three categories, namely (1) that the third party is a necessary party, (2) the third party is not even a proper party and (3) that the third party is a proper party. However, the question whether the third party claiming title to the property in a suit for ejectment is a proper party or not, would also depend upon the nature of the plaintiff's title. (Paras 5 and 17)

(B) Evidence Act (1872), S. 116 — Contractual relation of landlord and tenant — Defendant inducted into possession of suit property by plaintiff — No question of impleading third party setting up title to suit property can arise — Civil P. C. (1908), O. 1, R. 10 (2).

In cases where there is a contractual relationship of landlord and tenant and the defendant has been inducted into possession of the suit property as tenant by the plaintiff and the rule of estoppel contained in S. 116, Evidence Act operates against the tenant, no question of impleading a third person as a party setting up title to the suit property can arise because any enquiry about the title of a third party would be completely shut out by reason of the rule of estoppel and in such cases the third person would not be a proper party within the meaning of O. 1, R. 10 (2). However, in cases where the plaintiff claims title to the suit property on the basis of inheritance, assignment etc. and the tenant has not attorned to him and the rule of estoppel does not operate against him, enabling himself to set up the title of

a third person, such third person in appropriate cases can be regarded as proper party whose presence before the Court will be necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. In such cases there would be no question of converting a simple suit into a suit of title and no controversy beyond the scope of the suit would be introduced as after his joinder the main evidence in the suit and the main enquiry will remain the same as before his addition. In such cases the Court would not be exercising its discretion improperly to implead him as a party as he would be proper party. AIR 1953 SC 886, Foll. Case law discussed. (Para 20)

(C) Civil P. C. (1909), O. I, R. 10 (2) — Suit for ejectment — Application by third party to be impleaded, made at very late stage causing doubts about his bona fides — Multiplicity of enquiries can be avoided by a separate suit — High Court will not interfere in rejection of his application by lower Court. (Para 21)

Cases Referred: Chronological Paras

(1968) Civil Revn. No. 94 of 1964, D/-18-1-1968=1968 Raj LW 324, Anjuman Monia and S. P. Mohinta v. Murad Mohammed 9

(1966) ILR (1966) Cut 456=32 Cut LT 823, Gagan Behari Patnaik v. Rameshwar Lal 9, 15

(1962) AIR 1962 Mad 348 (V 49)= (1962) 1 Mad LJ 380, M. Abdul Razack v. S. Mohammad Shah 9

(1962) AIR 1962 Pat 357 (V 49), Motiram Roshanlal Coal Co. (P.) Ltd. v. District Committee, Dhanbad 9

(1960) AIR 1960 Bom 238 (V 47)= ILR (1958) Bom 1356, Uttam Gulabrao Sakhare v. Champatrao Gulabrao Gawande 9, 10, 17

(1960) AIR 1960 J and K 67 (V 47), Mt. Bindra v. Sada Ram 9

(1960) AIR 1960 Ker 284 (V 47)= 1960 Ker LJ 361, Chamiar Kanchelan v. Kandan Damodran 9

(1960) AIR 1960 Madh Pra 84 (V 47)= 1959 Jab LJ 624, Sampatbal v. Madhusingh Cambhirji 9

(1959) AIR 1959 Madh Pra 659 (V 46)= 1959 MPLJ 841, Mojtabal v. Mehbub Rehman 9

(1958) AIR 1958 SC 886 (V 45)= 1959 SCR 1111, Razia Begum v. Sahebzadi Anwar Begum 9, 19

(1953) 1953 Raj LW 320, Mst. Singar Kanwar v. Dhoopchand 9, 14

(1952) AIR 1952 Ajmer 59 (V 39), Kana v. Kishenlal 9

(1950) AIR 1950 Mad 91 (V 37)= (1949) 2 Mad LJ 538, V. D. Seetarama Mudaliar v. Momera Chettiar 14

(1937) AIR 1937 Mad 641 (V 24)= (1937) 1 Mad LJ 597, G. Krishnaswami Naidu v. Municipal Council Bellary 9

(1933) AIR 1933 Mad 664 (V 20)= 65 Mad LJ 290, (Pasumarthi) Subbaraya Sastri v. Mukkamala Seetha Ramaswami 9, 17

(1932) AIR 1932 Mad 688 (V 39)= 36 Mad LW 378, Srilla Sri Subramaniya Desika Ganana v. R. Ananthakrishnaswami Naidu 9, 12, 14

(1927) AIR 1927 Cal 340 (V 14)= 45 Cal LJ 146, Pravat Chandra Giri v. Amulya Chandra Bhaduri 9, 13, 14

(1926) AIR 1926 PC 142 (V 13)= 53 Ind App 271, Umedmal v. Chandmal 10

(1882) ILR 8 Cal 238=10 Cal LR 531, Lodai Mollah v. Kally Dass Roy 9, 11, 13, 14, 15, 17

(1842) 4 Man and G. 143 = 134 ER 59, Claridge v. Mackenzie 17

(1826) 3 Bing 474 = 130 ER 596, Gregory v. Doidgo 17

(1815) 6 Taunt 202 = 128 ER 1012, Rogers v. Pitcher 17

C. L. Agrawal and R. P. Goyal, for Petitioner; D. P. Gupta and H. C. Rastogi, for Non-petitioners.

ORDER: These three revision petitions are being dealt with together as the petitioner is common to them and they also raise common questions of law and fact.

2. In the Court of the Munsif, Alwar, the plaintiffs-non-petitioners filed separate suits for ejectment against the defendants-non-petitioners who were described as tenants of one Shivlal deceased from whom they claimed to have purchased the suit property. The defendants in their written statements denied that they held the property as tenants of Shivlal. They stated that they were in possession of the suit property since the time of their ancestors and were permanent tenants of the land and had constructed houses on it at their own costs. They further pleaded that Shivlal had no right to transfer the suit property to the plaintiffs in each case as he was the 'Muafidar' or 'Jagirdar' whose Jagir had resumed by the State of Rajasthan under the Rajasthan Land Reforms and Resumption of Jagirs Act of 1952 (hereinafter called the Act of 1952) and thus the ownership of the suit property vested in the State. They also stated that the alleged sale in favour of the plaintiffs was fictitious.

3. The trial Court did not frame any issue on the plea taken by the defendants viz., that the ownership of the suit property had become vested in the State of Rajasthan because of its resumption under the Act of 1952. The trial proceeded when in the suit out of which Civil Revision No. 458 of 1967 has arisen, defendants made an application for framing an additional issue. The Court acceded to their request and framed additional issue No. 9 on the point whether the ownership of the suit property, due to its resumption, vested in the State and the alleged sale in favour of the plaintiffs was unauthorised. On this issue too, the defen-

defendants closed their evidence and the plaintiffs are now required to lead evidence in rebuttal. The other two cases were also ripe for arguments. It was at this stage of the cases that the petitioner—Urban Improvement Trust, Alwar made an application under O. 1, R. 10 (2) of the Code of Civil Procedure for being impleaded as a party. The learned Munsif rejected the application in each case holding that the simple suit for ejectment cannot be allowed to be converted into a suit for title and if the petitioner wanted an adjudication of its title to the suit property it could file a separate suit. It is against these orders that the present revision applications have been filed.

4. Under O. 1, R. 10 (2) of the Code a person may be added to a suit:

i. when he ought to have been joined, whether as plaintiff or defendant, that is when he is a necessary party.

ii. when without his presence the question in the suit cannot be completely decided, that is when he is a proper party.

5. The question of addition of parties under the said rule is generally one of judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case subject to the provisions of O. 1, R. 1 and O. 2, R. 3. The rule has been enacted to prevent multiplicity of suits and conflict of decisions though it is not the only consideration in impleading parties.

6. In these cases learned counsel has urged that Shiv Lal was a jagirdar and his jagir including the suit property was resumed under the Act of 1952 and thereafter, it vested in the State. Thereafter, under the provisions of S. 43 of the Rajasthan Urban Improvement Act of 1959 (hereinafter called the Act of 1959), a notification was issued by the State whereby these properties along with other properties were placed at the disposal of the petitioner. After the vesting of the property in the State, Shivalal had no right left to transfer it to the plaintiffs. It is pointed out that the presence of the petitioner before the Court is necessary to enable it effectually and completely to adjudicate upon the question whether the petitioner or the plaintiffs is the owner of the land. It is urged that the power of adding parties can be exercised by the Court at any stage of the proceedings.

7. On the other hand learned counsel for the plaintiffs-non-petitioners has vehemently urged that by adding the petitioner, controversies which are foreign to the scope of the suit, would be introduced and the trial in all the cases which had now become mature for disposal, would be reopened. It is pointed out that the suits were instituted in the years 1962 and 1963 and the petitioner applied to be impleaded as a party about four years after their institution. It is pointed out that in the present suits the only question to be tried between the parties is whether the defendants are the tenants of

the plaintiffs they having purchased it from Shivalal and have a right to a decree for ejectment against them. It is also pointed out that the suit property consists of buildings and house sites and could not have been resumed by the State as provided in S. 23 of the Act of 1952. It is also pointed out that even if the suit property was resumed its ownership vests in the State of Rajasthan and not in the petitioner. The effect of the notification relied upon by the petitioner is only to place the property at the disposal of the petitioner and not of vesting its ownership in it. It is contended that all these questions will have to be determined by the Court if the petitioner is added as a party to the suit which are clearly beyond the scope of the present suit.

8. It may be stated at the outset that it is not the contention of the learned counsel for the petitioner that Urban Improvement Trust is a necessary party in the suits. He, however, says that the petitioner is a proper party whose presence before the Court is necessary in order to enable the Court to effectually and completely to adjudicate upon and settle all the questions involved in the suit.

9. In support of his contention learned counsel for the petitioner relied on (Pasumarthi) Subbaraya Sastri v. Mukkamala Seetha Ramaswami, AIR 1933 Mad 664, G. Krishnaswami Naidu v. Municipal Council Bellary, AIR 1937 Mad 641, Razia Begum v. Sahebzadi Anwar Begum, AIR 1958 SC 886 and Sampatbai v. Madhusingh Gambhirji, AIR 1960 Madh Pra 84. On the other hand learned counsel for the plaintiffs non-petitioners has placed reliance on Uttam Gulabrao Sakhare v. Champatrao Gulabrao Gawande, AIR 1960 Bom 238, Mst. Singar Kanwar v. Dhoopchand, 1953 Raj LW 320 a judgment in Civil Revn. No. 94 of 1964, D/- 18-1-1968 (Raj), Anjuman Monia and S. P. Mohinia v. Murad Mohammed, Mt. Bindru v. Sada Ram, AIR 1960 J and K 67, Kana v. Kishenlal, AIR 1952 Ajmer 59, M. Abdul Razack v. S. Mohammad Shah, AIR 1962 Mad 346, Motiram Roshanlal Coal Co. (P.) Ltd. v. District Committee, Dhanbad, AIR 1962 Pat 357, Mujta Bai v. Mehbub Rehman, AIR 1959 Madh Pra 357, Srilla Sri Subramaniya Desika Ganana v. R. Ananthakrishnaswami Naidu, AIR 1932 Mad 688, Pravat Chandra Giri v. Amulya Chandra Bhaduri, AIR 1927 Cal 340, Chariar Kunchelan v. Kandan Damodran, AIR 1960 Ker 284, Lodai Mollah v. Kally Dass Roy, (1882) ILR 8 Cal 233 and Gagan Behari Patnaik v. Rameshwar Lal, ILR (1966) Cut 456. It is however, not necessary to refer to all the decisions relied on by the parties and it would be sufficient to refer only those which relate to suits for ejectment.

10. In (Pasumarthi) Subbaraya Sastri's case, AIR 1933 Mad 664, where the plaintiff brought a suit to eject the defendant from a site and to remove

a pial erected by him thereon and the plea of the defendant was that the land belonged to the Municipal Council, that he put up a pial with its permission and that the Municipal Council was a necessary party to the suit, it was held that:

"The Municipality was a necessary party to the suit and not having been made one, in spite of objection taken from the start, the suit must be dismissed". In this case the learned Judge mainly relied upon *Umed Mal v Chand Mal*, AIR 1926 PC 142 and the observations made by Dicey on Parties to an Action, R. 113. This case was referred in *Uttam Gulabrao Sakhare case*, AIR 1960 Bom 238 and *Mudholkar J* as he then was, distinguished it and held that:

"Where in an ejectment suit instituted by the plaintiff as landlord against the defendant in actual juridical possession of the house, the defendant pleads that the house in question belonged to third party and not to the plaintiff, and the title of the third party is disputed by the plaintiff, though the third party is proper party to the suit, his founder was not necessary to enable the plaintiff to obtain the relief which he claimed against the defendant".

11. In *Lodal Mollah's case*, (1882) ILR 8 Cal 238 it was held per Field J., that:

"Where a person sued for rent sets up the title of a third party, and alleges that he holds under, and pays rent to him, such third party ought not to be made a party to the suit so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed.

Such a suit raises only two issues, viz.,

(1) Does the relation of landlord and tenant exist between the plaintiff and defendant?

(2) Are the alleged arrears of rent due and unpaid?

And these are questions in which the plaintiff and defendant are alone concerned, and no third party claiming a title adverse to the plaintiff can properly be made a party to the trial of these issues.

Section 28 of the Civil Procedure Code is not imperative, but allows a discretion to be exercised, and in such a suit it is better both in the interests of Government and for the proper adjudication of the question of title, that it should be tried by a competent Court in a suit directly framed and brought for that purpose".

12. In *Srila Sri Subramaniya Desika Ganana's case*, AIR 1932 Mad 688 it was held that:

"In an ejectment suit on basis of lease deed, prima facie, persons claiming adverse rights to the plaintiff's title should not be made parties in the absence of special circumstances".

13. In *Pravat Chandra Giri's case*, AIR 1927 Cal 340 following the decision in *Lodal*

Mollah's case, (1882) ILR 8 Cal 238 it was held that:

"A third party ought not to be made a party to a suit for rent so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed".

14. In *Mst. Singar Kanwar's case*, 1953 Raj LW 320 it was held that:

"In a rent suit where the defendant admitted the execution of rent note but pleaded that he executed it under undue influence and that one H was the real landlord, it was held that H was not necessary party". *Lodal Mollah*, (1882) ILR 8 Cal 238, *Pravat Chandra Giri*, AIR 1927 Cal 340, *Srila Sri Subramaniya Desika Ganana*, AIR 1932 Mad 688 and *N T. Palamsamy Chettiar* by agent *V. D. Sektarama Mudahar v Momara Chettiar*, AIR 1950 Mad 91 were relied upon for the said view.

15. In *Gagan Behari Patnaik's case*, ILR (1968) Cut 458 it was held that:

"A simple suit for rent should not be converted into a complicated title suit. There are some well known exceptions to the aforesaid dictum, viz., cases where a third party claims a share of the rent sued for, or where a third party is alleged to be a transferee from the tenant with the landlord's consent, or where the defendant in a suit for rent by the lessee against the sub-lessee pleads payment to a third party with the owner's consent. Subject to the various exceptions, some of which have been illustrated above, a suit for rent should not be converted into a complicated title suit and a third party claiming a title rival to that of the plaintiff-landlord is not a necessary party".

It may be noted that the petitioner in that case had already filed a separate suit claiming that he was the real owner of the disputed property.

16. Similar view was taken in *Chamilar Kunuchelan's case*, AIR 1960 Ker 284.

17. A review of the above decisions would show that they fall in three categories, viz., (i) that the third party is a necessary party (*Parumarthi Subbaraya Sastri's case*, AIR 1933 Mad 884) (ii) the third party is not even a proper party, *Lodal Mollah's case*, (1882) ILR 8 Cal 238 and other cases which have followed it, (iii) that the third party is a proper party, *Uttam Gulabrao's case*, AIR 1960 Bom 238. However, to my mind the question whether the third party claiming title to the property in a suit for ejectment is a proper party or not, would also depend upon the nature of the plaintiff's title. In cases where there is a contractual relationship of landlord and tenant and the defendant has been inducted into possession of the suit property as tenant by the plaintiff and the rule of estoppel contained in S 116 of the Evidence Act operates against the tenant no question of impleading a third person as a party setting up title to the suit

property can arise because any enquiry about the title of a third party would be completely shut out by reason of the rule of estoppel and in such cases the third person would not be a proper party within the meaning of O. 1, R. 10 (2), Civil P. C. However, in cases where the plaintiff claims title to the suit property on the basis of inheritance, assignment etc., and the tenant has not attorned to him and the above mentioned rule of estoppel does not operate against him and it is open to him in the suit to set up the title of a third person, such third person in appropriate cases can be regarded as a proper party whose presence before the Court will be necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. In such cases there would be no question of converting a simple suit into a suit of title and no controversy beyond the scope of the suit would be introduced as after his joinder the main evidence in the suit and the main enquiry will remain the same as before his addition. In *Lodai Mollah's case*, (1882) ILR 8 Cal 238, Field J. observed:—

“But it is clear that, in cases falling under this head, there may be a further defence; there may be a denial of the facts which constitute the derivation, or denial of the assignment, or of the adoption, or of the validity of either; or of the plaintiff being the heir of the original person from whom he professes to derive title by inheritance. It is clear that it is only as regards this further matter of defence that the rights of third parties can come into question. The effect of an assignment, or of an adoption, or of a claim founded on inheritance, may be to deprive of the property, and so of the rents and profits, of some other person who, but for such assignment or adoption or claim founded on inheritance, would be entitled thereto. This class of cases may be further divided into (a) cases where the defendant has attorned to the plaintiff; and (b) cases where the defendant has not attorned to the plaintiff. (a) Where the plaintiff claims by a derivative title, and the defendant has attorned to him, the defendant is not thereby stopped from showing that the title is really not in the plaintiff but in some other person: (See the cases of *Rogers v. Pitcher*, (1815) 6 Taun. 202, *Claridge v. Mackenzie*, (1842) 4 Man & G. 143 and *Gregory v. Doidge*, (1826) 3 Bing. 474). In this last case, a person had occupied lands under A. Upon A's death this person entered into an agreement to pay rent to D, and paid one shilling as an acknowledgment of D's title, being ignorant that D had no title to the property. It afterwards turned out that D had no title, and it was held, that such person might show in answer to a suit for rent that D had really not title. Ordinarily, a tenant who had attorned would not set up this defence unless some person had satisfied him of a better title and prohibited him from paying rent to the plain-

tiff. There is no plausible reason why this third person should be made a party to the suit for rent, and it is really for his own interest that he should not be a party. If he is a party, he will be bound by the adjudication upon the question of title, and this adjudication may be based upon scanty materials and insufficient investigation, which are not uncommon when the subject-matter of the claim itself is inconsiderable. If he is not a party, he has the chance of the tenant's plea being successful, and so of himself stepping into the place of landlord without personal litigation. If the tenant's plea is unsuccessful, he can litigate the question of title himself with better preparation and with experience gained from the contest at which he looked on without being a party”.

18. It would appear from the above that it was on the ground of expediency that it was held that the third person need not be joined as a party in such a suit because it is in his own interest that he should file a separate suit for the proper adjudication of his own title. At the same time it has been clearly observed that the question of rights of third parties do come in such cases because the effect of an assignment, or of an adoption, or of a claim founded on inheritance may be to deprive of the property, and so of the rents and profits, of some other person.

19. The power of the Court to add parties under O. 1, R. 10 (2) came up for consideration by the Supreme Court in *Razia Begam's case*, AIR 1958 SC 886. Their Lordships of the Supreme Court held *inter alia* that:

“In a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject matter of a litigation”.

20. Bearing in mind the above principle and the views expressed in the various decisions quoted above, I am of the view that in suits for ejectment falling under the second category noted by me, a third person claiming title in himself can be a proper party and the Court would not be exercising its discretion improperly to implead him as a party for the complete and effectual determination of the points involved in the suit.

21. The next question whether the present cases call for any interference with the discretion exercised by the Court below even though the reason given by that Court is not wholly sound. For more than one reason I am not inclined to interfere with the lower Court's discretion. Firstly, I am not satisfied with the bona fides of the petitioner in making the applications for being added as party in the lower Court because as mentioned earlier, these suits were filed as back as 1962 and 1963 and the petitioner submitted its applications in 1967 and sometime earlier also got some documents executed in

its favour by the defendants which shows that its object is to help the defendants in defeating the suit of the plaintiffs and not the vindication of its own rights. The suits were filed as back as 1962 and 1963 and no reason has been shown why applications for being added as a party were made as late as 1967, when suits had become ripe for arguments. Secondly, the suit property is situated in the city of Alwar and is in possession of the defendants. It seems to me rather doubtful although I express no opinion on this question how buildings and house sites situated in the city of Alwar could be resumed in the resumption proceedings taken against Shival under the Act of 1952. Thirdly, the parties are added very often to avoid multiplicity of suits and conflict of decisions. But here I am told that Shival had transferred houses and lands situated in the same locality known as Shivalpuri to different persons under various transfer deeds and many of them have filed suits against persons in occupation of those properties. There are about 40 suits pending in the Court below of similar nature. In case the petitioner is added party in these suits, it will have to be added as party in all the pending suits also and in each suit separate enquiry will be made regarding the title of the petitioner which instead of avoiding multiplicity of suits will lead to multiple enquiries in all the suits. On the other hand, if the petitioner files a separate suit in which all the transferees and the persons in occupation of those lands can be impleaded as defendants because there would be a common question of law and fact to be determined, the controversy will be determined once for all in that one enquiry. For the above mentioned reason no interference is called for with the order passed by the Court below.

22 The revision applications are rejected, but without costs.

DGB/DVC

Applications rejected.

AIR 1969 RAJASTHAN 136 (V 56 C 30)
D S DAVE, C J AND C M LODHA, J

Shitabkhan, Petitioner v Bar Council of India and others, Respondents

Civil Misc. Writ Petn. No 81 of 1967,
D/2-5-1968

Advocates Act (1961), Ss 24 (1) (c) (iii), 7 (b) (i) and 49 (ag) — Powers of Bar Council — Enrolment as Advocate — Recognition of law degrees obtained after graduation — Resolution not invalid — Receiving Diploma in Rural Services, held, no graduation — (Constitution of India, Arts 14 and 19) — (Civil P. C. (1908), Pre. — Interpretation of Statutes).

The petitioner passed the Higher Secondary Examination of the Board of Secondary Education, Rajasthan, in the year

1960 and thereafter joined three years' diploma course in Rural Services of the National Council for Rural Higher Education Ministry of Education, Government of India, in Jamia Rural Institute, New Delhi and obtained the diploma in the year 1963. He took LL B Degree from the University of Rajasthan in the year 1965. Since the Central Government in exercise of the powers conferred by the Advocates Act, exempted the candidates who had obtained degree in law on the results of examination held before 31-12-1965 from undergoing a course of training as required by the Act, the petitioner applied to the Bar Council of Rajasthan for enrolment as an Advocate. The Bar Council of Rajasthan in conformity with the decision of the Bar Council of India informed the petitioner that in view of a resolution passed by the Bar Council of India as far back as 25-2-1963 a degree in law obtained after 30-6-1964 from any University in the territory of India could be recognised only if such degree had been obtained after undergoing a course of study in Law after graduation and hence he could not be enrolled. On the question of the validity of the aforesaid Resolution

Held, (1) that on a correct interpretation of S 24 (1) (c) (iii) of the Act, the Bar Council of India was competent to prescribe a class or category of holders of degree in law from any University in the territory of India who would be entitled to be enrolled as Advocates. Sub-section (ag) to S 49 goes to show that the Bar Council has ample power to prescribe the class or category of persons entitled to be enrolled. The categorisation made in the resolution could not be said to be either arbitrary or unreasonable and does not violate Arts 14 and 19 of the Constitution. (Paras 11 and 18)

(2) that the graduation as used in the impugned resolution refers to the act of receiving a degree from a University established by law. The word ought not to be interpreted in a wide manner drawing support from how it is defined in various dictionaries and though the word 'graduation' has not been defined in the Act, one has to look to the definition of the word in the light of the definition of 'law graduate' contained in S 2 (h) of the Advocates Act. (Para 15)

When a word is not defined in the Act itself, it may be permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of the word regard must always be had to the context. (1914) 1 KB 641 at 647, Rel. on. (Para 15)

(3) that the question whether the Diploma in Rural Services obtained by the petitioner is equivalent to 'graduation' for the purposes of this Act is purely an academic matter which is to be decided by the Bar Council

of India itself which is an autonomous body and it would not be appropriate for the Court to differ from the opinion of the Bar Council of India on this point when the view taken by that body cannot be said to be patently erroneous. In these circumstances, the Bar Council could not be held to have acted unreasonably or erroneously in coming to the conclusion that the petitioner did not satisfy the qualifications prescribed for enrolment as an Advocate. AIR 1965 SC 491, Foll. (Paras 16 and 17)

and (4) that the impugned resolution could not be invalidated on the ground that it was not published. AIR 1951 SC 467, Dist.

(Para 19)

Cases Referred:	Chronological	Paras
(1965) AIR 1965 SC 491 (V 52) =		
(1964) 4 SCR 575, University of Mysore v. C. D. Govinda Rao		16
(1951) AIR 1951 SC 467 (V 38) =		
1952 Cri LJ 54, Harla v. State of Rajasthan		19
(1914) 1914-1 KB 641=83 LJKB 509, Camden (Marquis) v. Commr. of Inland Revenue		15

P. N. Dutt and K. N. Tikku, for Petitioner; J. P. Jain, for Bar Council of India; Smt. Renu Chatterjee, for Bar Council of Rajasthan; Moti Mal Bhandari, Secretary, Bar Council, Rajasthan.

LODHA, J.:—This is a petition under Art. 226 of the Constitution of India for issue of an appropriate writ, direction or order against the Bar Council of India and the Bar Council of Rajasthan calling upon them to enrol the petitioner as an Advocate.

2. The facts giving rise to this petition lie within a narrow compass. The petitioner passed the Higher Secondary Examination of the Board of Secondary Education, Rajasthan, in the year 1960 and thereafter joined three years diploma course in Rural Services of the National Council for Rural Higher Education, Ministry of Education, Government of India, in the Jamia Rural Institute, New Delhi and obtained the diploma in the year 1963. He took LL. B. Degree from the University of Rajasthan in the year 1965. The petitioner wanted to be enrolled as an Advocate and therefore, he got himself registered as a candidate for training in law with the Rajasthan Bar Council in 1965. Subsequently the Central Government in exercise of the powers conferred by the Advocates Act, 1961 exempted the candidates who had obtained degree in law on the results of examination held before 31-12-1965 from undergoing a course of training as required by the Advocates Act, 1961. The petitioner, therefore, applied to the Bar Council of Rajasthan for enrolment as an Advocate. The Bar Council of Rajasthan by its letter dated 24-2-1966 which has been placed on the record and marked Ex. 7 informed the petitioner that the Bar Council of India had passed a resolution as far back

as 25-2-1963 whereby a degree in law obtained after 30-6-1964 from any University in the territory of India could be recognised only if such degree had been obtained after undergoing a course of study in Law for a minimum period of 2 years after graduation and since it was doubtful whether the petitioner fulfilled these conditions, the petitioner's matter had been referred to the Bar Council of India for consideration. The Bar Council of India, however, vide its resolution No. 51 of 1966, held that the diploma in Rural Services awarded to the petitioner by the National Council cannot be treated as equivalent to a degree of a University of India. On receipt of this information from the Bar Council of India, the enrolment Committee of the Bar Council of Rajasthan proposed to refuse the application of the petitioner for enrolment as an Advocate by its order dated 11th August, 1966 but in view of the hardship that may be caused to the petitioner, it again referred the matter to the Bar Council of India for reconsideration.

The petitioner also submitted a written representation to the Bar Council of India on 22-9-1966 but he was ultimately informed by the Secretary, Bar Council of Rajasthan vide his letter D/- 14-12-1966 that the Bar Council of India vide its resolution No. 131/1966 had resolved that the refusal of the petitioners' request to be enrolled as an Advocate by the Bar Council of Rajasthan was in order. It is in these circumstances that the petitioner has filed the present writ application in this Court on 7-1-1967. The petitioner also stated in his petition that on 8-3-1966 the Bar Council of India had made Rules regarding Standard of Legal Education and Recognition of Degrees in Law for Admission as an Advocate and under R. 1 it was provided that "No person shall be eligible for enrolment under the Advocates Act, 1961 unless at the time of joining the course of instruction in law for a degree in Law he is graduate of University". In this writ petition the petitioner has challenged the validity of the aforesaid Resolutions and also of R. 1 of the Rules referred to above passed by the Bar Council of India, and has finally prayed that the decision of the Bar Council of Rajasthan endorsed by the Bar Council of India rejecting the application of the petitioner for enrolment as an Advocate be set aside, and a direction be issued to the Bar Council of Rajasthan to enrol the petitioner as an Advocate.

3. The petition has been opposed both by the Bar Council of India as well as the Bar Council of Rajasthan, who have filed, though separate but identical replies to the writ petition. The University of Rajasthan was also impleaded as non-petitioner No. 3 but it is not represented before us. The main plea raised both by the Bar Council of India as well as the Bar Council of Rajasthan is that the Bar Council of India was perfectly competent

to refuse to recognise the degree of law obtained by the petitioner inasmuch as the degree in law had not been obtained by him after graduation as required by the resolution of the Bar Council of India dated 25th February, 1963.

4. For a correct appraisal of the contentions raised by the parties it would be necessary to refer to certain relevant provisions of the Advocates Act (Act No 25 of 1961), (which will hereinafter be called "the Act")

5. Section 6 of the Act enumerates the functions of a State Bar Council, the first among which is "to admit persons as Advocates on its roll".

6. Section 7 lays down the functions of the Bar Council of India the relevant among which for our purposes are clauses (h) and (i) which are reproduced below—

(h) "to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils.

(i) to recognise Universities whose degree in law shall be a qualification for enrolment as an Advocate and for that purpose to visit and inspect Universities;"

7. Then comes the most important provisions for our purposes Section 24 the relevant portion of which reads as under—

"24 Persons who may be admitted as advocates on a State roll—

(i) Subject to the provisions of the Act and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfils the following conditions, namely—

(a) he is a citizen of India,

Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an Advocate on a State roll if citizens of India, duly qualified, are permitted to practise law in that other country;

(h) he has completed the age of twenty-one years

(c) he has obtained a degree in law—

(i) before the 28th day of February, 1963 from any University in the territory of India, or

(ii) before the 15th of August, 1947 from any University in any area which was comprised before that date within India as defined by the Government of India Act, 1935 or

(iii) after the 25th day of February 1963, from any University in the territory of India if the degree is recognised for the purposes of this Act by the Bar Council of India, or he is a barrister or

(iv) in any other case, from any University outside the territory of India, if the degree is recognised for the purposes of this Act by the Bar Council of India,

(d) he has undergone a course of training in law and passed an examination both of

which shall be prescribed by the State Bar Council

8. Then we may refer to S. 49 which deals with the general power of the Bar Council of India to make rules. The relevant clauses for our purposes in this section are (ag) and (d) which are extracted below for ready reference.

"49 General power of the Bar Council of India to make rules:—

The Bar Council of India may make rules for discharging its functions under this Act, and in particular, such rules may prescribe.

.....
(ag) the class or category of persons entitled to be enrolled as advocates,

.....
(d) the standards of legal education to be observed by Universities in India and the inspection of Universities for that purpose;"

9. Before embarking upon the decision of the question of validity or otherwise of the resolution passed by the Bar Council of India dated 25-2-1963 it would be necessary to reproduce that resolution in verbatim. It reads as follows —

"1. Resolved that a degree in law obtained on or before the 30th June, 1964 from any University established by law in the territory of India be recognised for the purposes of S 24 (1) (c) (iii) of the Advocates Act, 1961

2. Resolved that no degree in law obtained after the 30th June, 1964 from any University in the territory of India shall be recognised unless such degree has been obtained after undergoing a course of study in law for a minimum period of two years after graduation provided however that nothing herein contained shall affect a person who has commenced a course of study in law before graduation prior to 28th February, 1963 and obtained a degree in law before the 1st October, 1966

3. Resolved that for the purposes of Section 24 (1) (c) (iii) of the Act, a degree in law obtained from any University in Pakistan shall be recognised only if such degree has been obtained after a study in law for a minimum period of two years after graduation."

10. Learned counsel for the petitioner has strenuously contended before us that the petitioner has obtained a degree in law after the 28th of February, 1963 from the University of Rajasthan and the LL. B Degree awarded by the University of Rajasthan has been recognised by the Bar Council of India for the purposes of the Act, and it is therefore not open to the Bar Council of India to go behind that degree and reject the petitioner's application for enrolment on the ground that the degree of law had been awarded to the petitioner before graduation. To put it more precisely his contention is that it is within the purview of the Bar Council of India to recognise or not to recognise a degree in law awarded by any

University in the territory of India but once the degree of a University is recognised for the purposes of this Act, the Bar Council is not competent to make any distinction between the degrees of law obtained from that University after graduation and those obtained before graduation.

In order to support his argument the learned counsel has referred to S. 7 (1) of the Act which gives authority to the Bar Council of India "to recognise the Universities whose degree in law shall be qualification for enrolment as an Advocate". The learned counsel has therefore submitted that the resolution dated 25-2-1963 passed by the Bar Council of India to the effect that "no degree in law obtained after 30-6-1964 from any University in the territory of India shall be recognised, unless such degree has been obtained after undergoing a course of study in law for a minimum period of two years after graduation" is ultra vires of S. 24 (1) (iii) of the Act.

11. On the other hand Shri J. P. Jain, learned counsel for the Bar Council of India has argued that the Bar Council of India is authorised to recognise or not to recognise the degree in law obtained by a particular individual from any University and according to him it was not the intention of the legislature that once the degree in law of any University in the territory of India is recognised then the Bar Council of India is bound to recognise all degree-holders in law of that University. The correct decision of this point depends upon the interpretation of S. 24 (1) (c) (iii) of the Act. We may state at once that we are not impressed by the extreme position taken by Shri Jain that the Bar Council of India is competent to distinguish between the holders of the degree in law obtained from the same University in similar circumstances. That would amount to conferring most arbitrary, unbridled and capricious power on the Bar Council of India without any rational basis and we do not think it was the intention of the legislature to confer such a power on the Bar Council of India. The language of S. 24 (1) (c) (iii) also does not warrant such an interpretation. But at the same time we are also not prepared to accept the contention advanced on behalf of the petitioner that the moment the degree of law conferred by any University in the territory of India is recognised by the Bar Council of India it has to enrol all such degree holders as Advocates and it cannot prescribe any class or category of holders of such degree who may be entitled to be enrolled as Advocates.

A bare perusal of the resolution passed by the Bar Council of India in its meeting held on 25-2-1963 would show that in the first instance it recognised degree in law obtained on or before 30-6-1964 from any University established by law in the territory of India. This is the first class or category. The second class or category of persons, it

has carved out, consists of those persons, who may obtain after 30-6-64 degree in law from any University in the territory of India after undergoing a course of study in law for a minimum period of two years after graduation. Thus the Bar Council of India has prescribed certain class or category of persons who may be enrolled as Advocates. The condition that if a person who has obtained a degree in law from any University of India after 30th June, 1964 wants to be enrolled as an Advocate, he must show that he had obtained the degree in law after graduation, cannot be called arbitrary, unreasonable or discriminatory because it is the function of the Bar Council of India to promote legal education and to lay down standards of such education. The Act has given to it the authority to recognise a degree in law for the purposes of this Act. In this view of the matter we are clearly of the opinion that the resolution passed by the Bar Council of India dated 25-2-1963 to the effect that no degree in Law obtained after the 30th June, 1964 from any University in the territory of India shall be recognised unless such degree has been obtained after undergoing a course of study in law for a minimum period of two years after graduation does not violate the provisions of S. 24 (1) (c) (iii) of the Act. This classification made by the Bar Council of India is reasonably related to the object of the Act, which sought to create autonomous Bar Councils, one for the whole of India and one for each State and conferred upon the Bar Council of India the duty to promote legal education and to lay down standards of such education.

It is further clear from the provisions of S. 24 of the Act that one of the objects of the Act was to prescribe a uniform qualification for the admission of persons to be Advocates. The classification which the Bar Council of India has made is not arbitrary and there appears to be a reasonable basis for it. The Bar Council of India has, in its wisdom deemed it necessary to make provision that the degree in law obtained from any University in India after 28th day of February, 1963 will be recognised for the purposes of this Act only if such degree has been obtained after undergoing a course of study in law for a minimum period of two years after graduation. This, in our opinion, the Bar Council of India was entitled to do. This decision of the Bar Council is not based on grounds of race, religion, sex etc., but solely on the ground of qualifications. The petitioner cannot urge with any justification that there were other persons similarly situated as the petitioner out of whom the petitioner has been picked out for unequal treatment. Consequently the impugned resolution does not violate Arts. 14 and 19 of the Constitution. Upon this view, it follows that the resolution passed by the Bar Council of Rajasthan dated 25-2-1963 prescribing that no degree in law obtained after the 30th of

June, 1964 from any University in the territory of India shall be recognised unless such degree has been obtained after undergoing a course of study in law for a minimum period of two years after graduation cannot be challenged as unconstitutional. We are of opinion that on a correct interpretation of S 24 (1) (c) (ii) of the Act, the Bar Council of India is competent to prescribe a class or category of holders of degree in law from any University in the territory of India who would be entitled to be enrolled as Advocates.

We are fortified in this view by another provision of the Act which has been inserted by S 20 of the Act 21 of 1964 whereby under S 49 of the Act the Bar Council of India has been given an overriding power to make rules for discharging its functions under this Act and in particular such rules may prescribe

(ag) the class or category of persons entitled to be enrolled as Advocates.

This provision clearly goes to show that the Bar Council has ample power to prescribe the class or category of persons entitled to be enrolled. Thus though S 49 (ag) was not contained in the Act at the time the impugned resolution was passed, yet the power of recognition of the degree in law obtained from any University was there in the Bar Council of India by virtue of S 24 (1) (c) (ii) of the Act and it appears to us that the impugned resolution does not contain anything which may come in conflict with the provisions of the Constitution of India or the Act.

12. The next contention raised by the petitioner is that even if the impugned resolution of the Bar Council of India dated 25th February, 1963 is considered to be valid, the Diploma in Rural Services awarded to the petitioner by the National Council for Rural Higher Education is equivalent to the first degree of a recognised University and therefore the petitioner fulfilled the qualifications prescribed in the impugned resolution. In this connection the petitioner has brought to our notice that 52 Universities in the territory of India, a list of which has been annexed to the petition have recognised this diploma as equivalent to Bachelor's degree and have granted admission for Post Graduate studies in certain subjects for which recognition to such a diploma has been accorded. It has been urged that the University of Rajasthan grants admission to M. A. in Economics, Sociology, History, Public Administration, and similar disciplines to a holder of Diploma in Rural Services. He has also placed on record an order from the Government of Rajasthan dated 13-12-62 (enclosure C' to Ex. 1) by which the Government of Rajasthan has decided to accord permanent recognition to the Diploma in Rural Services awarded to the National Council of Rural Higher Education as equivalent to the first degree of a recognised

University for the purpose of employment to posts and services under the State Government.

We have also been referred to the dictionary meaning of the word "graduation". In Webster's Third International Dictionary, Vol. I, the term 'Graduate' has been defined as "one that has received an academic degree a diploma or a certificate (College) (High School) At another place 'graduate' has been shown to mean 'to grant an academic or professional degree, diploma or certificate' In the same dictionary the word 'graduation' has been defined as the act of receiving a diploma certificate or degree from a school, college or University; the act or ceremony of conferring academic diploma, certificates or degrees.

13. In the Random House Dictionary of the English Language the term 'graduate' is understood to mean 'a person (i) who has received a degree or diploma on completing the course of study, as in a University, college or a School, (ii) a student who holds the first of Bachelor's degree and is studying for an advanced degree', in the same dictionary the definition of the word 'graduation' has been given as below—

"(i) act of graduating; the state of being graduated,

(ii) the ceremony of conferring degrees or diplomas as at a College or a School"

On the basis of the meaning of the words 'graduate' and 'graduation' given in the above-mentioned dictionaries, the learned counsel for the petitioner has urged that the diploma obtained by the petitioner under Rural Services should be considered as 'graduation'.

14. On the other hand the learned counsel for the Bar Council of India has contended that the word 'graduation' has been used in the impugned resolution in the restricted sense of receiving a Bachelor's Degree from a University established by law. In this connection he has placed reliance on S 22 of the University Grants Commission Act, 1956 which runs as under—

"22. Right to confer degrees.

(1) The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be University under Section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees.

(2) Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree.

(3) For the purposes of this section, "degree" means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the commission by notification in the official Gazette."

He has also invited our attention to Sec. 8 of the University Grants Commission Act to show that the Central Government may on the advice of the Commission declare that any institution for higher education other than a University shall be deemed to be a University for the purposes of this Act.

It is contended that the National Council for Rural Higher Education is not a University nor has it been declared by the Central Government that it shall be deemed to be a University for the purposes of University Grants Commission Act. Learned Counsel has also referred to the definition of the word "Law Graduate" as contained in Section 2 (h) of the 'Act'. "Law Graduate", according to this definition, means "a person who has obtained Bachelor's degree in law from any University established by law in India." Deriving support from this definition Mr. Jain has argued that in order to be called a graduate in any subject, a person must have obtained a Bachelor's Degree in that subject from any University. It has been submitted on behalf of the Bar Council of India that the University of Rajasthan as well as other Universities have recognised diploma in Rural Services obtained by the petitioner only for certain limited purposes and it was within the competence of the Bar Council of India to recognise or not to recognise this diploma as equivalent to graduation.

15. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties. When a word is not defined in the Act itself, it may be permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of the word regard must always be had to the context. *Cozens-Hardy M. R. said in Camden (Marquis) v. Commissioners of Inland Revenue, 1914-1 KB 641, at p. 647:*

"It is for the Courts to interpret the Statute as best as they can. In so doing the Courts may, no doubt, assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries."

It was urged on behalf of the petitioner that the Courts should accept the wider significance of the term 'graduation' and include within its connotation the diploma granted to the petitioner by the National Council for Rural Higher Education even though it was not a degree obtained from a University established under Law. We find ourselves unable to accept this contention. As already stated the term 'law graduate' has been defined in the Act itself to mean a person who has obtained a Bachelor's Degree in Law from any University established by Law in India. This definition of 'law graduate'

as contained in the Act, in our opinion, will have more weight in construing the word 'graduation' in *pari materia* than the meaning of the term 'graduate' furnished by dictionaries. Thus even though the words "graduate" and "graduation" have not been defined in the Act, we have yet to look to the definition of the word 'Law Graduate' given in the Act, and construe the word 'graduation', in the light of this definition. This definition, in our view, makes the meaning of the word 'graduation' used in the impugned resolution quite clear and it becomes unnecessary to search for and select a particular meaning out of the diverse meanings, the word is capable of, according to lexicographers. Consequently we are of the opinion that the contention of the Bar Council that graduation as used in the impugned resolution refers to the act of receiving a degree from a University established by law is not incorrect.

16. There is another aspect of the matter also and it is this: Whether the Diploma in Rural Services obtained by the petitioner is equivalent to 'graduation' for the purposes of this Act is purely an academic matter which is to be decided by the Bar Council of India itself which is an autonomous body and it would not be appropriate for us to differ from the opinion of the Bar Council of India on this point when the view taken by that body cannot be said to be patently erroneous. The Bar Council has accepted the restricted definition of the word 'graduation' so as to mean the act of receiving a Bachelor's degree from a University established by Law in India and the courts would naturally hesitate to brush aside this view of the Bar Council particularly when it appears that the Bar Council of India which consists of experts such as Attorney-General of India, the Solicitor-General of India and a representative elected by each State Bar Council from its members, was satisfied that the act of receiving diploma, in the Rural Services was not graduation. In these circumstances it cannot be held that the Bar Council has acted unreasonably or erroneously in coming to the conclusion that the petitioner did not satisfy the qualifications prescribed for enrolment as an Advocate.

In this connection we may refer to the observations made by their Lordships of the Supreme Court in the *University of Mysore v. C. D. Govinda Rao, AIR 1965 SC 491*. Their Lordships were pleased to observe as follows:

"Where one of the qualifications for the appointment to the post of a Reader in the University was that the applicant should possess a First or High Second Class Master's Degree of an Indian University or an equivalent qualification of a foreign University the candidate should possess a First Class Master's Degree of an Indian University or High Second Class Master's Degree of an

Indian University or qualification of a foreign University which is equivalent to a First Class or a High Second Class Master's degree of an Indian University. Whether the foreign degree is equivalent to a High Second Class Master's Degree of an Indian University is a question relating purely to an academic matter and courts would naturally hesitate to express a definite opinion, specially when the selection Board of Experts considers a particular foreign University degree as an equivalent."

17. These observations of their Lordships indicate that the Courts should be slow to interfere with the opinions expressed by the experts in academic matters. As already observed above, the Bar Council of India is an autonomous body which has been given wide powers in the matter of laying down standards of legal education and unless it is found that it has acted mala fide or in clear defiance of a mandatory provision contained in any statute, it would normally be wise and safe for the Courts to leave the decision of such matters to the Bar Council itself.

18. In this view of the matter it is not necessary to adjudge on the validity of the Rules made by the Bar Council of India, vide its circular dated 8-3-1968. In the first place the petitioner's case is not governed by these Rules as they were made later on and the petitioner's application for enrolment was refused not on account of these rules but because the petitioner did not fulfil the qualifications prescribed in the impugned resolution. Apart from that, the condition laid down in Rule 1 of these rules that "no person shall be eligible for enrolment under the Advocates Act 1961 unless at the time of joining the course of instruction in law for a degree in law, he is a graduate of a University" appears to us to be in order and we do not propose to repeat all those reasons in support of our view which we have already given while upholding the validity of the impugned resolution. The Bar Council thus had an authority to make such a rule in view of the provisions contained in Section 24 (1) (c) (iii) read with S 49 (ag) and (d) and Section 7 (b) and (1) of the Act.

19. Before parting with the case we may dispose of another argument advanced by the learned counsel for the petitioner. It has been urged that the impugned resolution of the Bar Council of India dated 5-2-1963 was never published nor the public was made aware of it and therefore it should be adjudged as invalid. In this connection reliance has been placed on *Harla v State of Rajasthan*, AIR 1951 SC 487. While dealing with a criminal appeal from conviction under Section 7 of Japur Opium Act their Lordships were pleased to observe as follows:—

"In the absence of any special law or custom, it would be against the principles of

natural justice to permit the subject of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is, or at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential."

We may state here that the rationale of the decision in *Harla's* case, AIR 1951 SC 487 has no application to the facts and circumstances of the present case. The petitioner is not sought to be punished or penalised under the Advocates Act and it was not necessary under any provision of law for the Bar Council to promulgate or publish its resolution. Moreover the act of recognising a degree in law obtained from any University for the purposes of the Act cannot be said to be a law made by the Bar Council. In this view of the matter we do not see any substance in this contention of the petitioner also.

20. For the reasons mentioned above we do not see any force in this petition and dismiss it. But in the circumstances of this case we make no order as to costs.

TVN/D.V.C.

Petition dismissed.

AIR 1969 RAJASTHAN 143 (V 58 C 31)

L. N. CHHANGANI AND L. S. MEHTA, JJ
Dholpur Glass Works Ltd., Petitioner v. Commissioner of Income Tax, Delhi and Rajasthan, New Delhi, Non petitioner.

Civil Income Tax Reference No 18 of 1964, D/- 29-7-1968, Reference made by L-T Appellate Tribunal, Delhi Branch "B" on 7-5-1964.

(A) Income Tax Act (1922), S. 10 (2) (iv) — Lump sum paid voluntarily to managing agents who were entitled to commission on profits, in recognition of their past services and sacrifices — Not allowable deduction under Section 10 (2) (iv).

A reference to Section 10 (2) (iv) of the Act makes it clear that, in order to claim successfully a deduction, the assessee must prove that the expenditure was laid out or expended "wholly and exclusively" for the purpose of business, profession or vocation and that the expenditure was not to the nature of capital expenditure or personal expenses. What money can be said to be

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wholly and exclusively laid out and expended for the purpose of business etc. has to be decided on consideration of commercial expediency which in the very nature of things cannot admit of the application of a rigid test. (Para 7)

The assessee company paid a sum of Rs. 60,000 to their managing agents (who were already entitled to commission on profits), as a reward for their past services and sacrifices. The assessee company claimed the amount paid as a permissible deduction principally on the ground that the payment was made to earn the goodwill of the managing agents which was a matter of commercial expediency. It was not the case of the company nor was any evidence led to show that the payment was made with a view to facilitate business in future or that the payment was made on commercial expediency. The claim was disallowed by the I. T. authorities:

Held, on the facts, that the payment was not allowable as business expenditure or as indirectly facilitating the carrying on business, under clause (xv) of sub-section (2) of Sec. 10. A reward for past services need not necessarily be construed differently in the cases of persons continuing in service and persons quitting service. (1965) 57 ITR 281 (MP); AIR 1962 SC 1361. Rel. on; AIR 1937 PC 139 and (1926) 10 Tax Cas 155 and AIR 1951 SC 278 and AIR 1960 SC 738 and AIR 1961 SC 1028 and AIR 1962 SC 1361 and AIR 1964 SC 1722, Ref.

(Paras 13, 14)

(B) Income Tax Act (1922), Sec. 66 (1) — Advisory jurisdiction — New case — In the exercise of its advisory jurisdiction, High Court will not allow development of a case on altogether new lines. (Para 14)

Cases Referred: Chronological Paras

(1965) 1965-57 ITR 281 = 1965 MPLJ 357, Kalyanmal Mills Ltd. v. Commr. of I.T., M. P. 10, 11, 12, 13

(1964) AIR 1964 SC 1722 (V 51) = 53 ITR 140. Commr. of I. T. Kerala v. Malyalam Plantation Ltd. Quilon 9

(1962) AIR 1962 SC 1361 (V 49) = (1962) 44 ITR 551, Gordan Woodroffe Leather Mfg. Co. Ltd. v. Commr. of I. T. 8, 12

(1961) AIR 1961 SC 1028 (V 48) = (1961) 41 ITR 414, Commr. of I. T. v. Royal Calcutta Turf Club 8

(1960) AIR 1960 SC 738 (V 47) = (1960) 38 ITR 601, Commr. of I. T. v. Chandulal Kesharlal and Co. 8

(1951) AIR 1951 SC 278 (V 38) = 1951 SCR 594, Eastern Investment Ltd. v. Commr. of I. T., W. B. 8

(1937) AIR 1937 PC 139 (V 24) = 5 ITR 202, Tata Hydro-Electric Agencies Ltd., Bombay v. Commr. of I. T. Bombay Presidency and Aden 7

(1926) 10 Tax Cas 155 = 1926 AC 205, Atherton v. British Insulated Helsby Cables Ltd. 8

J. P. Jain, for Petitioner; S. C. Bhandari, for Non-petitioner.

CHHANGANI, J.: This is a reference under Section 66 (1) of the Indian Income Tax Act, 1922 (hereinafter referred to as the Act) by the Income Tax Appellate Tribunal, Delhi Branch "B", by which the following question of law has been referred to us for our answer:—

"Whether on the facts and in the circumstances of the case, the Tribunal was right in disallowing the payment of Rs. 60,000 under Section 10 (2) (xv) and/or S. 10 (1)?"

2. The material facts are these: The assessee is the Dholpur Glass Works Ltd. a public limited company (hereinafter referred to as the assessee company) formed in the year 1946. By an agreement dated 18-2-1945 the assessee-company appointed the firm of M/s. Agarwal Brothers of Agra as its Managing Agents. M/s. Agarwal Brothers were to be paid managing agency commission equivalent to 12½ per cent of the net profits of the assessee-company besides office allowance of Rs. 1,000 per month. Initially the assessee-company started manufacturing commercial glasses which were not paying. The assessee company earned small profits in the calendar years 1946 and 1947 and incurred losses in the subsequent three years. Profits for the calendar years 1951, 1952 and 1953 were negligible. In view of this, M/s. Agarwal Brothers relinquished their right to the remuneration of Rs. 72,000 representing their office allowance, Rs. 3,117 representing their managing agency commission and Rs. 43,975 interest on loans advanced by it to the assessee company during the aforesaid period. From 1954 onwards the assessee company switched on to the manufacturing of scientific glasses with the result that its sales as well as profits increased considerably.

3. On July 8, 1956, the assessee-company passed the following resolution:—

"Unanimously resolved as a special resolution that out of the net profits of the Company prior to 31-3-56 the managing agents of the company be and are hereby paid a sum of Rs. 60,000 over and above their usual remuneration to which they are entitled to, as detailed below on account of:

(1) Recognition of their past services and putting the factory on sound footing.

(2) Their past sacrifices as per wishes of the Board of Directors in forgoing their remuneration of Rs. 72,000 from 1948 to 1953 and interest on loans advanced to the Company by them for several years from 1948 to 1951 as also their commission in the years 1946 and 1947.

Rs. 40,000 out of the profits of the calendar year 1955 and that necessary entries for payment of this sum be passed in the books of the Company as at 31-12-55.

Rs 20,000 out of the profits from 11-58 to 31-3-58."

In its assessment year 1957-58 the assessee company claimed Rs 60,000 as a permissible deduction. The assessee company contended before the Income-tax Officer that the said payment was made to earn the good will of the managing agents which was a matter of commercial expediency, and thus it was a permissible deduction. The Income-tax Officer disallowed the said claim on the following grounds—

(i) That it was not paid as per the terms of the managing agency agreement;

(ii) That the reasons for the payment of this amount contained in the resolution viz. "putting the factory on sound footing" denoted a benefit of a lasting nature which made the payment an expense of a capital nature

(iii) That the firm of M/s Agarwal Brothers cannot be said to have forgone its claim for office expenses inasmuch as its office was situated in the factory premises and it did not incur any separate expenses out of its pocket for the same;

(iv) That the payment was not made on any commercial footing and cannot be said to be wholly and exclusively for the purpose of the business

(v) That the payment was made out of the net profits of the company and was not charged to the profit and loss account."

4. The assessee company preferred an appeal against the said disallowance before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner disallowed the same on the ground that the payment had been made for something which had happened in the past and it had not been incurred for the purpose of business carried on during the year under consideration. The assessee-company filed an appeal before the Income-tax Appellate Tribunal. The Tribunal upheld the decision and held that the payment of Rs 60,000 amounted to double remuneration for the same set of services once under the terms of the agreement and again as special remuneration and that it could not be covered by Section 10 (2) (xv) of the Act. The Tribunal held that even if it were assumed that the payment was permissible expenditure it was permissible for the year in which the obligation to remunerate for the services rendered was incurred, as the company maintained its account on mercantile system and that there was no question of the same being allowed in a distant year

5. Referring to the second purpose, for which the remuneration was said to have been paid, the Tribunal held that the remuneration was paid in appreciation or as a reward for the past sacrifices and that the word "sacrifices" implied that it was made without legal obligation to do so and without any claim for the expectation of compensation, reward or remuneration and was thus

outside the purview of Section 10 (2) (xv). The Tribunal also held that the claim was not permissible under Section 10 (1).

6. The assessee-company felt aggrieved by the decision of the Appellate Tribunal and moved for referring the question of law to this Court and the Tribunal has consequently made the present reference.

7. A reference to Section 10 (2) (xv) of the Act makes it clear that in order to claim successfully a deduction, the assessee must prove that the expenditure was laid out or expended "wholly and exclusively" for the purpose of business, profession or vocation and that the expenditure was not in the nature of capital expenditure or personal expenses. It may be pointed out at the outset that before 1st April, 1939 in Section 10 (2) (xv) the expression used was any expenditure not being in the nature of capital expenditure "incurred solely for the purpose of earning such profits or gains" and that it was in the year 1939 that S 10 (2) (xv) was amended and the words "wholly and exclusively laid out for the purpose of business etc." were substituted to bring the Act in line with the corresponding United Kingdom Statute. The clause as it existed before the amendment was considered by the Privy Council in *Tata Hydro-Electrical Agencies, Ltd., Bombay v Commissioner of Income-tax, Bombay Presidency and Aden*, AIR 1937 PC 189 and Lord Macmillan speaking on behalf of the Privy Council pointed out the difficulty in dealing with cases under Clause in the following words—

"Their Lordships recognise and the decided cases show how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains." The words used in the amended clause appear no doubt wider than the words "solely for the purpose of earning such profits" as it existed before 1939 yet the difficulty pointed out by the Privy Council still persists. What money can be said to be wholly and exclusively laid out and expended for the purpose of business etc. has to be decided on consideration of commercial expediency which in the very nature of things cannot admit of the application of a rigid test. However Judges had formulated general and broad tests in this connection

8. We may in this connection refer to the following observations made by Viscount Cave, L. C., in *Atherton v British Insulated and Helsby Cables Ltd.*, (1926) 10 Tax Cas 155 at p 191 H. L. (Palkiwala's Income Tax 5th Edition, Vol I p 390)

"A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business may yet be expended wholly and exclusively for the purposes of the trade."

This test was quoted with approval by the Supreme Court in *Eastern Investments Ltd. v. Commissioner of Income-tax, West Bengal*, AIR 1951 SC 278. In *Eastern Investments Ltd. v. Commr. of Income Tax, West Bengal* AIR 1951 SC 278 the Supreme Court while construing section 12 (2) laid down the following principles as relevant:—

(a) though the question must be decided on the facts of each case the final conclusion is one of law.....

(b) it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned.....

(c) it is enough to show that the money was expended 'not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the ground of commercial expediency, and in order indirectly to facilitate the carrying on of the business.....'

(d) beyond that no hard and fast rule can be laid down to explain what is meant by the word 'solely'.

These principles are relevant while construing Section 10 (2) (xv). For the general principles governing the subject of allowance or deduction under Section 10 (2) (xv) reference may be also made to the Supreme Court decisions in *Commissioner of Income-tax v. Chandulal Keshavlal and Co.*, (1960) 88 ITR 601 = (AIR 1960 SC 738), *Commissioner of Income-tax v. Royal Calcutta Turf Club*, (1961) 41 ITR 414 = AIR 1961 SC 1028 and *Gordon Woodroffe Leather Mfg. Co. v. Commissioner of Income-tax*, (1962) 44 ITR 551 = (AIR 1962 SC 1361).

9. The Supreme Court in *Commissioner of Income-tax, Kerala v. M/s. Malayalam Plantation Ltd., Quilon*, AIR 1964 SC 1722 considering the proper scope of the expression "for the purpose of the business" and after noticing a number of English and Indian decisions summed up the position as follows:—

"The expression 'for the purpose of the business' is wider in scope than the expression 'for the purpose of earning profits.' Its range is wide: it may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery; it may include measures for the preservation of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business. However, its limits are implicit in it."

These cases and others which were referred to us at the Bar and which we have not chosen to refer, make it clear that each case must turn upon its own facts and the decisions in other cases can be useful as illustrations of the general principles. We may say the same thing a little differently by observ-

ing that the principles may appear to be well settled and the difficulty and the difference arise in connection with the application of the principles to the facts of the individual cases.

10. The learned counsel for the respondent pointed out that the nearest case to the present controversy is the one that was decided by the Madhya Pradesh High Court in *Kalyanmal Mills Ltd. v. Commissioner of Income-tax, Madhya Pradesh*, (1965) 57 ITR 261 (MP). In that case, the assessee mills cut down the salaries of all its employees and members of staff in 1933. The cut was restored in 1941, in the case of all its officers and staff except the managing director. Subsequently dearness allowance and bonus payments were made to officers and members of staff once again with the exception of the managing director. In 1951 by a resolution of the board of directors it was decided to restore the cut in the salary of the managing director with effect from 1933 and to pay him dearness allowance and bonus, etc. The resolution mentioned that the payment was made in consideration of the meritorious services of the managing director. The sum paid to the managing director amounting to Rs. 66,900 was claimed by the mills as business expenditure. On these facts the High Court held that "as no reason was given for not restoring the cut in the salary of the managing director earlier and then for restoring it in his case alone from 1933 and as the managing director was still in the service of the mills and there was no evidence of any claim made by him for the payment and the resolution of the board of directors also showed that the payment was made voluntarily in consideration of the meritorious service of the employee, the payment was not made in discharge of liability or on grounds of commercial expediency. The amount was not allowable as business expenditure."

11. The counsel contended that in the present case also the assessee company paid Rs. 60,000 to the managing agents only as a reward for past services and that it was not the assessee's case that the payment was made with a view to facilitate business in future and consequently, the case should be decided on the principle laid down by the Madhya Pradesh High Court in (1965) 57 ITR 261 (MP).

12. In answer, the assessee's counsel submitted that the Madhya Pradesh High Court relied upon the Supreme Court decision in AIR 1962 SC 1361 but did not notice the distinguishing features of the case before the Supreme Court. The facts in that case were that one J. H. Phillips who was the Director of the assessee company and was also an employee in the managing agent company, resigned from his office. The Board of Directors passed a resolution that his resignation be accepted and in appreciation of his

long and valuable services to the company he be paid a gratuity of Rs 50 000 out of which the appellant company was to pay Rs 40 000 and the Managing Agent Company the balance of Rs 10 000. The amount of Rs 40 000 paid to J H Phillips was claimed as deduction under Sec. 10 (2) (xv) of the Act. The matter went up to the Supreme Court and the claim for deduction was disallowed. In rejecting the claim, the Supreme Court observed as follows—

"In our opinion the proper test to apply in this case is was the payment made as a matter of practice which affected the quantum of salary or was there an expectation by the employee of getting a gratuity or was the sum of money expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business. But this has not been shown and therefore the amount claimed is not a deductible item under Section 10 (2) (xv)." The counsel for the assessee pointed out that in the case, before the Supreme Court, J H Phillips had already resigned and there was no question of his continuing in service and facilitating the business of the assessee company. In the case before the Madhya Pradesh High Court, (1965) 57 ITR 261 (MP) the employees was still in service and the principles laid down by the Supreme Court should not have been applied. It was further submitted by him that in the present case also the managing agents continued as managing agents and that the reward for their past services was bound to secure good will and efficient working in future and that this should be taken as facilitating the business of the assessee company.

13. We have given our careful consideration to the submissions made on behalf of the assessee-company but have not felt persuaded to accept them. In our opinion, the decision of the Madhya Pradesh High Court in (1965) 57 ITR 261 (MP) does not disclose any wrong application of the principle enunciated by the Supreme Court. In our opinion, a reward for past services, without anything more, need not necessarily be construed differently in the cases of persons continuing in service and persons quitting service, although differences in other facts and circumstances may warrant different decisions in such cases. We have no hesitation in rejecting the contention of the assessee that the Madhya Pradesh High Court did not properly apply the principle enunciated by the Supreme Court.

14. As for the case before us, we consider it proper to recall a few facts appearing in the decision of the Income-tax Authorities. Before the Income-tax Officer the claim for deduction was made principally on the ground that the payment was to secure the good will of the managing agents. The assessee did not contend further that the good will was sought to be secured for the purpose of promoting the business of the

assessee-company. The managing agents were entitled to commission on profits and had adequate incentive to facilitate the business of the assessee-company and there is no evidence that any special incentive was needed for the purpose. The Appellate Assistant Commissioner observed, "The assessee has not claimed that it is in settlement of old dues. It could not do so because no such liability existed in the balance-sheet." Similarly, the Appellate Tribunal observed that "it is not the case of the assessee before us that but for this payment the Managing Agents would have refused to continue as agents and that this was a bait to persuade it to continue as an agent in the ultimate benefit of the company." Throughout before the Income Tax Tribunals the assessee-company neither contended nor led evidence to show that the special payment was necessary to offer any special incentive to the managing agents and to facilitate the assessee's business. It was before this Court that the assessee-company took this stand for the first time. The learned counsel for the assessee, argued that the reward of the past services and incentives for future works are so integrally connected with each other that this Court should liberally construe the entire transaction and hold that the special remuneration was paid to facilitate the business of the assessee-company. In the case of our advisory jurisdiction, we do not feel justified in permitting the counsel to develop the case on new lines.

15. On the evidence and findings of the Tribunal below we see no reason to differ from the findings of the Appellate Tribunal that the expenditure was not wholly and exclusively laid out for the purpose of the business. Having regard to this finding, we consider it unnecessary to deal with the other two questions debated at the Bar namely, (i) whether the expenditure is in the nature of capital expenditure, and (ii) whether the expenditure can be deemed to have been incurred in the accounting year. The expenditure thus does not fall within section 10 (2) (xv) of the Act and the Tribunal was right in disallowing the claim.

16. Our answer to the question is thus in the affirmative.
NYR/V.B.B. Answer in affirmative.

AIR 1969 RAJASTHAN 146 (V 56 C 33)
KANSINGH, J

Johari Mal and others, Petitioners v State of Rajasthan and another, Respondents

Writ Petas Nos 1503, 1533, 1732, 1832 of 1964, D/ 29-7 1968

(A) Municipalities — Rajasthan Municipalities Act (38 of 1959), Section 104 — Constitutional validity — Constitution of India, Articles 14 and 245 — Section 104 is

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not void either on account of excessive delegation or on account of violation of Art. 14.

Section 104 of Rajasthan Municipalities Act, 1959, is not void either on account of excessive delegation or on account of violation of Article 14 of the Constitution.

(Para 17)

The question of excessive delegation does not emerge from the fundamental rights. Even when they did not exist, a law could be pronounced to be bad if it suffered from excessive delegation. The essence of this concept is that the Legislature has to make the law itself and it cannot entrust that essential function to an extra legislative body. In the present day circumstances some degree of flexibility has become necessary so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again: AIR 1951 SC 332, Foll. (Para 13)

Section 104 when it makes provision for imposition of certain taxes, is in keeping with the legislative policy underlying the Act. Conditions vary from municipal area to municipal area, and, therefore, the Legislature may not find it convenient to decide as to what should be the dates on which the taxes mentioned in Section 104 should be imposed and what should be the rates thereof. Thus by making provision for imposition of tax for the carrying out of the purposes of the Act as mentioned in Sec. 98 and other connected sections, the Legislature has clearly laid down a policy. What is left in the hands of the outside body, namely the Government is the carrying out of that policy. Thus there is no question of there being excessive delegation in enacting S. 104 of the Act. (Para 16)

It is common knowledge that Rajasthan is a vast State and it comprised of no less than 22 Covenanting States and some territory viz. Ajmer Merwara which was formerly British India Territory. The conditions were so variant that one common uniform model tax structure for municipal areas may not have been adopted. For evolving a tax structure local conditions as well as the capacity of the people to pay the tax could legitimately be considered. It cannot be said that inequality is writ large in the Act itself or is inherent in the relevant provisions of the Act. AIR 1960 Mad 160, AIR 1962 Ker 298 held not good law in view of AIR 1965 SC 1107, AIR 1958 SC 538, Rel. on; AIR 1961 SC 552, Disting. (Para 17)

(B) Municipalities — Rajasthan Municipalities Act (38 of 1959), Section 104 — Scope — Tax is imposed by Government in its own rights and not on behalf of municipal boards though it may benefit only the municipal boards — Local differences in taxes can be allowed, but they cannot be allowed to be outrageous — Constitution of India, Article 14. (Para 19)

(C) Constitution of India, Article 14 — Validity of executive order of Government

acting under provisions of taxing statute challenged on the ground of discrimination — Initial burden is on petitioner to show how discrimination is brought about — But where persons similarly situated are subjected to differential treatment, it would be open to State to establish that the differentiation is based on a rational object sought to be achieved by legislature. (Para 20)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 691 (V 54) =
(1967) 1 SCR 15, Jalan Trading Co. v. Mill Mazdoor Sabha 7, 19
(1966) AIR 1966 SC 442 (V 53) =
(1966) 1 SCWR 361, Pema Chibar v. Union of India 7
(1966) AIR 1966 SC 1807 (V 58) =
(1966) 3 SCR 328, Katra Education Society v. State of U. P. 7, 19
(1966) AIR 1966 SC 1980 (V 53) =
(1966) 3 SCR 724, Cochin Devaswom Board v. Vamana Setti 7, 19
(1966) AIR 1966 Guj 268 (V 58) =
7 Guj LR 96, Kantilal Popatlal v. State of Gujarat 7, 19
(1966) AIR 1966 Mys 267 (V 53) =
(1966) 1 Mys LJ 265, A. Noronha v. State of Mysore 7, 19
(1966) AIR 1966 Raj 142 (V 53) =
1965 Raj LW 358, Bhikam Chand v. State of Rajasthan 7
(1965) AIR 1965 SC 1107 (V 52) =
(1965) 2 SCR 477, Corporation of Calcutta v. Liberty Cinema 7, 16
(1964) AIR 1964 SC 925 (V 51) =
(1964) 5 SCR 975, Khyerbari Tea Co. Ltd. v. State of Assam 7
(1962) AIR 1962 Ker 298 (V 49) =
ILR (1962) 1 Ker 494, S. M. Union (Pr.) Ltd. v. State of Kerala 7, 14, 16
(1961) AIR 1961 SC 552 (V 48) =
(1961) 3 SCR 77, K. T. Moopil Nair v. State of Kerala 7, 17
(1960) AIR 1960 Mad 160 (V 47) =
ILR (1960) Mad 171, Shanmugam Oil Mill v. Market Committee, Coimbatore 7, 14, 15
(1958) AIR 1958 SC 538 (V 45) =
1959 SCR 279, Ram Krishna Dalmia v. Justice Tendolkar 17
(1952) AIR 1952 SC 75 (V 39) =
1952 Cri LJ 510, State of West Bengal v. Anwar Ali Sarkar 7
(1951) AIR 1951 SC 332 (V 38) =
1951 SCR 747, In re, Article 143, Constitution of India 18
G. M. Lodha and J. S. Rastogi (In Nos. 1503 and 1732/64), G. M. Lodha (In No. 1533/64) and J. S. Rastogi (In No. 1832/64) for Petitioners; S. K. Tiwari, Dy. G. A., for the State; R. K. Rastogi, for Respondent No. 2 (In No. 1533/64); L. R. Mehta for J. K. Jain, for Respondent No. 2 (In No. 1739/64) (sic).

JUDGMENT: I have before me a group of four writ petitions by which the several petitioners challenge the vires of Secs. 104 and 107 of the Rajasthan Municipalities Act,

1959 (Act No. 38 of 1959, hereinafter called the Act), as also certain notifications issued by the State Government in exercise of its powers under Section 104 of the Act imposing octroi in the concerning municipalities. As the writ petitions raise common questions, they can conveniently be disposed of together.

2. I may give the facts with reference to writ petition No. 1503/64 Joharimal and others v. The State of Rajasthan and another. Writ Petition No. 1533 of 1964 Jaishiv and others v. The State of Rajasthan and another is identical with Joharimal's writ petition. Both these writ petitions relate to Abu Road Municipality. Writ Petition No. 1832 of 1964 Shivcharan Lal and others v. The State of Rajasthan and another is for Bari Municipality in district Bharatpur and the fourth writ petition Prabhu Dayal and others v. The State of Rajasthan and another concerns the Municipal Board Kota.

3. Joharimal states that in the Municipality of Abu Road, the Municipal Board had imposed octroi duty in the year 1951 after going through the procedure prescribed for imposition of octroi duty. According to the petitioner, the Municipal Board imposed this duty after ascertaining the public opinion. The octroi duty on cloth was 1/9 per cent. and as it was found to be high, the Municipal Board later on reduced it to 50 Paise per cent. The grievance of the petitioner is that the State Government published a notification on 20th August, 1964, imposing octroi duty on various commodities including cloth, silver and gold. The notification has been placed on record and it is Ex. 6. It is dated 10th April, 1964, and has been issued by the State Government in exercise of its powers under Section 104 of the Act. Textiles and yarn occur at items Nos. 62 and 63 respectively of this notification and gold and silver bullion and articles thereof appear at item No. 81 in the Notification. A perusal of these items shows that octroi duty is chargeable on them at the rate of 1 per cent. The petitioner's grievance is that before issuing the notification Ex. 6, neither the State Government nor the Board had ascertained the wishes of the public. The petitioner proceeds to say that Section 104 of the Act is violative of Article 14 of the Constitution and also by this provision, the Legislature has delegated its functions of imposing tax by law to the State Government which, according to the petitioner, amounts to excessive delegation so as to be void. It is pointed out that wide and arbitrary powers have been placed in the hands of the State Government in the matter of imposition of taxes mentioned therein without affording any guidance to the State Government as to how it has to exercise its powers. It is contended that the State Government is left to pick and choose between the various commodities which it may take for imposi-

tion of octroi and likewise it may prescribe different rates of taxes for the same commodity for different municipalities. Thus according to the petitioner, the powers granted to the State Government by Section 104 are arbitrary and are in clear contravention of the provisions of Article 14 of the Constitution. Then as regards Section 107 of the Act it is pointed out that the power of granting exemption from taxes is likewise arbitrary.

4. Then in attacking the notification Ex. 6 it is urged that the issuing of different notifications with widely varying rates of taxes for various municipalities, amply demonstrates that Section 104 of the Act has placed unguided powers in the hands of the State Government and further the State Government has abused its powers and there is no reasonable basis for making distinction regarding the incidence of tax for the various commodities and therefore it is maintained that the notification Ex. 6 was bad on account of the violation of Article 14 of the Constitution. The petitioner has submitted a comparative chart with his writ petition regarding octroi on textiles and silver and gold in the various municipalities information about which he could gather. The petitioner on the basis of this information submits that whereas in the municipalities of Abu Road and Sirohi, octroi on gold and silver has been fixed on the basis of value thereof at the rate of 1 per cent. in the case of Abu Road and 50 Paise in the case of Sirohi at Jodhpur, Bikaner, Parbatsar and Jaipur, the rate of octroi for gold and silver has been fixed at per quintal, that is, on the basis of weight of the commodity. The petitioner contends that this has resulted in a wide disparity regarding the incidence of tax between persons living in the Abu Road Municipality and those living in the areas of other municipal Boards. According to the petitioner, five rupees per quintal or 25 rupees per quintal of gold and silver will result in just a very nominal tax in those municipalities as the value of silver and gold per quintal will run in thousands in the case of silver and lacs in the case of gold; that is one quintal of gold will be about eight lacs in value and one quintal of silver will not be less than rupees ten thousand in any case and hundred rupees worth gold will be about half a tola in weight. It is thus submitted that wide disparity in the imposition of burden on citizens of the same State is wholly understandable and there is no conceivable basis for making distinction between citizens living in one municipality from those living in another municipality in the same State. Similarly about cloth, it is submitted that whereas in the municipality of Abu, octroi is realised on cloth on the basis of percentage of value at one per cent, in other municipalities it is realised on the basis of weight per quintal. For example, in Ganganagar it is 150 per

quintal of cloth and at Jodhpur it is Rs. 2 per quintal. According to the petitioner, this imposition also works to be discriminatory and for that there is no reasonable basis. Then as regards the municipalities situated in the same district, that is, Sirohi, the petitioner submits that there is difference in the rates applied to Sirohi and those applied at Abu Road, which, according to the petitioner, are higher. As regards Kota Municipality, it is said that octroi on silver is charged at the rate of 50 paise per cent for bullion and 75 Paise per cent on silver ornaments. The fourth writ petition is about the octroi on sugar cane. The petitioners in that case submit that there are a number of municipalities in the Bharatpur district and while in some municipalities no octroi is charged on sugar-cane, in others the rate is considerably low. Thus according to the petitioners, there has been discrimination in the imposition of octroi on sugar-cane. The submissions about the vires of Section 104 of the Act are common in all the four writ petitions.

5. The writ petitions have been opposed both on behalf of the State and the respective Municipal Boards. The learned Deputy Government Advocate who appeared for the State of Rajasthan at the outset prayed for an adjournment as the cases on behalf of the State were to be argued by the Advocate General who could not come on account of some other Government business. However as the writ petitions have been pending since 1964 and have also been appearing both in the weekly cause-lists as well as daily cause-lists for a number of days, I was not inclined to accede to the request of the learned Deputy Government Advocate to adjourn the hearing of the cases.

6. The writ petitions thus raise two questions — one, regarding the vires of Sections 104 and 107 of the Act and the other about the validity of the Government Notifications imposing octroi in the concerning municipalities. The validity of the notifications is challenged on two grounds. One ground is that if Section 104 itself is struck down, the notifications would fall through ipso facto, and the other ground is that even assuming that Section 104 of the Act was a valid provision, the exercise of the powers by the State Government under that section was bad on account of the State Government having acted with discrimination. In other words, it is urged that the State Government has in issuing the notifications brought about a difference between the citizens of the same State as regards the incidence of the taxes without there being any reasonable basis for classification and according to the petitioners, the respondents have pointed out none for it in their replies.

7. I have heard learned counsel for the parties. They have placed reliance on a number of cases. Learned counsel for the petitioners has cited K. T. Moopil Nair v.

State of Kerala, AIR 1961 SC 552, State of West Bengal v. Anwar Ali, AIR 1952 SC 75, Shanmugha Oil Mill v. Market Committee, AIR 1960 Mad 160, S. M. Union (Pr.) Ltd. v. State of Kerala, AIR 1962 Ker 298 and Bhikam Chand v. State of Rajasthan, 1965 Raj LW 353 = (AIR 1966 Raj 142). Learned Counsel for the respondents have, on the other hand, placed reliance on Khyerbari Tea Co. Ltd. v. State of Assam, AIR 1954 SC 925, Corporation of Calcutta v. Liberty Cinema, AIR 1965 SC 1107, Cochin Deva-swom Board v. Vamana Setti, AIR 1966 SC 1980, Pema Chibar v. Union of India, AIR 1966 SC 442, Katra Education Society v. State of U. P. AIR 1966 SC 1307, Jalan Trading Co. v. Mill Mazdoor Sabha, AIR 1967 SC 691, A. Noronha v. State of Mysore, AIR 1966 Mys 267 and Kantilal Popatlal v. State of Gujrat, AIR 1966 Guj 268.

8. It will be convenient at this place to read sections 104 and 107 of the Act.

"104. Obligatory taxes.—Every board shall levy at such rate and from such date as the State Government may in each case direct by notification in the Official Gazette and in such manner as is laid down in this Act and as may be provided in the rules made by the State Government in this behalf, the following taxes namely:—

(1) a tax on the annual letting value of buildings or lands or both, situated within the municipality:

(2) an octroi on goods and animals brought within the limits of the municipality for consumption, use or sale therein; and

(3) a tax on professions and vocations:

Provided that—

(a) the tax under clause (1) shall not be levied—

(i) on kham houses, or

(ii) on buildings or lands or both, of which annual letting value is less than one hundred and eighty rupees.

(b) the tax under Clause (2) shall not be on a motor vehicle as defined in the Motor Vehicles Act, 1939, (Central Act IV of 1939) or any other mechanically propelled vehicle, and

(c) the tax under Clause (3) shall not be levied on artisans:

Provided further that, upon a representation made to it by, and at the request of, a board, the State Government, if it is satisfied that circumstances exist which sufficiently provide the justification for a board not to levy, or to stop the levy of, any of the taxes mentioned in this section, may by special order published in the official Gazette, along with the reasons for making such order, permit the board not to levy, or to stop the levy of, any such tax."

"107. Exemptions from taxation.—(1) None of the taxes specified in Sections 104, 105 and 106 shall be leviable by a board in respect of any property belonging to or vested in it.

(2) None of the taxes specified in Cls (i) and (2) of S 104 and in Clauses (i) (ii), (iv) and (v) of sub-section (1) of Section 105 shall be leviable in respect of any lands, buildings, goods, vehicles, conveyances, boats or animals belonging to or vested in the Central Government or the State Government:

Provided that, so long as any such tax continues to be levied by the board on like properties of other persons, nothing in this sub-section shall prevent the board from levying that tax to which, immediately before the 28th day of January, 1959 any lands, buildings, goods, vehicles, conveyances, boats or animals of the Central Government were liable or treated as liable.

Provided further that any land, building, goods vehicle, conveyance, boat or animal belonging to or vested in the State Government shall be so exempt from payment of any such tax if the same is used or intended to be used solely for public purposes of profit.

(3) None of the taxes specified in Cls (i) and (2) of Section 104 and in Clauses (i) and (ii) of sub-section (1) of Section 105 shall be leviable in respect of.

(a) any land or any building or part of a building exclusively used and meant for the personal occupation of the Ruler of a covenanting State or the members of his family or for the rent free residence, occupation or location of the establishment of such Ruler or members, or

(b) any goods, vehicle, conveyance or animal in and for the exclusive use of such Ruler or members.

Provided that nothing in this sub-section shall prevent a board from levying such tax on any such land, building or part, goods, vehicle, conveyance or animal if the same is used or intended or meant to be used for purposes of profit for carrying on any trade or business or if in respect thereof any rent or other income or pecuniary benefit is derived or intended or meant to be derived, so long as the board continues to levy a similar tax on like properties of other persons.

(4) The tax specified in clause (1) of Section 104 shall not be leviable in respect of lands and buildings used solely as places of public worship or for religious or charitable purposes,

Provided that such lands or buildings shall not be exempt from payment of the said tax if any trade or business is carried on therein or if in respect thereof rent or other income is derived, whether such rent or other income is or is not applied exclusively towards such places of public worship or towards such religious or charitable purposes.

Explanation I. "Charitable purpose" includes relief of the poor, education and medical relief.

Explanation II. When any portion of any land or building is exempt from payment of

tax under this sub-section such portion shall be deemed to be a separate property for the purposes of the said tax.

(5) The State Government may, if in its opinion reasonable grounds exist for so doing, grant and define, by notification in the Official Gazette, such exemptions in exceptional cases from payment of a tax leviable under Section 104 or imposed under Section 105 or under S 106 as it may consider necessary.

9 When it was pointed out to the learned counsel that Section 107 is about granting of exemptions and even if that were struck down, it cannot help the tax-payers because that section is severable from other sections of the Act, learned counsel gave up his challenge against S 107 of the Act, and, therefore, I need not say anything more about it.

10 Chapter VII of the Act in which Section 104 occurs is about the imposition of taxes. The scheme of the Chapter appears to be like this. Taxes which could be imposed under the Act have been divided into two categories. One category is covered by Section 104. These taxes, namely, on letting value of the buildings popularly known as house tax, octroi on goods and animals and tax on professions and vocations have been characterised as obligatory taxes. These have to be levied by Municipal Boards when the Government directs the Municipal Boards concerned to levy such taxes, at such rate and from such date as may be mentioned in the notification. Section 105 relates to various taxes which the Municipal Board itself may impose after undergoing certain formalities. It appears that the Act of 1939 was passed to consolidate and amend the law relating to municipalities in the State of Rajasthan. Before the passing of the Act, there were different sets of laws in respect of various municipalities. There was (1) the Rajasthan Town Municipalities Act, 1951, and then there were separate municipal Acts of ex-covenanting States which were applicable to cities like Jaipur, Jodhpur, Udaipur and Bikaner, which were situated in different covenanting States. In the Alwar area, there was a separate municipal Act and so was Abu area governed by a different municipal law.

11. A perusal of the Rajasthan Town Municipalities Act 1951 shows that it was the Municipal Board itself who could have imposed house-tax, octroi and taxes on professions and vocations though subject to the approval of the State Government (vide Section 59 and Section 63). But now Section 104 provides that it shall be for the Government to direct from what date and at what rate any of these taxes are to be levied and then the Board has no choice but to levy these taxes. It may be that the Legislature has made this provision in the light of the experience of the working of the different sets of municipal laws for different municipalities in the State of Rajasthan after

it came to be formed in the year 1949. One of the considerations might very well have been that many of the municipal boards were unwilling to impose these taxes. It is common knowledge that imposition and levy of a tax is not a pleasant duty for any body. The other consideration might have been that for certain essential taxes the Legislature thought that the mode of taxes should be by and large the same for all municipalities so that to some extent uniformity may be brought about.

12. As has been observed above, the attack against the vires of this section is twofold: (1) that there is delegation of excessive legislative powers in favour of the Government and (2) there is violation of Article 14. Though to some extent the arguments might cover common ground yet they proceed on two distinct concepts.

13. The question of excessive delegation does not emerge from the fundamental rights. Even when they did not exist, a law could be pronounced to be bad if it suffered from excessive delegation. The essence of this concept is that the Legislature has to make the law itself and it cannot entrust that essential function to an extra legislative body. However, by this date the legitimate limits of delegation have been well settled. It has been recognised that the complexity of modern administration and the expansion of the functions of the State to the economic and social sphere has rendered it necessary for the Legislature to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. Delegated legislation has become the present-day necessity and it has come to stay — it is both inevitable and indispensable. The Legislature has now to make so many laws that it has no time to devote to all the legislative details and some times the subject on which it has to legislate is of such a technical nature that all it can do is to state the broad principles and leave the details to be worked out by those who are more familiar with the subject. Again, when complex schemes of reform are to be the subject of legislation, it is difficult to bring out a self-contained and complete Act straightaway, since it is not possible to foresee all the contingencies and envisage all the local requirements for which provision is to be made. Under the circumstances, some degree of flexibility has become necessary so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again, (vide *In re Art. 143, Constitution of India*, etc. AIR 1951 SC 332). In that very case, Fazl Ali J. pointed out what has to be kept in view for seeing the validity of delegation. The learned Judge enunciated four principles: (1) The legislature must normally discharge its primary legislative function itself and not through others; (2) Once it is established that it has sovereign powers within

a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and it may utilise any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do; (3) It cannot abdicate its legislative functions, and, therefore, while entrusting power to an outside agency it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (4) There are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to 'abdication and self-effacement'.

14. Now what is the position in the case of a taxing statute? Can the Legislature empower the Government to decide about the rate of tax and about the goods which can be subjected to tax and from what date tax has to be levied? Learned counsel for the petitioners submitted that these were essential legislative functions and could not be delegated to an agency outside the Legislature. Learned counsel for the respondents on the other hand submitted that this was not an essential legislative function and could be entrusted to the Government. Learned counsel for the petitioners placed reliance on AIR 1960 Mad 160 (supra) and AIR 1962 Ker 298 (supra).

15. In the Madras case, AIR 1960 Mad 160 in considering the provisions of the Madras Commercial Crops Market Act, Ramachandra Iyer J. as he then was observed as follows:

"A taxing provision has essentially three features (1) a declaration of liability, (2) assessment or quantification and (3) machinery for collection. Section 11 (1) of the Madras Commercial Crops Markets Act 1933 declares a liability and provides the machinery. But the rate of tax which is an essential part of the declaration and assessment has been completely delegated to the Executive Government with no principles or basis laid down. Uncontrolled power is vested in the Executive to fix such rate as it pleases. In the absence of a legislative provision regarding any policy or limits of assessment for the guidance of the assessing authority, the provisions of the section amount to excessive delegation of legislative power, and, therefore, are invalid." According to the learned Judge, fixation of rate of tax could not have been left to the Executive Government.

16. In AIR 1962 Ker 298 (supra) the question was about a toll tax which was to be fixed by the Government. Section 12 of the Travancore Cochin Motor Vehicles Act (14 of 1950) came up for consideration and the learned Judge observed as follows:—

"The essential powers of legislation cannot be delegated. The legislature must declare the policy of the law and the legal principles which are to control any given case and must also provide a standard to guide the officials or the body in power to execute the law. The legislature cannot strip itself of its essential functions and vest the same on an extraneous authority. The primary duty of law making has to be discharged by the legislature itself, but there can be a delegation resorted to as a subsidiary or ancillary measure. The legislature cannot abdicate its functions in favour of another

There is no indication anywhere in the T C Motor Vehicles Act as to what circumstances can be considered to be 'special circumstances' under Section 12 justifying the levy of a toll. The decision as to what will constitute a 'special circumstance' under Section 12 for levy of a toll, has been completely left to the sole and exclusive discretion of the Government without any guidance or restriction whatsoever. Again, the legislature has not specified on what basis the toll is to be levied on the various vehicles using the bridge or road. The maximum levy, that could be made under the section has not in any way been indicated by the legislature. As it is, it is open to the Government to treat any circumstance as a 'special circumstance' and the only requirement is that the Government should be so satisfied. Further, it is also open to the Government to levy toll on any road or bridge as they may think necessary. In the absence of any legislative indication in the Act regarding any policy to govern the Government before taking action under Section 12 or placing any limits of assessment for the guidance of the assessing authority in the matter of fixing of the rates of tolls, the provisions of Section 12 of the Act amount to excessive delegation of legislative power

Hence the notification D/- 28-4-53 issued by the T C State Government, under S 12 of the Act, directing the levy of tolls on vehicles using the bridge at Palal across the Meeenachil river was held to be invalid. These two cases do lend support to the contentions of learned counsel, but there is a Supreme Court case to the contrary. It is AIR 1965 SC 1107 (supra). Their Lordships were considering there the vires of Section 548 of the Calcutta Municipal Act, which inter alia provided for charging of a licence fee which may be charged at such rates as may from time to time be fixed by the Corporation, and their Lordships observed as follows—

"No doubt a delegation of essential legislative power would be bad. But the fixation of the rates of taxes is not of the essence of legislative power of taxation. The fixation of rates of taxes may be legitimately left by a statute to a non-legislative author-

ity, for there is no distinction in principle between delegation of power to fix rates of taxes to be charged on different classes of goods and power to fix rates simpliciter, if power to fix rates in some cases can be delegated then equally the power to fix rates generally can be delegated. No doubt when the power to fix rates of taxes is left to another body, the legislature must provide guidance for such fixation. The validity of the guidance cannot be tested by a rigid uniform rule, that must depend on the object of the Act giving power to fix the rate. The specification of the maximum rate does not supply any guidance as to how the amount of the tax which no doubt has to be below the maximum, is to be fixed. Provision for such maximum only sets out a limit of the rate to be imposed and a limit is only a limit and not a guidance."

Now by the Act autonomous bodies in the shape of municipal boards thereby granting local self government to the people living in the municipal areas were to be established and certain important functions were assigned to the municipal boards. Their primary and secondary functions are contained in Chapter VI of the Act. The functions are inter alia lighting public streets, watering public streets, cleaning public streets, removing filth, rubbish, night-soil, odour or any other noxious or offensive matter, extinguishing fires and protecting life and property when fire occurs, regulating offensive or dangerous trades or practices, etc. These are all governmental functions. Likewise the Boards have to provide special medical aid and accommodation for the sick in times of dangerous diseases. They have also to give relief in times of famine or scarcity. All these functions need not be enumerated. Suffice it to say that for properly discharging them, resources will be necessary. Therefore, S 104 when it makes provision for imposition of certain taxes, is in keeping with the legislative policy underlying the Act. Conditions vary from municipal area to municipal area, and, therefore, the Legislature may not find it convenient to decide as to what should be the rates on which the taxes mentioned in Section 104 should be imposed and what should be the rates thereof. Thus by making provision for imposition of tax for the carrying out of the purposes of the Act as mentioned in S 93 and other connected sections, the Legislature has clearly laid down a policy. What is left to the hands of the outside body namely the Government is the carrying out of that policy. Thus there is no question of there being excessive delegation in enacting S 104 of the Act. This argument, therefore, fails.

17. I may now consider whether S 104 violates Article 14 of the Constitution. In Ram Krishna Dalma v Justice Tendolkar, AIR 1958 SC 538 which was a unanimous judgment of five Judges, S R. Das C.J. having made a review of the several deci-

sions enunciated certain principles for seeing whether a particular statute is invalid on account of its violating Article 14 of the Constitution. He observed as follows:

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of Supreme Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The decisions further establish

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed. If there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain indi-

viduals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

According to the above principles, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. It is common knowledge that Rajasthan is a vast State and it comprised of no less than 22 Covenanted States and some territory viz. Ajmer Merwara which was formerly British Indian territory. The conditions were so variant that one common uniform mode of tax structure for municipal areas may not have been adopted. For evolving a tax structure local conditions as well as the capacity of the people to pay the tax could legitimately be considered. Learned counsel for the petitioner placed reliance on AIR 1961 SC 552. That was a case where certain tax on lands had been imposed at a flat rate and this was found to result in great inequality amongst the land-holders. That Act was found to be confiscatory in character and effect, as inequality was writ large on the Act and was found to be inherent in the very provisions of the taxing Section, that Act was struck down. However, it is not so in the present case and it cannot be said that inequality is writ large in the Act itself or is inherent in the relevant provisions of the Act. Therefore I do not find any force in the contention of learned counsel for the petitioners that Section 104 of the Act is void either on account of excessive delegation or on account of the alleged violation of Article 14 of the Constitution.

18. Now I may turn to the relevant notifications for the three municipalities of Abu Road, Kotah and Bari. The learned counsel for the petitioners confined his attack only to items relating to gold and silver, cotton textiles and sugar cane. In am, therefore, not called upon to examine the validity of other items covered by these notifications. As noticed above, learned counsel for the petitioners vehemently argued that there is no reasonable basis for such a wide disparity between citizens living in one municipal area and another even regarding the incidence of tax.

19. As I have already discussed above, some allowance has to be made for the variations in local conditions and about the capacity of persons on whom the burden of tax is cast. Even so, the difference between citizens living in one part of the State and those living in another regarding the incidence of tax should not be outrageous. Learned counsel for the respondents has put

his case somewhat like this. He submitted that if different municipal boards were to impose their own taxes, then the ground of discrimination would not be available. Making this postulate a spring board, learned counsel argued that what the Government was really doing under Section 104 of the Act was to act on behalf of the several municipal boards and it could thus impose taxes on different bases by separate notifications for different municipalities. Learned counsel maintains that if what is not bad if it is done by a municipal board cannot be bad if it is done by the Government on its behalf. I assume for the sake of argument that different municipal boards can within the frame-work of the law provide for different rates of taxes and that it will not be discriminatory. But the position will be materially different when one body namely the Government acts in the matter. Government as one entity in my view, cannot claim immunity from the impact of Article 14 even when it acts under Section 104 of the Act. I have read Section 104 carefully but am unable to hold that the State Government is acting on behalf of the municipal boards. It is true the tax may benefit only the municipal boards but it is a far cry to urge that the Government acts on behalf of the municipal boards. The tax is imposed by the Government in its own right and it is only realised by the municipal boards. In enacting S 104, the consideration, in my view was to have a somewhat uniform pattern for the three kinds of taxes included in Section 104 though there may be some difference due to local conditions. However in my view, where the Government is the source of authority, the difference cannot be allowed to be outrageous. Shri Rastogi submitted that a person relying upon the plea of unlawful discrimination due to infringement of the guarantee of equality before the law or equal protection of the laws must set out with sufficient particulars his plea showing that between the persons similarly circumstanced, such discrimination has been made which is founded on no intelligible differentiation, and if the claimant for relief establishes similarity between persons who are subjected to a differential treatment, then it may lie upon the State to establish that the differentiation is based on a rational object sought to be achieved by the Legislature. Reliance is placed in this connection on AIR 1966 SC 1930 (supra). He also cited AIR 1968 SC 1307 (supra) AIR 1968 Mys 287 (supra), AIR 1967 SC 691 and AIR 1968 Guj 263 (supra).

20 It is true that a petitioner carries the initial burden of showing as to how discrimination has been brought about but where persons similarly situated are subjected to a differential treatment, then it will be open to the State to establish that the differentiation is based on a rational object sought to be achieved by the legislature. This is

all the more necessary when it is not the legislative act that is under examination but an executive order of the State Government which is under examination as in the present case. One fails to see how in the matter of silver, gold and cloth, there was justification for such a widely differing impost. In places like Jaipur, Jodhpur and Ganganagar, for one quintal of gold or silver octroi is not more than Rs 25 per quintal. This comes to Rs. 10,000 or so worth of silver or about rupees eight lakhs of gold for which the duty is Rs 25. In Abu Road, it comes to 1 per cent. of the price of these commodities. The same thing can be said about cloth. The respondents have not offered any justification for so much divergence in the incidence of tax. It is true the citizens are living in different municipal areas but all the same they are citizens living in one State and the source of authority for imposing the tax is the State Government. It was in the circumstances absolutely necessary for the State Government to offer justification for this impost which it has completely failed to do. As regards octroi on sugar cane for Municipal Board Bari, it is one rupee per quintal at Bari and at Rajakheda it is 15 paise per quintal. In Bharatpur and Deeg which are bigger towns, it is 50 paise per quintal. In Dholpur there is no octroi on sugar cane. Here also in the same district for municipalities not quite far from one another, the disparity is not easily comprehensible. I may observe that even though the notification may not afford any indication regarding the differentiation in the taxes, it is open to the Government to offer justification by placing proper material before the Court by an affidavit or otherwise. This has, however, not been done.

21. After the arguments were concluded and I had started dictating judgment, learned counsel for the respondents expressed his desire to place before me some notifications. He was permitted to do so. Today Mr. Rastogi invited my attention to a Government notification dated 30th March, 1968, published in the Gazette Extraordinary of even date. This notification shows that octroi duty on silver and gold and articles of silver and gold was fixed at 25 per cent. On the basis of this notification, Shri Rastogi submits that the earlier notification which is the subject matter of the writ petition no longer subsists regarding silver and gold, and, therefore, the petitioners should not be given any relief. It will be observed that the notification of 30th March, 1968 does not call for re-consideration of the rationale of the judgment thus far dictated though the notification may have to be kept in view for the proper relief to be given to the parties under the circumstances. In view of this amendment of item it will not be necessary to strike down the relevant item in the impugned notification for Abu Road regarding silver and gold, and it will be

enough if that notification is only pronounced to be bad regarding silver and gold. It will be then for the party to pursue his remedy regarding the consequential relief for refund or otherwise elsewhere. The position even for Abu Road municipality stands as before so far as cloth is concerned.

22. In view of what I have said above, I hold (1) that Sections 104 and 107 of the Act are *intra vires* and are not bad on any of the grounds urged by the petitioners; (2) that the impugned notification in respect of the three municipal boards namely Abu Road, Kota and Bari, are not bad in respect of items other than silver and gold and articles thereof and cloth in the notification relating to Abu Road Municipality and in relation to the item of silver, bullion and ornaments in the impugned notification relating to Kota Municipality and as regards octroi on sugar-cane in respect of items relating to Municipal Board Bari and (3) that the notification Ex. 6 relating to Abu Road Municipality is thereby declared to be bad in respect of item No. 81 relating to gold and silver bullion and articles thereof and as regards item No. 62 relating to all kinds of textiles, cotton, silk, and woollen including rayons, nylon, artificial silk, terylene and articles made of chemical fabrics, ready-made clothes, hosiery, knitting wool, millinery duries and carpets. In view of the fresh notification having been issued on the 80th March, 1968, it is not necessary to give any direction regarding consequential relief in respect of item No. 81; but in respect of item No. 62, it is hereby ordered that the respondents shall not give effect to this notification in respect of this item qua the petitioners Joharimal and others and Jai-shiv and others. Likewise the respondents in D. B. Writ petition No. 1732/64 are hereby restrained from giving effect to items Nos. 57 and 58 in the notification Ex. 6 in that case against the petitioners Prabhudayal and others. Similarly in writ petition No. 1832 of 1964, the respondents are restrained from giving effect to the item of sugar cane occurring in serial No. 16 of the impugned notification Ex. 1. In other words, they are restrained from realising octroi duty from the petitioners in respect of sugar-cane on the basis of the impugned notification. The Municipal Boards concerned shall refund the amount of octroi duty if realised by them in the meantime to the respective petitioners in respect of the items that have been declared to be null and void, in terms of the stay orders granted by this Court. The parties are left to bear their own costs of these petitions.

RSK/D.V.C.

Order accordingly.

AIR 1969 RAJASTHAN 155 (V 56 C 33)

P. N. SHINGHAL, J.

Inderjit Singh, Plaintiff v. Sunder Singh, Defendant.

Civil Regular Second Appeals Nos. 32 and 225 of 1962, D/- 20-8-1968, from judgment of Dist. J., Bhilwara, D/- 23-12-1961.

Motor Vehicles Act (1939), Section 59 (1) — Contract Act (1872), Sections 23, 65 — Transfer of motor vehicle permit without permission of Transport Authority — Such transfer is forbidden by Section 59 (1), M. V. Act and therefore is unlawful under Sec. 23, Contract Act — Transfer illegal to knowledge of parties — Benefit of Section 65 is not available — Maxim “*ex turpi causa non oritur actio*” — Applicability.

The obligation for restitution dealt with in Section 65, Contract Act applies to all agreements which are discovered to be void or contracts which became void. But the scope of Section 65 has been limited to (i) agreements which are discovered to be void, and (ii) contracts which became void. These classifications may not be exhaustive, but, by and large, they serve the purpose of excluding an unconscionable claim like the one in a case where the parties are in *pari delicto* from the benefit of restitution and would serve the cause of justice if they are applied with discretion and caution. Thus where a person knowingly transfers money or other property for an unlawful consideration or object, it would be fair and equitable to hold that he would not be entitled to claim restitution in a court of law on the ground that the agreement had been discovered to be void or that the contract had become void. Such an agreement or contract would not therefore fall within the benefit of Sec. 65 of the Contract Act. [Exceptions to the rule of non-recovery in English Law, compared.]

While it is true that the general law would refuse to give full effect to such an illegal contract because of its illegality on the maxim *ex turpi causa non oritur actio* (an action does not arise from a base cause), the shade of illegality differs from contract to contract, and there may be a contract in which a party is unaware of the illegality, in all innocence. Rigorous and indiscriminate application of the rule of *turpi causa* to all illegal contracts, without exception, will not, however, be reasonable or fair. Thus where a contract is made illegal by a statute passed for protection of a class of persons, where the parties are not in *pari delicto*, where a party repudiates the contract out of remorse and penitence, or where a person is able to establish his claim to recover the money or property transferred by him without reference to the illegality of the contract, there is no reason why the general rule of *turpi*

causa should be held to be applicable

(Paras 15 16)
Where by a partnership agreement one of the partners holding permit solely in his name agreed to share the motor vehicle permit with the other partner in proportion to his share without the permission of the transport authority and conferred on them selves the right to use and manage the vehicle in the manner authorised by the permit and that agreement was actually put into operation the agreement contravened the provisions of Section 59 of the Motor Vehicles Act in doing what was forbidden by it. The consideration or object of the agreement was unlawful within the meaning of S 23 of the Contract Act and it was therefore void. The other partner therefore was not entitled to claim restitution under Section 65 of the Contract Act. (1959) 37 ITR 271 (SC) and AIR 1961 Punj 405 Dist.

(Paras 10 11 12)

The parties knew that even though the permit for plying the bus was in the name of the defendant and they were not going to get it transferred in their names, and yet they effected its transfer to themselves in proportion to their respective shares and hence the agreement could not be said to have been discovered to be void after its execution. It was void to the knowledge of the parties ab initio. Besides the parties were obviously in pari delicto and they could not claim restitution for that reason also. There was no question of locus poenitentiae because it was admitted in the plaint that the parties implemented the agreement. Moreover in absence of any proof of oppression or fraud, or that the right or title to the money paid arose otherwise than from the illegal agreement, Section 65 Contract Act could not be attracted. The general rule that money paid or property transferred under an illegal agreement cannot be recovered would, therefore apply. The claim for restitution was therefore not enforceable. 1953 Raj LW 220 Expl

(Para 24)

- Cases Referred Chronological Paras
(1968) AIR 1968 SC 534 (V 55) =
(1967) 2 SCWR 838 Sitaram v Radha Bai
(1967) AIR 1967 Pat 72 (V 54) =
ILR 45 Pat 962 Kajju Collieries Ltd. v Jhoar Khan Mines Ltd
(1966) AIR 1966 Madh Pra 13 (V 53) =
1965 MPLJ 644, Dayabhai and Co Barwam v Commr of I T., M P Nagpur and Bhandara
(1964) AIR 1964 Andh Pra 256
(V 51) = (1964) 1 Andh WR 109
Tekumalla Rama Rao v Durga Suryanarayana
(1963) AIR 1963 Mad 413 (V 50) =
ILR (1963) Mad 842, A. V. Varada rajulu Naidu v K. V. Thavasi Nader
(1961) AIR 1961 All 347 (V 48) =
1960 All LJ 333 Syam Sunder Lal v Lakshmi Narain Mathor

- (1961) AIR 1961 Punj 405 (V 48) L. Shiv Dayal L. Mela Mal v Firm Bishan Dass Shankar Dass
(1960) AIR 1960 Andh Pra 186
(V 47) = (1959) 2 Andh WR 241
Kanuri Shivramakrishnaiah v Vemuri Venkata Narhari Rao
(1959) 37 ITR 271 (SC) Umacharan Shaw and Bros v Commr of I T West Bengal
(1959) AIR 1959 Cal 165 (V 46) =
62 Cal WN 377 Jahed Shaikh v Kamalash Chandra Das
(1957) AIR 1957 Mad 620 (V 44) =
(1957) 2 Mad LJ 264 Manian Ilina Cowder v Naga Mastry
(1955) AIR 1955 Hyd 69 (V 42) =
ILR (1955) Hyd 101 Budhulal v Deccan Banking Co Ltd.
(1953) ILR (1953) 3 Raj 45 = 1953 Raj LW 341 Baiju Lal v Matadin

- (1953) 1953 Raj LW 220 Hummat Ram v Lal Chand
(1949) AIR 1949 Mad 252 (V 36) =
(1948) 2 Mad LJ 198 Purvada Venkata Subbayya v Attar Sheikh Mastan
(1943) AIR 1943 PC 29 (V 30) =
70 Ind App 1 Babu Raja Mohan Manucha v Babu Mansoor Ahmad Khan
(1939) AIR 1939 Mad 957 (V 28) =
ILR (1939) Mad 928 Madura Muni cipality through Commr v Alagiri Sami Naidu
(1933) AIR 1933 PC 63 (V 20) =
60 Ind App 13 Hansraj Gupta v Dehradun Mussoorie Electric Tram way Co Ltd
(1923) AIR 1923 PC 189 (V 10) =
45 Mad LJ 617, Annada Mohan Roy v Gour Mohan Mullick
(1921) AIR 1921 PC 137 (V 8)
Gordhandas Kessowji v Champsey Dossa

M M Tiwari, for Plaintiff H L Purohit, for Respondent.

JUDGMENT: These two appeals arise out of the judgment and decree of District Judge Bhilwara, dated December 23 1961, and will be disposed of together

2. Defendant Sunder Singh held a permit for plying a bus on the Shabpura Bhilwara route but he was apprehensive that the permit might be cancelled because he could not run the bus for some time. He thought it necessary to secure another bus for his permit and obtained a vehicle for that purpose from the New Laxmi Finance Company Ajmer for Rs 21 000 on hire-purchase. The New Laxmi Finance Company asked for security for the arrangement, and it was furnished by the plaintiff's father Gyan Singh at the instance of the plaintiff and the defendant. It was however realised that some more expenditure would have to be incurred in building the body, insuring the

vehicle and meeting the registration and other charges which Sunder Singh was unable to finance. He therefore entered into agreement Ex. 1 dated December 28, 1958 for a partnership with plaintiff Inderjit Singh. Under that agreement, Sunder Singh retained a three-fourth share for himself in the vehicle and the permit and decided to give the remaining one-fourth share to Inderjit Singh. Vehicle No. RJL 218 was accordingly run on the Shahpura-Bhilwara route from January, 1959 on the basis of that agreement.

The plaintiff pleaded that he spent more than his share on the vehicle but that the defendant did not allow him to participate in the joint management after a period of one month, and did not give him an account of the profit or loss in the business. He therefore alleged that as the defendant had committed a breach of the terms of the partnership, it had become impossible to carry it on any further. He prayed for dissolution of the partnership and rendition of accounts or, in the alternative, for refund of Rs. 6,900 on account of the money spent by him, and its interest.

3. Defendant Sunder Singh admitted the execution of the deed of partnership (Ex. 1) dated December 28, 1958, but pleaded that it was not acted upon because of its illegality. He also pleaded that bus No. RJL 218 was obtained by him on hire-purchase basis on the security of the plaintiff's father Gyan Singh, but that the plaintiff did not contribute to the purchase. He pleaded that the plaintiff had nothing to do with its ownership, management or accounts and claimed that it was his exclusive property and was running on the basis of his permit. Further the defendant denied that the plaintiff had made any payment to him for the running of the bus, or for any other purpose, and pleaded that the plaintiff was not entitled to recover the money spent by him on account of the partnership business.

In his additional pleas, he specifically pleaded that the partnership agreement was illegal because it contravened the provisions of Section 59 of the Motor Vehicles Act. He gave an account of the money spent by the plaintiff and urged that the plaintiff had spent a much smaller sum in connection with the partnership and was not entitled to recover it because the object and consideration of the partnership agreement were illegal. In the alternative, he pleaded that the partnership was terminated by a mutual agreement between the parties on October 3, 1959. The plaintiff filed a replication, but confined it to the question of the extent of his investment in the partnership business and did not say anything about the plea of illegality of the agreement.

4. A number of issues were framed covering the various points in controversy. Issue No. 8 related to the question whether sec-

tion 59 of the Motor Vehicles Act was an impediment in the claim of the plaintiff because of the fact that the permit was only in the name of the defendant. Issue No. 9 specifically dealt with the question whether the partnership agreement was void.

5. The trial court decreed the plaintiff's suit for Rs. 3,800 on account of principal and Rs. 218/8/- by way of interest. Both the parties preferred appeals to the District Judge who reduced the decretal amount to Rs. 3253/10/-, with interest at 6 per cent per annum from the date of the suit until realisation. It is against that judgment and the consequent decree that these two appeals have been filed by the parties.

6. The learned District Judge took the view that the partnership agreement (Ex. 1) was illegal because it involved the transfer of the permit of the vehicle, but gave relief to the plaintiff by invoking Section 65 of the Contract Act on the ground that the agreement was discovered to be void later. The question is whether this finding is correct? But as Mr. Tiwari, learned counsel for the defendant, has strenuously argued that the partnership agreement did not contravene Section 59 of the Motor Vehicles Act and was quite legal, I shall first consider that argument.

7. Section 23 of the Contract Act brings out the characteristics of an illegal agreement in the following terms,—

"23. The consideration or object of an agreement is lawful, unless—

It is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or
is fraudulent; or
involves or implies injury to the person or property of another; or
the Court regards it as immoral, as opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." In the present case the question is whether the agreement in question was "forbidden by law", so that it is not necessary to consider the other unlawful considerations or objects referred to in the section. To put it simply and directly, the question is whether agreement Ex. 1 could be said to relate to a consideration or object which was forbidden by Section 59 of the Motor Vehicles Act?

8. Chapter IV of the Motor Vehicles Act deals with the control of transport vehicles and while the earlier sections of the chapter deal with the necessity for permits and the mode of obtaining them etc., Section 59 lays down the general conditions attaching to all permits. We are concerned with subsection (1) and it provides as follows—

"59 (1). Save as provided in Section 61, a permit shall not be transferable from one person to another except with the permission of the transport authority which granted the

permit and shall not without such permission operate to confer on any person to whom a vehicle covered by the permit is transferred any right to use that vehicle in the manner authorised by the permit."

Section 61 is of no relevance because it provides for the transfer of a permit on the death of the holder. Section 59 prohibits the transfer of a permit from one person to another except with the permission of the concerned transport authority, and it further provides that the transfer of a permit without such permission shall not operate to confer on the transferee any right to use the vehicle covered by the permit in the manner authorised by it. It is conceded that a breach of this provision is an offence punishable under the Motor Vehicles Act. If therefore there is a breach of the provisions of Section 59 (1) by transferring a permit under an agreement between the parties without the permission of the transport authority, or if the agreement operates to confer on the transferee any right to use the vehicle covered by the permit, the consideration or object of the agreement would be unlawful because it is forbidden by the law.

9 The genuineness of partnership agreement Ex. 1 has never been in dispute in the sense that its execution has all along been admitted by the parties. The document recites the circumstances in which the partnership was entered into by the parties and I have mentioned them to some extent. It will be sufficient to state here the following four important terms of the agreement,—

(a) It has been stated in the preamble that Sunder Singh would remain a "partner" in the vehicle including its permit, to the extent of his three-fourth share, while the remaining one-fourth share would go to Inderjit Singh, so that the two parties would be owners in possession of the vehicle and its permit, and would continue to remain so in future.

(b) Clause (1) of the agreement provides that the two partners would be owners of the permit of the route and the vehicle in accordance with their respective shares mentioned in the agreement and both of them would exercise full ownership rights as long as the partnership continued to remain in existence.

(c) Clause (11) of the agreement provides that both the partners would be the principal managers of the vehicle.

(d) Clause 17 of the agreement is all the more significant and translated into English it reads as follows—

"17 That because the permit of the route is in the name of Sunder Singh, Party No. 1 the parties had decided that the owner's name for the new vehicle would be that of Sunder Singh, otherwise the title and possession in respect of the permit and the vehicle would, in accordance with the partnership agreement, be such that Sunder Singh, the first party, would have it to the extent

of three-fourth while Inderjit Singh would have it to the extent of one-fourth."

10 There is therefore no room for doubt that the partners transferred the permit in proportion to their respective shares, without the permission of the transport authority, and conferred on themselves the right to use and manage the vehicle in the manner authorised by the permit in terms of the partnership agreement.

11 It is also a significant fact that the agreement of partnership was actually put into operation, for the plaintiff has admitted in paragraph 2 of the plaint that the vehicle was purchased and was plying on the Shahpura Bhiwara route in accordance with the terms of the agreement and that differences between the partners arose when, as has been stated in paragraph 3 of the plaint, the defendant did not keep the plaintiff in joint management after a period of one month and did not render the account.

12. It is therefore apparent that the partnership agreement contravened the provisions of Section 59 of the Motor Vehicles Act in doing what was forbidden by it. The consideration or object of the agreement was unlawful within the meaning of Section 23 of the Contract Act and it was therefore void. I am fortified in this view by the decisions in Maniam Hira Gowder v. Naga Mastry, AIR 1957 Mad 620, A. V. Varadrajulu Naidu v. K. V. Thavasi Nadar, AIR 1963 Mad 413 and Tekumalla Rama Rao v. Durga Suryanarayana, AIR 1964 Andh Pra 258.

Reference may also be made to Gordhandas Kassawji v. Champsey Dossa, AIR 1921 PC 137 which supports the view that the agreement became unlawful because it provided for the transfer of the permit. Similarly M/s Dayabhai and Co Barwan v. Commissioner of Income-tax M. P., Nagpur and Bhandara, AIR 1966 Madh Pra 13 on which reliance has been placed by Mr. Tiwari himself, supports the view that if the partnership deed contains a clause for the transfer of the vehicle or the permit, that would make the agreement unlawful.

13 Some cases have been cited for a contrary submission, but they are clearly distinguishable. In Umacharan Shaw and Bros. v. Commissioner of Income-tax, West Bengal, (1959) 37 ITR 271 (SC) their Lordships of the Supreme Court found that there was no evidence that the excise licences were transferred or sub-let and they therefore held that there was no offence or transgression of the provisions of the Bengal Excise Act, 1911 and there was nothing affecting the validity of the partnership. Similarly in L. Shriv Dayal L. Mela Mal v. Firm Bishan Dass Shankar Dass, AIR 1961 Punj 405 the agreement did not involve the "transfer" or "sub-lease" of the licence and the licensee under the Opium Act merely entered into an agreement that a third person, who was a non-licensee, would share

the profits and losses of his business in consideration of his contribution towards the capital of the business. It was therefore held that the agreement was not unlawful as it did not contravene any provision of the Opium Act or the Rules made thereunder. The cases cited by Mr. Tiwari are thus of no avail to the plaintiff, and the fact remains that it has been proved beyond doubt that the partnership agreement was illegal and void.

14. What then is the effect of the illegality on the partnership? Mr. R. L. Purohit learned counsel for the defendant, has argued that the agreement having been vitiated by illegality is wholly unenforceable because its consideration and object were forbidden by law and courts cannot give effect to such an agreement for that would amount to the recognition of an illegal act and place a premium on contumacy. To support his argument, the learned counsel has placed reliance on two decisions of this court in *Himmat Ram v. Lalchand*, 1953 Raj LW 220 and *Bajlulal v. Matadin*, ILR (1953) 3 Raj 45 and the decisions in *Madura Municipality through Commissioner v. K. Alagirisami Naidu*, AIR 1939 Mad 957, *Puvvada Venkata Subbayya v. Attar Sheik Mastan*, AIR 1949 Mad 252, *Shyam Sunder Lal v. Lakshmi Narain Mathur*, AIR 1961 All 347 and *Kuju Collieries Ltd. v. Jhoar Khan Mines Ltd.*, AIR 1967 Pat 72. I shall revert to these cases in a while.

15. I may here state that while it is true that the general law would refuse to give full effect to an illegal contract because of its illegality on the maxim *ex turpi causa non oritur actio* (an action does not arise from a base cause), the shade of illegality differs from contract to contract, and there may well be a contract in which a party is unaware of the illegality, in all innocence. The question whether in such a contract a person will be relieved of the consequences of an illegal contract, has therefore attracted a good deal of attention. Connected with it is the question, which so often arises, whether a party to such a contract is entitled to recover the money paid by it even though the contract is not enforceable, and this ancillary question has also assumed considerable importance because courts have often been called upon to apply the yardstick of justice to such cases as well. These are precisely the points for consideration in the present case.

16. It appears that the rigorous and indiscriminate application of the rule of *turpi causa* to all illegal contracts, without exception, will not be reasonable or fair. Thus in a case where a contract is made illegal by a statute passed for protection of a class of persons, there is no reason why a member of the protected class should not be able to recover the property transferred by him because, after all, the statute has

been made for his benefit. There may also be a case where the parties are not in *pari delicto*, as for example, where the person who parts with money is an ignorant man who has been taken-in by an unscrupulous person. There may also be a case where, before the illegal purpose is substantially carried out, a party repudiates the contract out of remorse and penitence. Similarly there may be a case in which a person is able to establish his claim to recover the money or property transferred by him without reference to the illegality of the contract. In these and like cases there is no reason why the general rule of *turpi causa* should be held to be applicable. In England, such exceptional cases have been recognised and are to be found in all text books on contracts: "Principles of the English Law of Contract" by Anson, 22nd Edition, pp. 342-350, "Chitty on Contracts", 22nd edition pp. 383-386, "Sutton and Shannon on Contracts", 6th edition, pp. 245-250, "The Law of Contract" by Cheshire and Fifoot, 6th edition, pp. 311-316.

17. In our country while Section 23 of the Contract Act deals with unlawful or illegal agreements and provides that every agreement of which the object or consideration is unlawful is void, section 65 of that Act deals with the obligations of the person who has received an advantage under a void agreement or a contract which becomes void, as follows,—

"65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it." The obligation for restitution dealt with in the section applies therefore to all agreements which are discovered to be void or contracts which became void.

18. A "void" agreement as well as the contract which "becomes void" are defined in the Contract Act as follows,—

"2(g). An agreement not enforceable by law is said to be void;"

"2(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."

The definitions cover all void agreements and contracts, and therefore Section 65 covers them also, and there is no justification for the argument that it excludes illegal agreements and contracts falling within the mischief of Section 23 from its benefit. I have no doubt therefore that section 65 is applicable to illegal agreements and contracts also.

19. At the same time, it could not be the purpose of the law that even in cases where the parties are in *pari delicto* the one who gives the money for an unlawful object should be entitled to recover it under Section 65 of the Contract Act. This appears

to be the reason why the scope of the section has been limited to (i) agreements which are discovered to be void, and (ii) contracts which became void. These two classifications or categories of cases may not be exhaustive but, by and large, they serve the purpose of excluding an unconscionable claim like the one in a case where the parties are in pari delicto from the benefit of restitution and would serve the cause of justice if they are applied with discretion and caution. Thus where a person knowingly transfers money or other property for an unlawful consideration or object, it would be fair and equitable to hold that he would not be entitled to claim restitution in a court of law on the ground that the agreement had been discovered to be void or that the contract had become void. Such an agreement or contract would not therefore fall within the benefit of Section 65 of the Contract Act.

20 In England, there are certain well known exceptions to the rule of non recovery and some of them may not, strictly speaking, fall within the ambit of Section 65 of the Indian Contract Act. For instance in the illustration mentioned by me earlier where a contract is made illegal by a statute passed for the protection of a class of persons it may not be possible to order restitution where the contract was made with full knowledge of its illegality because the two requirements of Section 65 of our Act may not be fulfilled. It may also be that a person may be forced by the other party to enter into an illegal contract with full knowledge of its illegality. In these cases it may not be possible to take the plea that the agreement was discovered to be void or that the contract became void so as to place an obligation on the person who has received the advantage under the void agreement or contract to make restitution on the workings of Section 65.

But, all the same, in such agreements or contracts the parties cannot be said to be in pari delicto. There might also be a case in which a person who has made an illegal agreement or contract may voluntarily and genuinely repudiate the illegal purpose well in time and claim locus poenitentiae. Well such agreements or contracts may also not fall within the scope of Section 65 if a strict and literal interpretation is placed on the workings of the section. Restitution has all the same, been allowed in such cases on grounds of public policy (as in the case of the class protecting statute) or for equitable considerations. Courts are meant to do justice by the parties and such just and equitable rules or exceptions are always for the as and when necessary and this is the reason why section 65 cannot be taken in respect of it exhaustively with all claims would, in accordance that there is nothing in agreement, be such from allowing restitution first party, would be

21 It is true that in *Himmat Ram's case*, 1953 Raj LW 220 this court has taken the view that "Section 65 however only applies to contracts which are void, but not to those which are illegal" and it has further been observed that "the section can have no application where the parties are presumed to have known at the time of its inception that the contract was void or illegal". The reason of the rule has been stated to be that when a contract is void or illegal to the knowledge of the parties, it cannot be said that such a contract was discovered to be void or illegal. If it was the intention of their Lordships to exclude all illegal contracts from the benefit of Section 65 I may say with utmost respect that there is nothing in Section 65 of the Contract Act to exclude illegal contracts from its purview. On the other hand as I have already shown, illegal contracts are in my humble opinion, also covered by that section.

Similarly the decision in *Bajulals case* ILR (1953) 3 Raj 45 that a suit for refund of money is not maintainable in the case of a contract which is prohibited by law and is punishable as an offence cannot be correct in all circumstances and cases and does not appear to have been laid down as a general or inexorable rule of law. In fact it appears from a perusal of the two cases just referred that the attention of their Lordships was not invited to the other relevant cases bearing on the point. All the same, I would gladly have referred the matter to a larger Bench for reconsideration but I find that it is not necessary to do so because of a recent decision of their Lordships of the Supreme Court in *Sita Ram v Radha Bai*, AIR 1968 SC 534.

In that case *Radha Bai*, the plaintiff entrusted some jewellery to her brother *Lachhmi Narain*, father of the defendant. After *Lachhmi Narain's* death, the plaintiff asked for the return of the jewellery. The claim was resisted by the defendant and it was contended that because on the plaintiff's own showing the jewellery was left with *Lachhmi Narain* with the object of defrauding the plaintiff's daughter in law during the course of the arbitration proceedings, the parties were in pari delicto and the claim was untenable. Their Lordships considered the submission with reference to the provisions of Sections 23 and 24 of the Contract Act and thought it proper to refer to the exceptional cases known to English Law in which a man will be relieved of the consequences of an illegal contract e.g a case where the illegal purpose has not yet been substantially carried into effect, or where the plaintiff is not in pari delicto or where he does not have to rely on the illegality to make out his claim. Their Lordships ordered restitution on the ground that

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